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15TH ANNUAL Real Estate Law Summit

CHAIRS

Sidney Troister
C.Arb., C.S., LSM
Torkin Manes LLP

Joel Kadish
Barrister and Solicitor

April 18 & 19, 2018





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Law Society of Ontario

130 Queen Street West, Toronto, ON M5H 2N6
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315
Fax: 416-947-3991
E-mail: cpd@lsuc.on.ca
www.lso.ca

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April 18-19, 2018

9:00 a.m. to 4:00 p.m.

Total CPD Hours = 10 h Substantive + 2 h Professionalism 

**University of Toronto
Chestnut Conference Centre
89 Chestnut Street
Toronto, ON**



SKU: CLE18-0040601-A-REG

Agenda

DAY ONE:

9:00 a.m. – 9:10 a.m.

Welcome and Opening Remarks from Chairs

Sidney Troister, C.Arb., C.S., LSM, Torkin Manes LLP

Joel Kadish, Barrister and Solicitor

- 9:10 a.m. – 9:40 a.m.** **What’s Old and What’s New in Condoland**
Audrey Loeb, LSM, *Shibley Righton LLP*
- 9:40 a.m. – 10:00 a.m.** **Construction Lien Act Changes**
Roger Gillott, *Osler, Hoskin & Harcourt LLP*
- 10:00 a.m. – 10:40 a.m.** **Treaties, Territories and Reserve Land: Things you Might not Know (20 Minutes )**
Kathleen Lickers, LSM, Barrister and Solicitor

In conversation with: Sidney Troister, C.Arb., C.S., LSM, *Torkin Manes LLP*
- 10:40 a.m. – 10:50 a.m.** **Go Ahead and Ask Us (Question and Answer Session)**
- 10:50 a.m. – 11:05 a.m.** **Coffee and Networking Break**
- 11:05 am – 11:25 a.m.** **Making Royalties Binding on Successors: When is a Right Arising out of Land Personal?**
Craig Carter, C.S., LSM, *Fasken Martineau DuMoulin LLP*
- 11:25 a.m. – 11:50 a.m.** **Camps, Mining Claims, and Resort Locations: What Makes Practice North of North Bay Different?**
Christine McLeod, *McLeod Ducharme LLP*
- 11:50 a.m. – 12:00 p.m.** **Question and Answer Session**
- 12:00 p.m. – 1:00 p.m.** **Lunch will be provided**

1:00 p.m. – 1:20 p.m.

**Hold me Harmless: Indemnidoos and Indemnidon'ts
(Indemnity Agreements in a Commercial Sale)**

Simon Crawford, Bennett Jones LLP

1:20 p.m. – 2:05 p.m.

**Syndicated Mortgages: How to Avoid the Risks
(30 Minutes )**

Gary Goldfarb, Meyer, Wassenaar & Banach LLP

*Stephen McClyment, Senior Investigation Counsel,
Law Society of Ontario*

Ronald Melvin, Rose, Persiko, Rakowsky, Melvin LLP

2:05 p.m. – 2:30 p.m.

**The “Abolition” of the Ontario Municipal Board and
Curtailement of Appeal Rights**

Leo Longo, C.S., Aird & Berlis LLP

2:30 p.m. – 2:35 p.m.

Question and Answer Session

2:35 p.m. – 2:50 p.m.

Coffee and Networking Break

2:50 p.m. – 3:20 p.m.

**Understanding the Risks of the Web and How to Avoid
Them (30 Minutes )**

*Phil Brown, Counsel, Practice Management Helpline,
Law Society of Ontario*

*Raymond Leclair, Vice-President, Public Affairs, Lawyers'
Professional Indemnity Company (LAWPRO [®])*

3:20 p.m. – 3:45 p.m.

A Lot from the DOT: An Overview of Recent Developments and Future Bulletins

Jeffrey Lem, C.S., Director of Titles,
Ministry of Government and Consumer Services

3:45 p.m. – 4:00 p.m.

Question and Answer Session

4:00 p.m.

End of Day One

4:00 p.m. – 6:00 p.m.

Reception



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Agenda

DAY TWO:

9:00 a.m. – 9:10 a.m.

Welcome and Opening Remarks from Chairs

Sidney Troister, C.Arb., C.S., LSM, Torkin Manes LLP

Joel Kadish, Barrister and Solicitor

9:10 a.m. – 9:30 a.m.

Remedies Refresher

The Honourable Paul Perell, *Superior Court of Justice*

9:30 a.m. – 9:50 a.m.

What's Happened to Tender?

Silvana D'Alimonte, *Blake, Cassels & Graydon LLP*

In conversation with: Sidney Troister, C.Arb., C.S., LSM, *Torkin Manes LLP*

9:50 a.m. – 10:20 a.m.

More Owners, More (Potential) Problems: How to Avoid Disputes Between Co-owners and What to do When They Arise

Mark Dunn, *Goodmans LLP*

10:20 a.m. – 10:35 a.m.

Question and Answer Session

10:35 a.m. – 10:50 a.m.

Coffee and Networking Break

10:50 a.m. – 11:15 a.m.

Payments and Technology: Wires, E-transfers and Cryptocurrency (10 Minutes )

Tannis Waugh, *Tannis A. Waugh Professional Corporation*

In conversation with: Joel Kadish, Barrister and Solicitor

11:15 a.m. – 11:45 a.m.

Real Estate Audits: Making Them Pain-Free and Stress-Free (30 Minutes )

Rimpal Hinduja, CPA, CGA, Supervisor, Spot Audit,
Law Society of Ontario

Deborah Loh, CPA, CA, MAcc., Auditor, Spot Audit,
Law Society of Ontario

11:45 a.m. – 12:00 p.m.

Question and Answer Session

12:00 p.m. – 1:00 p.m.	Lunch will be provided
1:00 p.m. – 1:20 p.m.	<p>FCPA: One Year Later</p> <p>Brenda Linington, Senior Counsel, <i>Ministry of the Attorney General, Civil Law Division, Ministries of Energy/ Economic Development and Growth / Research, Innovation and Science/ Infrastructure / Accessibility</i></p> <p>Marta Zoladek, Legal Counsel, <i>Ministry of the Attorney General, Civil Law Division, Ministries of Energy / Economic Development and Growth /Research, Innovation & Science Infrastructure / Accessibility</i></p>
1:20 p.m. – 1:45 p.m.	<p>Income Tax Traps to be Aware of When a Non-Resident is Involved</p> <p>Rock Lapalme, CPA, CA, TEP, Senior Tax Manager, <i>Collins Barrow SNT LLP</i></p>
1:45 p.m. – 2:05 p.m.	<p>Latest on Land Transfer Tax: Non-Resident Speculation Tax, New Tax Rules re Vacant Property Tax, Assignments/Flippers of Property, and More</p> <p>Sherry Lavine, <i>Chaitons LLP</i></p>
2:05 p.m. – 2:15 p.m.	Question and Answer Session
2:15 p.m. – 2:30 p.m.	Coffee and Networking Break

- 2:30 p.m. – 2:45 p.m.** **The Practicalities of Private Mortgage Discharges**
- Lorne Shuman, *Isenberg & Shuman Professional Corporation*
- 2:45 p.m. – 3:00 p.m.** **When Should You Call an Environmental Specialist?
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- Rosalind Cooper, C.S., *Fasken Martineau DuMoulin LLP*
- 3:00 p.m. – 3:20 p.m.** **Recent Changes to the *Residential Tenancies Act* that Will
Affect Your Practice**
- Joseph Hoffer, *Cohen Highley LLP*
- 3:20 p.m. – 3:50 p.m.** **Does Good Faith Trump Certainty?**
- Reuben Rosenblatt, Q.C., LSM, *Minden Gross LLP*
- 3:50 p.m. – 4:00 p.m.** **Question and Answer Session**
- 4:00 p.m.** **Program Ends**



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What's Old & What's New in Condoland

Audrey Loeb, LSM
Shibley Righton LLP

April 18, 2018

What's Old & What's New In Condoland

By Audrey Loeb, LSM, B.A., LL.B., LL.M
Partner | Shibley Righton LLP, Condominium Law
250 University Avenue, Suite 700 | Toronto, Ontario M5H 3E5
W: www.shibleyrighton.com
E: aloeb@shibleyrighton.com
T: 416-214-5267
F: 416-214-5467

With the grateful assistance of Inderpreet Suri, student-at-law at
Shibley Righton LLP

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Disclosure Statements & Cooling Off Periods

Overview:

- Sections 72 to 82 of the *Condominium Act* (the "Act") deal with the rights and duties of developers and purchasers on the sale of new or resale condominium units. The disclosure obligations apply to the sale of all condominium units. The disclosure obligations for purchasers of new condominium units are set out in sections 72 to 74 and 78 to 82 of the *Act* and sections 17 and 19 to 22 of LGC Reg. 48/01. Section 72, for example, creates an obligation on a developer to provide each purchaser of a unit or proposed unit with specific detailed information. The document containing this information is called a disclosure statement.
- Under the *Act*, there is no distinction between the obligations for the sale of residential and non-residential units and there is a positive obligation on the declarant to deliver a current disclosure statement.
- Section 72 of the *Act* provides that the declarant shall deliver to every purchaser of a unit or a proposed unit a copy of the current disclosure statement made by the declarant for the corporation of which the proposed unit or unit forms part.
- The *Act* enumerates what must be contained in the disclosure statement and limits the brief descriptions to agreements to which the proposed corporation will be a party and which may not be finalized.
- Section 72(4) of the *Act* requires the delivery of a table of contents that sets out matters that will be of assistance to purchasers of units in new condominium projects. For each item set out in the table of contents there will be a reference to which document and to which page in that document the purchaser is to refer. The developer is required to list in a table of contents the items set out in section 72 of the *Act* as set out in the Disclosure Statement, Table of Contents (formerly Form 12, LGC Reg. 48/01). This form is designed to list the items which should be of interest to the average purchaser and indicate in what document and on which page references to these items are located.
- The only documents that need to be described in a brief narrative form under the *Act* are the following agreements:
 1. for management,
 2. for shared facilities,
 3. for insurance trustees,
 4. for goods and services on a continuing basis,
 5. for facilities to be provided to the corporation on other than a not-for-profit basis, and
 6. to lease all or any part of the common elements for business purposes.

- Section 72 of the *Act* creates extensive disclosure obligations, which are set out below.
- Section 72(3) of the *Act* provides that the disclosure statement shall include *the date on which it is made* and shall include:
 - (a) a table of contents;
 - (b) a statement as to whether the condominium is a freehold condominium and, if so, of what type or whether it is a leasehold condominium;
 - (c) the name and municipal address of the declarant or proposed declarant and the mailing address and, if available, the municipal address of the property or proposed property;
 - (d) a general description of the property or proposed property, including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;
 - (e) if the declarant has applied to convert the property from rental to condominium under section 9(4), a summary of any reports (i.e., a reserve fund or performance audit) that the approval authority has required be made and any agreements that have been imposed by the approval authority as a condition of approval;
 - (f) a statement indicating whether the property or part thereof is covered by the *Ontario New Home Warranties Plan Act* or whether the declarant has enrolled or intends to enrol the proposed units and common elements in the Plan;
 - (g) a statement whether any building on the property or a unit or proposed unit has been converted from a previous use;
 - (h) a statement whether any units may be used for commercial or other purposes other than ancillary residential use;
 - (i) a statement of the portion of units or proposed units that the declarant intends to market in blocks of units to investors;
 - (j) a statement of the portion of units or proposed units to the nearest 25 per cent which the declarant intends to lease;
 - (k) where construction of amenities is not completed, a schedule of the proposed commencement and completion dates.
- This provision raises the question of what is meant by amenities. In the *Act*, this clause was interpreted to mean the recreational amenities. Unfortunately, in the *Act*, the wording has changed and section 72(3)(d) states that the disclosure statement must include "a general description of the property or proposed property including . . . recreational and other amenities together with all conditions that apply to the provisions of amenities." This would lead to the interpretation that more than just recreational amenities is intended and therefore a more complete listing of amenities than just recreational is recommended. This would include services such as security, valet parking and concierge services, as well as upgraded

television and communication services, lawn sprinklers and any other facility or service that the unit purchasers would expect as a result of the disclosure material and/or sales information provided by the declarant;

(l) a list of the amenities that the declarant intends to provide to the purchasers during the section 80 interim occupancy period;

(m) a copy of the proposed or existing declaration, by-laws, rules and insurance trust agreement;

(n) a brief narrative description of the significant features of any existing or proposed agreements between the new corporation and another corporation as well as any referred to in sections 111, 112, 113 or 114;

- The only agreement for which a brief narrative description is required and a copy of the full agreement delivered is the insurance trust agreement. It is the opinion of the author that developers will no longer enter into insurance trust agreements but only include in the corporation's declaration an obligation to retain the services of an insurance trustee when there has been greater than 25 per cent damage to the buildings;

(o) a statement as to whether to the declarant's knowledge the corporation intends to amalgamate the corporation with another corporation or whether the de-clarant intends to do so within 60 days of the date of registration of the declaration and description of the corporation;

(p) if amalgamation is intended, a copy of the proposed declaration, description, by-laws and rules for the amalgamated corporation;

(q) a copy of the budget statement for the one-year period immediately following the registration of the declaration and the description.

- Additional disclosure requirements are imposed by section 17 of LGC Reg. 48/01. Some of these matters are dealt with in the Disclosure Statement, Table of Contents (formerly Form 12, LGC Reg. 48/01). They are as follows:

(a) a copy of sections 73 and 74 advising purchasers of their rescission rights under the *Act*;

(b) a statement that the declarant is entitled to retain the excess interest earned on money held in trust beyond the interest that it is required to pay to the purchaser;

(c) a statement whether any part of the common elements may be used for commercial or other purposes not ancillary to residential purposes;

(d) if there is no by-law or proposed by-law of the corporation establishing what constitutes a standard unit, a copy of the schedule of what constitutes the standard unit;

(e) a statement

(i) indicating whether visitors must pay for parking and what the anticipated costs are,

(ii) indicating whether there is visitor parking on the property, and

(iii) if there is no visitor parking on the property, indicating whether visitor parking is available elsewhere and, if so, describing where;

(f) an identification of the major assets and property that the declarant has indicated that it may provide, even though it is not required to do so;

(g) an indication of the units and assets that the corporation is required to purchase, the services that it is required to acquire, and the agreements and leases that it is required to enter into with the declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant; and

(h) with respect to land that is owned by the declarant, or by a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant, and that is adjacent to the land described in the description, a statement indicating,

(i) the current use of the land,

(ii) the representations, if any, that the declarant has made respecting the future use of the land, and

(iii) a summary of the applications, if any, respecting the use of the land that have been submitted to an approval authority.

- The following definitions apply to clause (h) above:

"affiliated body corporate" means a body corporate that is deemed to be affiliated with another body corporate under subsection 1(4) of the *Business Corporations Act*;

"body corporate" means a body corporate with or without share capital;

"holding body corporate" means a body corporate that is deemed to be the holding body of another body corporate under subsection 1 (3) of the *Business Corporations Act*;

"subsidiary body corporate" means a body corporate that is deemed to be a subsidiary of another body corporate under subsection 1(2) of the *Business Corporations Act*.

- Section 72(4) requires the following to be set out in the Disclosure Statement, Table of Contents (formerly Form 12, LGC Reg. 48/01). The Table of Contents must indicate whether the condominium documents or any other material in the disclosure statement deal with any of the following matters and, if so, where those matters are located. The required information is:

1. whether the condominium is a freehold, vacant, phased or common elements condominium or whether it is a leasehold condominium;

2. whether the property or part thereof is or may be subject to the *Ontario New Home Warranties Plan Act* or whether the proposed units or the units are intended to be enrolled in the Plan;

3. whether any building or unit on the property has been converted from another use;

4. whether one or more units may be used for a commercial or other purpose not ancillary to residential purposes;
5. whether there are any pet provisions;
6. whether there are any restrictions or standards regarding the occupancy or use of units or common elements based on the nature of the design of the facilities and services on the property or on other aspects of the buildings located on the property;
7. a statement to the nearest 25 per cent of the number of units the declarant intends to lease;
8. a statement whether the proportions expressed in percentages for contribution to common expenses or common interest appurtenant to the unit differ by more than 10 per cent from another unit of the same size, type and design;
9. a statement whether any unit is exempt from a cost which the other units have to bear;
10. a statement whether all or part of the common elements are subject to a lease or licence;
11. a statement whether parking is on a unit, common elements or exclusive use common elements basis and whether there are any restrictions on parking;
12. a statement whether visitors must pay for parking, the anticipated costs and whether there is visitor parking on the property. If not available on the property, the location of visitor parking if available;
13. a statement whether the corporation is required to purchase units or assets, acquire services or enter into agreements or leases with the declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant and identify same;
14. a statement whether the declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant owns land adjacent to the land described in the description. If the answer is "yes," the current use of the land is to be described. If the declarant has made representations respecting the future use of the land, the disclosure statement must contain a statement of the representations and whether an application has been submitted to an approval authority respecting the use of the land and, if so, the disclosure statement must contain a summary of the applications;
15. a statement whether the corporation intends to amalgamate with another corporation or whether the declarant intends to cause an amalgamation;
16. a statement whether the developer will provide major assets and property to the condominium even though not required to do so and, if so, what those are;
17. a statement whether there is either a schedule or an existing or proposed by-law establishing what constitutes a standard unit;
18. special provisions apply for the new concept condominium corporations, which are not set out in this chapter; and
19. any statements required by the regulation, i.e., a reference to the 10-day right of rescission.

Right of Rescission:

- When a purchaser enters into an agreement to purchase a unit from a developer, he or she will be presented with an offer to purchase that has been prepared by the developer's solicitors. Although a prospective purchaser should consult his or her solicitor before the agreement of purchase and sale is entered into, this is often not the case. The solicitor, however, must be aware that the purchaser has a 10-day right of rescission. During that time, a purchaser may either rescind the agreement or attempt to amend provisions contained therein.
- It should be noted that the *Act* establishes the time from which the 10-day rescission period runs. Section 73 of the *Act* provides that the purchaser of a new condominium unit is entitled to rescind the agreement of purchase and sale within 10 days of the later of the purchaser receiving the disclosure materials and the date that the purchaser receives a copy of the agreement of purchase and sale executed by the vendor. The purchaser may rescind without cause and the notice to rescind need not explain the reasons for rescission.
- The purchaser's automatic right to rescind an agreement of purchase and sale, pursuant to section 73(1) of the *Act* is to be exercised either by the purchaser or the purchaser's solicitor. Notice of rescission is to be given in writing to the declarant or the declarant's solicitor within the later of 10 days after the date the purchaser receives the disclosure statement and the date the purchaser receives a copy of the agreement of purchase and sale executed by the declarant and the purchaser.
- The *Act* provides that when the declarant or the declarant's solicitor receives a notice of rescission from a purchaser, the declarant must refund to the purchaser, without penalty or charge, all monies received from the purchaser that were to be credited toward the purchase price and payable pursuant to the agreement of purchase and sale, together with interest at the rate prescribed, from the date the money is received until the date the monies are refunded.

Material Changes:

- Purchasers are not aware that a material amendment to the disclosure materials has occurred until they receive the amendment, and the further 10-day period is an important, although rarely used, protection for the purchaser. This is particularly so since it is the developer who determines whether a material amendment has taken place and rarely, if ever, is notice of such an amendment given. If it is given after the purchaser is in occupancy of his or her unit, there is very little likelihood that the purchaser will terminate the agreement of purchase and sale. Since this is the only statutory remedy available to a purchaser, the right to rescind is an impractical remedy when purchasers receive a notice of a material amendment in a rising real estate market. There remains to be answered whether the statutory remedy precludes all others.

- The typical agreement of purchase and sale precludes the purchaser from taking any action against the developer other than the right to rescind.
- In a depressed market there is a strong likelihood that the developer will decide that the amendment is not material and no notice of the change to the disclosure materials will be given to the purchaser.
- Under section 74 of the *Act*, a regime is established for dealing with questions regarding the issue of whether a change or series of changes presented to a purchaser is material. The *Act* provides that the 10-day rescission period starts fresh upon receipt by a purchaser of a material amendment to the disclosure materials, or the purchaser becoming aware of a material amendment thereto. As was the case with the 10-day rescission period when the agreement was executed, the purchaser may rescind simply by delivering written notice to the declarant or the declarant's solicitor.
- Section 74(1) provides that where there is a material amendment to the information contained in a disclosure statement that has been delivered to a purchaser, the declarant shall deliver to the purchaser either a notice of the material change or a revised disclosure statement.
- If the declarant delivers a revised disclosure statement, section 74(3) obligates the declarant to identify all the changes that in the reasonable belief of the declarant may be material; the developer must summarize their particulars. The declarant, pursuant to section 74(4), must deliver the revised disclosure statement or the notice to the purchaser within a reasonable time after the material amendment occurs but in no event can the delivery be later than 10 days before delivering a deed to the unit to the purchaser in registerable form.
- Section 74(5) of the *Act* provides that a purchaser may, upon receipt of a revised disclosure statement or a notice of a material amendment, make an application to the Superior Court for a determination as to whether the change or series of changes is material.
- Section 74(6) of the *Act* does not require that a purchaser apply to court for an order on the question of materiality. It provides that when a purchaser receives a revised disclosure statement or a notice of change that is material or a material change occurs that is not disclosed by the declarant in either a revised disclosure statement or a notice, a purchaser has the right, before accepting delivery of a deed in registerable form to the unit, to rescind the agreement of purchase and sale within 10 days of the latest of:
 1. the date the purchaser receives the notice or revised disclosure statement;
 2. if the declarant has not delivered a notice or revised disclosure statement, the date on which a purchaser becomes aware of a material amendment; and
 3. the date on which the court determines the question of materiality.
- The right of rescission can be exercised by giving written notice to the declarant or the declarant's solicitor. If a declarant or the declarant's solicitor receives written notice of

rescission, the declarant may, if the purchaser has not already done so, apply to the Superior Court for an order determining the question of materiality. In the author's opinion, it is unlikely that a purchaser will apply to the court for an order regarding materiality; it is more likely that a developer who receives a notice of rescission will contest the right to rescind by bringing an application pursuant to section 74(8) of the *Act*.

- If a declarant receives a notice of rescission under section 74, the declarant is required to return to the purchaser, without penalty or charge, all monies received from the purchaser under the agreement of purchase and sale and credited towards the purchase price, together with interest on the monies at the prescribed rate from the date the declarant received the money until the money is refunded.
- If the declarant takes the position that no material change has occurred, then section 74(8) entitles the developer to bring an application to the Superior Court for a declaration on the question of materiality.
- Section 74(10) of the *Act* requires that the declarant refund the money within 10 days after receiving notice of rescission if neither the purchaser or the declarant has applied to the court for a determination on the issue of materiality or, if an application is made, within 10 days after the court determines the issue of materiality in favour of the purchaser. The developer is required to refund all monies payable towards the purchase price, together with interest thereon from the date the monies are received to the date the monies are refunded at the rate of 2 per cent below the prime rate set by the Bank of Canada. (See section 74(9) of the *Act* and section 19(3) of LGC Reg. 48/01.)
- The *Act* adopts the definition of materiality set forth by Robins J.A. in the *Abdool* case, *supra*. It defines material change as a change or series of changes that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation, that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the rescission right available under section 73 if the change or series of changes was set out in the disclosure statement.
- The *Act* sets out the changes that do not constitute material changes. They are as follows:
 1. a change in the contents of the corporation's budget for the current fiscal year if more than one year has elapsed since the registration of the condominium corporation;
 2. a substantial addition, alteration or improvement within the meaning of section 97(6) that the corporation makes after a section 43 turnover meeting has taken place;
 3. a change in the portion of units that the developer intends to lease;
 4. a change in the schedule of the proposed commencement and completion dates for the construction of amenities which have not been completed as of the date on which the disclosure statement was made; and

5. a change in the information contained in the statement described in section 161(1) of the services provided by the municipality or the Minister of Municipal Affairs and Housing in a vacant land condominium corporation.

- It is the author's opinion that the intention of the legislators is that the definition of material change apply in determining all controversies regarding the question of materiality except the five specific issues listed above as these are deemed not to qualify as material changes.
- Although the *Act* provides a right of rescission when a purchaser receives notice of a material amendment from a developer, there remain a few unanswered questions, which the courts have yet to consider:
 - Does the developer owe a higher duty to the purchaser of a condominium unit than the purchaser of a different type of property? Is the right of rescission the only remedy available to a purchaser? If the right to rescission is determined to be the only right available to a purchaser, does the condominium corporation, once it comes into existence, have rights against the developer with respect to amendments to the disclosure material that will have a financial impact on the condominium corporation?

Upcoming Amendments:

- Condominium Guide – the amendments to the *Act* will require the province to publish a plain language condominium guide, containing general information for purchasers about the rights and obligations of owners, occupiers of units and the corporation, and any other matters the Minister considers appropriate. Developers will be required to provide a copy of the condominium guide to purchasers at the time of entering into an agreement of purchase and sale for a newly-built unit in a condominium.
- Disclosure Statement – the amendments introduce new items that once in force will have to be included in a disclosure statement and the regulations will standardize the form and content of the disclosure statement. When these changes become effective, a declarant will be required to include the following items in the disclosure statement:
 1. Prescribed Summary – s. 72(3)(a.1): the prescribed Table of Contents will be replaced with a new prescribed "summary" of the proposed condominium project.
 2. Phased Condominium – s. 72(3)(b): along with the current requirement to indicate whether the condominium is freehold and if so what type, a statement specifying whether the corporation is to be a phased condominium will have to be included in the disclosure statement.
 3. Conversion Projects – s. 72(3)(f.1): as of January 1, 2018, if the disclosure statement is for a residential condominium conversion project, a declarant must include the following in the statement:
 - i. a statement that the project is a residential condominium conversion project;

- ii. a list of the pre-existing elements as identified in the newly required pre-existing elements fund study (see discussion below on the changes to the *ONHWPA*);
 - iii. a copy of the pre-existing elements fund study;
 - iv. a statement that section 13 (1)(a)(i) of the *ONHWPA* does not apply to the pre-existing elements;
 - v. a copy of the text of subclause 13 (1)(a)(i) and subsection 17.2 (1) of the *ONHWPA*; and
 - vi. a statement that the Registrar, as defined in the *ONHWPA*, has confirmed that the conditions set out in subsection 17.2 (1) of the *ONHWPA* have been satisfied.
4. Significant Features of Shared Facilities Agreement – s. 72(3)(n): section 72(3)(n) of the *Act* currently states that a declarant must provide a brief description of the significant features of any agreements or proposed agreements between the corporation and another corporation as well as any agreements referred to in ss. 111 to 114 of the *Act*. When the amendments to s. 72(3)(n) become effective, a declarant will be required to disclose the key features of any shared facilities agreement involving the condominium. Pursuant to s. 21.1 of the *Act*, a shared facilities agreement will have to meet prescribed requirements and will have to be registered in accordance with the regulations. The regulations dealing with s. 21.1 have not yet been finalized and, as a result, we do not know what the prescribed requirements for shared facilities agreements will be.
- Inadequate disclosure of shared facilities agreements has been an ongoing concern for purchasers of new condominium units. This was the subject of a recent court decision in *Toronto Standard Condominium Corp. No. 2130 v York Bremner Developments Ltd.* In that case the condominium corporation sought relief under a shared facilities agreement to which the condominium and the declarant were parties. The agreement appointed the declarant as the manager to oversee the operation of the shared facilities and enabled the declarant to allocate the shared facilities costs in a discretionary manner. This was problematic as the declarant had retained ownership of the commercial premises in the complex and was therefore in an inherent conflict of interest position.
 - At trial, the condominium corporation argued that the declarant had failed to disclose the contents of the shared facilities agreement and used the unbalanced terms of the agreement to favour itself. The declarant refuted these allegations by arguing that the terms of the agreement, which had been summarized in and appended in its entirety to the disclosure document, were adequately disclosed.
 - In determining the adequacy of the declarant's disclosure, the court noted that although the disclosure statement contained two pages of text describing the agreement, nowhere in it did the declarant discuss the terms

under which the facilities were to be managed and operated or how the costs would be shared under the agreement (which terms heavily favoured the declarant). The court opined that the statute required more than just the disclosure of the document and that adequate disclosure, for purposes of the Act, means disclosing the provisions in the shared facilities agreement that could result in oppression or unconscionable prejudice to the unit owners and the corporation. Moreover, if the oppressive result is caused by the conduct of the declarant acting under the provisions of the agreement, the disclosure will not be adequate unless it clearly notified purchasers of the risk of that outcome. In the circumstances, the court held that the declarant had breached its disclosure obligations by failing to disclose its conflicted role and powers (particularly with respect to cost allocations) in the disclosure statement. This case is currently under appeal.

5. Known Costs Beyond the Corporation's First Year s. 72(3)(q.1)(q.2): a statement, prepared in accordance with the regulations, of the circumstances the declarant knows or ought to know which may result in an increase in the common expenses after the corporation's first year and the amount of any potential increases in the common expenses as a result of same.
 - This change will help to address the current problem with a declarant only being responsible for the first year budget deficiency and, hopefully, will put an end to the practice of some developers deferring part of a corporation's operating costs and excluding them from the first-year operating budget.
6. Current Fiscal Year Budget – s. 72(3)(r): if more than one year has passed since the registration of the declaration and description, a copy of the budget of the corporation for the current fiscal year and a copy of all amendments, if any, made to that budget.
 - Budget Statement – the amendments to the *Act* will impact budget statements. Once in force, the amendments to s. 72(6) of the *Act* will require that the budget statement for the one year period immediately following the registration of the declaration cover the corporation's general and reserve fund accounts. A declarant will also be required to provide a statement, prepared in accordance with the regulations, as to whether there will be any increase in the common expenses and setting particulars of those increases. Additionally, a declarant will be required to deliver a copy of the corporation's current first year budget and any amendments thereto to a purchaser no later than 10 days before delivering a deed to the purchaser.
 - Material Changes in Disclosure Statements – Currently, under the *Act*, a declarant must deliver a revised disclosure statement to a purchaser within a reasonable time after a material change occurs and, in any event, no later than 10 days before delivering to the purchaser a deed to the unit being purchased.

- When the amendments to s. 74(1) come into force, the term “within a reasonable time” will be replaced with the requirement to deliver a revised disclosure statement “as soon as reasonably possible”, imposing a more stringent obligation on a declarant to communicate a material change without delay.
- In an effort to promote greater predictability for purchasers, the definition of “material change” will be amended and, when in force, the following will not constitute material changes:
 - increases in common expenses of less than 10% (or another threshold set out in the regulations), previously disclosed to the buyer;
 - increases in the common expenses that results from the application of any prescribed taxes, levies, or charges; and
 - any other changes prescribed in the regulations.
- The amendments will also introduce a remedy for purchasers affected by a declarant’s breach of its disclosure obligation. When in force, s. 74(11) of the *Act* will allow a purchaser to make an application to the court to obtain compensation for losses incurred as a result of a declarant's failure to comply with the material change disclosure requirements. Pursuant to s. 74(12), a court will have the ability to order a declarant to comply with its disclosure obligation as well as grant the applicant's costs and an additional amount not exceeding \$10,000.
- Implied Covenants – the amendments under s. 78 (1.1) will introduce three new deemed covenants in every agreement of purchase and sale of a unit entered into by a declarant. These covenants will apply regardless of anything contained in an agreement of purchase and sale to the contrary.
 1. No Acquisition of Property: a purchaser cannot acquire an interest or right in any real or personal property that is intended for the collective use or enjoyment of the unit owners in the condominium. This puts an end to the practice of developers selling guest suites, superintendant's units, parking spaces and building infrastructure to the condominium corporation.
 2. Contribution Towards Reserve Fund Charges: a declarant cannot charge, and a purchaser cannot be required to pay, any amount that is intended to be a projected or actual contribution to the condominium’s reserve fund, unless otherwise permitted under the *Act*; and
 3. No Indemnities from Purchasers: a purchaser cannot, directly or indirectly, be obligated to indemnify, reimburse or otherwise compensate a declarant (or affiliate of the declarant) for any remedies exercised by or on behalf of the condominium corporation against the declarant (or declarant affiliate).

Cases:

1. *Aiken v. Dockside Village Inc. (1993) (Ont Gen Div)*

- The applicants sought a declaration from the court that they were entitled to rescind the agreements of purchase and sale that they had entered into with the respondent. The grounds for seeking rescission were as follows:
 1. that there was a true condition precedent in the agreement of purchase and sale which required that a building permit be issued by November 30, 1988;
 2. that full disclosure was not made and that there were material amendments to the disclosure statement.
- With respect to the first issue the court found that notwithstanding that the issuance of a building permit was a condition precedent, the conduct of the parties constituted a waiver of the right to terminate the offer in 1988. The applicants accepted benefits under the agreements of purchase and sale, including going into interim possession and, in the case of Aiken and Reisman, the collection of rent from their tenants. Their conduct was such that it affirmed the contract.
- With respect to the second issue, that the developer failed to make disclosure pursuant to section 52 of the *Condominium Act*, R.S.O. 1980 [S.O. 1998, s. 72], because it failed to provide By-Law Nos. 3 and 4, the court found that:

[6] Providing these by-laws at a later date after the initial disclosure statement, and providing the Shared Facilities Agreement at a later date does not, after it was created, in my view, conflict with the obligations to provide initial disclosure enunciated in s. 52 [s. 72] of the *Condominium Act* [R.S.O. 1980].
- In fact, the court went on to state that there is no obligation under section 52 [s. 72] to provide a shared facilities agreement.
- The court found that the delivery of the shared facilities agreement did not constitute a material amendment which gave rise to the right of rescission. Two issues to which the applicants raised objections were the ability of the chairman of the recreation facility committee to cast a deciding vote in the case of a tie and the committee's right to suspend the use of the facilities for breach of the rules enunciated in said agreement.
- The third issue was that the shore area in the original disclosure statement was described as a beach and a boardwalk and in the revised disclosure statement it was described as "shore area". Once again, the court found that this did not constitute a material amendment to the disclosure statement.
- The court dismissed the application with costs in favour of the respondent.

2. *Kozourek v. Carlyle Residence (III) Inc. (1996) (Ont. Gen. Div.) affirmed at the ONCA*

- The plaintiff brought an application for the return of a \$15,000 deposit paid by him towards the purchase of a condominium unit. The defendant Carlyle Residence did not appear but the Montreal Trust Company of Canada who co-arranged the financing of the units did. Montreal Trust defended and by counterclaim, claimed damages for the loss of the resale of the condominium unit in the sum of \$67,426.04 plus interest in addition to the \$15,000 deposit.
- There were three issues before the court. One was whether an oral representation supposedly made at a presentation by the solicitor for the Carlyle constituted an agreement in which Carlyle agreed to buy back any units on which the purchasers decided they did not want to close. The court found that it did not believe that such an oral representation was made, but that even if it was, the plaintiff had not relied upon the same and was confronted with the parole evidence rule.
- The second issue was whether, when the defendant Carlyle Residence having sent a letter to the purchaser saying that the agreement of purchase and sale was null and void unless he agreed to enter into an agreement extending the economic viability date, constituted a termination of the agreement of purchase and sale. The court found that once the plaintiff had signed an agreement amending the original agreement, he was bound thereby.
- The third issue was whether the plaintiff could argue that there had been a material amendment to the disclosure statement. In November of 1990, the plaintiff was notified that the size of his unit had been increased by 11 per cent and his common expenses would therefore increase by \$16.72 per month. Montreal Trust argued that this did not constitute a material amendment within the meaning of section 51 of the *Condominium Act*, R.S.O. 1990. The judgment did not indicate what the original common expenses were expected to be for the unit but the court found that the change was not material and did not require notice in writing to the plaintiff. Notwithstanding that written notice was not required, the plaintiff did receive same and did not act within the 10 days prescribed by the *Condominium Act*. The court therefore dismissed the plaintiff's claim and granted judgment to the defendant for the amount of the counterclaim.

3. *Metropolitan Toronto Condominium Corp. No. 1250 v. Mastercraft Group Inc. (2009) (ONCA)*

- An appeal from a decision of the Ontario Superior Court of Justice. In 1997, the respondent Mastercraft entered into an agreement to purchase a building in order to convert it to a condominium. It incorporated three companies, Eglinton, Lofts and Lomico, to carry out this project. The respondent Greenberg was the principal of Mastercraft and controlled Eglinton, Lofts, and Lomico.

- Eglinton took title to the building on May 22, 1997. Lofts and Lomico each immediately entered into agreements with Eglinton whereby Eglinton owned the underground parking floors, the ground floor, and the eighth floor, in trust for Lomico, and floors two and seven in trust for Lofts. Eglinton transferred its interest in the eighth floor to Lomico for the amount of \$346,000. A deed was later registered whereby Lomico surrendered its interest in the eighth floor in exchange for 13 condominium units located on the eighth floor and consideration of \$2.00.
- Lofts carried out renovations and began selling units on floors two to seven. The agreements of purchase and sale contained a provision that parking was not to be included in the purchase price of the condominium unit; however, parking leases would be available to purchasers at market rates. Eglinton further provided the original purchasers with a disclosure statement that provided that each owner of a commercial/residential unit "shall be entitled to lease a parking unit . . . at market rates". When disputes arose between Greenberg and the board of directors of the appellant condominium corporation (MTCC 1250), Lomico cancelled the parking privileges of a number of owners involved in the dispute.
- Lofts also purchased new heating, ventilation, and air conditioning (HVAC) equipment and installed it on the roof of the building. Lofts subsequently sold this new HVAC equipment to the respondent S-99, a company controlled by Greenberg, which subsequently purported to lease the equipment to MTCC 1250.
- During the conversion construction three reports were commissioned by Mastercraft, and later Lofts, concerning the underground garage. The inspection reports indicated that there was significant deterioration of the garage and repairs would be required. None of the work recommended by the reports was done. In 1999, when MTCC 1250 came into existence, its board of directors commissioned a performance audit of the building. It also showed significant areas of deterioration in the garage. Eglinton did not respond to MTCC 1250s request to address these deficiencies.
- There were four issues to be determined. The first was whether Lomico was a "declarant" for the purposes of the *Condominium Act*, R.S.O. 1990, c. C.26 [now the *Condominium Act, 1998*, S.O. 1998, c. 19]. The second was whether the lease, under which S-99 purported to lease the central HVAC equipment to MTCC 1250, was null and void because its subject-matter was common elements of the corporation. The third was whether Eglinton, Lomico and Lofts breached the terms of the agreements of purchase and sale of the condominium units by failing to carry out repairs to the underground garage. The fourth was whether Eglinton and Lomico breached the agreements of purchase and sale of the condominium units by refusing to rent parking spaces at fair market value to each unit owner. The trial judge answered no to the first and third questions, and yes to the second and fourth questions. The condominium corporation appealed the first three findings and Eglinton and Lomico cross-appealed the fourth. The Court of Appeal addressed each of the issues.

- When assessing whether Lomico met the statutory definition of declarant, the court referred to section 1(1) of the *Condominium Act*, R.S.O. 1990, which defined a declarant as: the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes any successor or assignee of such owner or owners but does not include a purchaser in good faith of a unit who actually pays fair market value or any successor or assignee of such purchaser.
- The court found that the change of Lomico's ownership of the entire eighth floor into its ownership of the units on the eighth floor did not qualify as a *bona fide* purchase of the units at fair market value. The court found that at the time of registration of the declaration, Lomico was the owner in fee simple of the eighth floor, despite the fact that Eglinton held the property in trust as a bare trustee. The court held that Lomico was a declarant within the meaning of section 1(1) of the Act.
- The court then considered whether the lease of HVAC equipment by S-99 to MTCC 1250 was null and void. The court cited *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280, 1981 CarswellOnt 1131 (Ont. C.A.), leave to appeal to S.C.C. refused, [1981] 1 S.C.R. xi, 122 D.L.R. (3d) 280n, 32 O.R. (2d) 458n (S.C.C.), making it clear that once the vendor started to sell its units, the vendor had a fiduciary duty to the purchasers of those units that extended to the common elements. The court found that the HVAC equipment was part of the common elements and the equipment could not lawfully be separated from the remaining common elements, sold, and then leased back to MTCC 1250. When the declaration was registered, the unit owners became the owners of the common elements, including the HVAC equipment. S-99 thereafter had no interest in the equipment and hence no interest in what it purported to lease to MTCC 1250. The court found the lease was null and void.
- Regarding the lack of repairs to the underground garage, the court considered the construction warranty provision contained in the agreement of purchase and sale between Lofts and each initial purchaser, which stated:
 - The Purchaser acknowledges that the Building is a substantial renovation of an existing building and that the base building remains as originally constructed.
 - In taking an interpretive approach, the court found that the purchasers of the units reasonably intended to purchase a unit in a substantially renovated building with a substantially renovated parking garage.
 - Accordingly, by failing to substantially renovate the garage, Lofts breached the construction warranty given to the purchasers.
 - Finally, the court looked to whether Eglinton and Lomico breached the agreements of purchase and sale of the condominium units by refusing to rent out parking

spaces at fair market value to the unit owners. The court looked to the reasonable expectations of the parties, taking into consideration the entire contract and surrounding circumstances. The court found that the right to lease a parking space was part of the consideration given for the purchase price of each condominium unit. The court further came to the conclusion that the right to rent a parking unit was an easement appurtenant to each residential unit, which Lofts, as agent for Lomico, granted to initial owners of the condominium units. As easements run with the land, it followed that the right to rent the parking units enured to each subsequent owner of the condominium units. Mastercraft is seeking leave to appeal to the Supreme Court of Canada.

4. ***Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp. (2011) (ONCA)***

- The appellants were three condominium corporations, each of which housed commercial and retail establishments on their ground floors. There was no cost-sharing agreement between the condominium corporations and the ground-floor businesses for shared facilities and services. The issue was whether the application judge had correctly held that it was unreasonable for the purchasers to have expected the condominiums to enter into a reciprocal agreement based upon the information available to them at the time of purchase.
- The Ontario Court of Appeal held that the application judge correctly rejected the appellants' argument that it was reasonable for purchasers to have expected the condominiums to enter into a cost-sharing reciprocal agreement in the future. There was no mention of such an agreement in the condominium's governing documents despite reference to sharing of facilities and services. Therefore, it was not reasonable to have expected such an agreement to have been entered into.
- **Note:** This reasoning seems troubling as it is hard to imagine separate condominiums successfully sharing facilities and services without a formal agreement allocating the respective costs of doing so. The application judge had gone as far as to "acknowledge that a cost sharing agreement might have been a prudent, and even preferred, way to achieve a fair allocation" (para. 46).
- The application judge properly found that there was no oppression because the absence of a cost-sharing agreement in the mixed-use development was a "considered business decision" of the respondents and was fully disclosed where the unit purchasers of the appellants had counsel. Finally, oppression was not available because the appellants voluntarily purchased their condominiums with the full disclosure and knowledge of the rights, risks and obligations of their units.

5. ***Ormond v. Richmond Square Development Corp. (2001) (Ont. S.C.J.)***

- The case was part of a continuing dispute between the parties. The initial action was determined by the Court of Appeal in July 1998. The issue before the court

was the meaning of rescission within section 52(2) of the *Condominium Act*, R.S.O. 1990, c. C.26 [S.O. 1998, ss. 72(2), 73(2), 74(6)]. The court found that the plaintiff purchasers were entitled to rescind their agreement of purchase and sale pursuant to section 52(2) of the *Condominium Act*. The issue which had to be determined was whether this was a common law or an equitable right of rescission as the remedy would vary. The court found that the rights for common law rescission could not appropriately apply to section 52(2) of the *Condominium Act* and therefore the rights to rescission under that section were equitable rights to rescission. Equitable rescission was intended to restore the parties to their original positions. Equitable rescission enabled a court to take accounts, balance setoffs against each other and make allowances. This greater flexibility allowed for adjustments that could not be made under common law rescission.

[32] In my view, the word "rescind" in s. 52 [ss. 72(2), 73(2), 74(6)] of the *Condominium Act* is intended to refer to the equitable notion of rescission. Its flexible nature enables judicial and practical efficiency and justice. It is in accordance with subs. 96(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [as amended by S.O. 1991, C.46], which stipulates that where common law and equity are in conflict, equitable rules are to prevail. It is also in keeping with the facts of this case and is more practical when dealing with condominiums generally. Although condominium units normally substantially retain their identity, restitution in the purest sense is not possible, as the plaintiffs cannot restore to the vendor a brand new, unused condominium unit. Rescission at common law required restoration of the exact thing. The principle of *restitutio in integrum* encompassed by the equitable notion of rescission does not require that a person be put into the same position as before the contract was concluded but, rather, that the person be put into as good a position as they were before the contract was entered into.

[33] It may be argued that the Court of Appeal's order in this matter implicitly adopts the equitable notion of rescission as it directs the referee to ascertain financial adjustments to be made between the parties. Rescission at common law would not permit a consideration of offsetting balances in favour of the vendor.

[34] I conclude, therefore, that the word "rescind" in s. 52 of the *Condominium Act* refers to the equitable concept of rescission. As a consequence, the court must enter into a consideration of credits that ought to be given to the purchasers and those which ought to be provided to the vendor. (p. 323 R.P.R.)

- As a result, the court found that the purchasers were entitled to the credit of their deposits plus interest at the prescribed rate under the *Condominium Act*, R.S.O. 1990; the occupancy fees made by the plaintiffs with respect to the units were to be credited to the vendor. The vendor was entitled to credit from the date that the parties were entitled to occupy the units.
- The defendant argued that it should have been entitled to the full amount of the occupancy fees called for under the agreement of purchase and sale, being \$836.57

per month. The court found that since the whole agreement between the parties failed, the portion of the agreement setting out the occupancy fees could not apply. The court further found that since the occupancy fees were intended to reflect what the parties were to pay for the use of the units and the plaintiffs did not get what they bargained for, the amount of credit to the vendors for the period of time that the purchasers had tenants in their units should be the \$550.00 per month for which the plaintiffs were able to rent the units. The court found that the time at which the credit to the vendors should stop for the rental was when the tenants vacated those properties. The court also ordered that the plaintiffs were entitled to simple interest at the rate prescribed under the Condominium Act.

6. *Simcoe Vacant Land Condominium Corp. No. 272 v. Blue Shores Developments Ltd. (2014) (Ont. S.C.J.)*

- An application by Simcoe Vacant Land Condominium Corporation No. 272, Simcoe Vacant Land Condominium Corporation No. 299, Simcoe Vacant Land Condominium Corporation No. 312, and Simcoe Vacant Land Condominium Corporation No. 321 (together the "Corporations") claiming breach of trust and oppression against Blue Shores Developments Ltd. ("Blue Shores"), which had been the developer of a residential project in Collingwood. The development was comprised of residential buildings and a community clubhouse. The Corporations sought a declaration of ownership of the clubhouse, and a declaration that a mortgage that had been registered on title to the clubhouse was void against them. Furthermore, they sought an accounting of amounts collected as membership fees and monies disbursed for the operation of the clubhouse.
- The court dismissed the application. The Corporations' legal theory was not substantiated by the evidence they had adduced. The agreements and disclosure documents related to the sale of the condominium units did not establish a trust relationship with respect to the clubhouse. The evidence did not indicate that Blue Shores had conducted itself in such a way that the relationship between the parties had changed over time or that would amount to a breach of contract. Furthermore, the court was satisfied that there had been no oppressive conduct on the part of Blue Shores, since it had respected its contractual obligations, in accordance with the Corporations' reasonable expectations.
- Blue Shores had built the clubhouse for the use of unit owners and their guests. The ownership of the clubhouse had been thoroughly described in the disclosure statement, which indicated that the ownership of the clubhouse would be transferred to the Corporations for a nominal sum upon transfer of the title to the lands from Blue Shores to the Corporations. The statement provided that until then, the clubhouse would be operated and maintained by Blue Shores since it was an "essential amenity in the marketing of the project". (para. 8)
- Blue Shores had remained the registered owner of seven unsold condominium units ten years after the commencement of the project. This prompted the Corporations

to argue that Blue Shores had failed to make satisfactory efforts to sell its units. The Corporations further argued that the conveyance of the clubhouse had already been effected by virtue of the sale of the condominium units to the purchasers. The Corporations submitted that they were now entitled to require specific performance of the contract for the conveyance of the clubhouse.

- The court remarked that the Corporations had misinterpreted Blue Shores' contractual obligations. Blue Shores' obligation to convey title to the clubhouse in the future was not an "executory contract" that had already received consideration, since it had not been set out in writing. The court remarked that, given the fact that a condominium was a complex and unique form of property title, standard agreements of purchase and sale had to set out that they were subject to condominium documents. However, while the condominium documents operated so as to provide further details as to the nature of the property title, they could not give purchasers additional items that were not part of their unit. In this case, the court was satisfied that the agreements did not incorporate any terms contained in the disclosure statement or in any future contracts for the purchase and sale of the remaining condominium units.
- The court referred to *Metropolitan Toronto Condominium Corp. No. 1250 v. Mastercraft Group Inc.* (2009), 82 R.P.R. (4th) 1, 2009 CarswellOnt 4281, 2009 ONCA 584, where the Court of Appeal had to determine whether HVAC equipment was distinct from the condominium's common elements and concluded that the clubhouse was distinct from the unit owners' interest in the condominiums' common elements, since it was not an "essential" part of the building. The court remarked that common elements are normally conveyed to purchasers in the present tense, giving purchasers an immediate interest in them upon execution of the agreement of purchase and sale. This was not the case for the clubhouse, which had been intentionally excluded from the documents.
- With respect to the Corporations' submission that Blue Shores had not exercised good faith in selling the remaining seven units, the court found that the Corporations had not met their evidentiary burden of proof to substantiate any alleged contravention to section 78(1) of the *Condominium Act, 1998* (the "Act"). The court found that the Corporations had incorrectly attempted to reverse the burden of proof by requiring Blue Shores to make submissions as to the efforts it had made to find potential purchasers for the remaining units.
- Blue Shores had granted a mortgage for \$1 million to Duca Financial Services Credit Union Ltd. ("Duca") and had registered it on the clubhouse's title. The Corporations submitted that the registration had been made without their prior approval and therefore amounted to a violation of their vested rights in the clubhouse. The court found that Blue Shores was not a trustee of the clubhouse and that there had been no prohibition in the disclosure statement, in the purchase and sale agreements or in any other document, against Blue Shores obtaining and registering a mortgage against title to the clubhouse. Thus, the Corporations would

not be able to block the mortgage since they had no presently enforceable interest or equitable right in the clubhouse.

- The Corporations submitted that they had been charged fees for the clubhouse that exceeded the amount permitted in the relevant documents and sought an accounting of all funds. The court noted that the operation of the clubhouse and all associated fees were governed by an Easement and Cost Sharing Agreement (the "EACSA") that had been entered into by the parties. The EACSA had been registered against title. The court was satisfied that the membership fees charged fell within the amount permitted to be charged under both the disclosure statement and the EACSA. As the declarant of the property, Blue Shores owned, operated and maintained the clubhouse. The Corporations had no reasonable expectations or contractual right to audited statements or further accounting.
- The Corporations had taken the position that, by failing to register the clubhouse as a condominium unit, Blue Shores had made "material misrepresentations" in the documents that had been provided to the purchasers and had thus been in contravention of section 133(1) of the *Act*. The court found that the Corporations had not established any prejudice to themselves or to unit owners as a consequence of Blue Shores' failure to register the clubhouse as a condominium unit. Furthermore, none of the documents bound Blue Shores to a specific timeframe by which the clubhouse had to be registered.
- Finally, the Corporations took the position that Blue Shores had acted oppressively in failing to convey the clubhouse, in failing to account for associated expenses and in failing to register it as a condominium unit. Therefore, they submitted that they were entitled to a remedy under section 135(2) of the *Act*. The court rejected the Corporations' argument, since Blue Shores' conduct had been legal, fair and in accordance with the reasonable expectations of the purchasers.
- This decision was affirmed on appeal.

7. *Simcoe Vacant Land Condominium Corp. No. 272 v. Blue Shores Developments Ltd. (2015) (ONCA)*

- The appellants were four condominium corporations, and the respondent, Blue Shores Developments, was the developer of the project. The dispute related to ownership and control of the clubhouse, which the respondent had owned and operated from the outset. The appellants applied for a declaration that it owned the clubhouse and that the mortgage granted over it by Blue Shores to another respondent, Duca Financial Services (Duca), was void or subordinate to their interests. The application was dismissed at trial along with the claim that the respondent was liable for oppression under section 135 of the *Condominium Act, 1998, S.O. 1998, c. 19*.

- The disclosure statements that the respondent gave to purchasers of the condominium units, under section 72 of the *Act*, provided for the conveyance of the clubhouse to the appellants within 120 days after the date that the respondents no longer owned any lands within the project.
- An Easement and Cost Sharing Agreement (EACSA) between the appellants and Blue Shores provided that as long as Blue Shores owned and operated the clubhouse, each condominium unit owner was required to pay a monthly clubhouse membership fee to the condominium corporation in which the unit was located; the corporation in turn was required to remit the aggregate of these fees to Blue Shores. Blue Shores had used these payments for its own purposes and refused to provide an accounting to the appellants.
- Since Blue Shores had not yet sold all of the vacant units or the lands within the project, the conveyance obligation had not been triggered. As a result, Blue Shores continued to own and operate the clubhouse. Blue Shores then granted a mortgage to Duca and the appellants brought an application for a declaration of ownership.
 1. Did the appellants have an equitable or inchoate interest in the clubhouse?
 2. Did Blue Shores have the right to mortgage the clubhouse to Duca?
 3. Was Duca's mortgage subordinate to or void against the appellants' interest in the clubhouse?
 4. Were the appellants entitled to an order that Blue Shores take steps to convert the clubhouse from a freehold interest to a unit within a condominium corporation?
 5. Was Blue Shores required to operate the clubhouse on a non-profit basis and account to the appellants?
 6. Did the limitation period in section 113 of the *Condominium Act, 1998* bar the appellants' claim?
 7. Did Blue Shores' conduct constitute oppression under section 135 of the *Condominium Act, 1998*?
- Issue 1
 - The court was divided on this point.
 - MacFarland J.A., writing for the majority, agreed with the application judge that the disclosure statement did *not* form an executory contract because it was not what the document said, nor what the parties had bargained for, but was instead an obligation that Blue Shores would have in the future. The court went on to discuss the unique purpose of a disclosure statement provided under section 72 in the condominium law regime — to assist in

resolving disputes as to which assets and common elements were intended to be included in the purchase price.

- The majority distinguished *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 12 R.P.R. (3d) 278, 35 O.R. (3d) 257, 103 O.A.C. 153, 1997 CarswellOnt 2998 (Ont. C.A.), by deciding that it did not suggest that the disclosure statement could, in and of itself, constitute a contract between the developer and the condominium corporation. Further, the court noted that the disclosure statements expressly indicated that an interest in the clubhouse was not being conveyed with each sale of a condominium unit. The appellants were therefore limited to actions under section 133(2) of the *Act* — which, however, they did not raise.
- The court also concluded that the appellants had no interest that could be registered under the Land Titles Act, R.S.O. 1990, c. L.5, given its conclusion on the above point and that the *Newrey* case did not support an equitable interest in the clubhouse (*York Condominium Corp. No. 167 v. Newrey, Holdings Ltd.* (1981), 32 O.R. (2d) 458, 1981 CarswellOnt 1131 (Ont. C.A.) [leave to appeal refused, [1981] 1 S.C.R. xi (S.C.C.)]).
- Lauwers J.A., in dissent, concluded that the appellants had an equitable interest in the clubhouse and that the executory contract compelled Blue Shores to transfer ownership to the appellants after they no longer owned any lands within the project. Lauwers J.A. reached this result by application of the principles of contract and real estate law, in the statutory and regulatory context governing condominiums, and not through the *Newrey* line of cases on which the appellants relied.
- Citing *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.*, Lauwers J.A. concluded that "condominium documents can be enforceable contracts that may give rise to obligations to convey property in the condominium context." (para. 39) Lauwers J.A. also cited *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* (2001), 41 R.P.R. (3d) 231, 2001 CarswellOnt 579 (Ont. C.A.), for the proposition that:

[T]he conveyance obligation in the disclosure statements contains the requisite elements of a valid executory contract of purchase and sale for real property — the clubhouse — between Blue Shores and the appellants. The compliance of the contractual package as a whole with the Statute of Frauds is manifest. (quoted at para. 44)

- On the equitable interest, the judge recalled the principle of "equitable conversion" in real estate law — the idea that the purchase and sale of land gives rise to a trust relationship, with the purchaser acquiring a beneficial interest in the property — and noted its application to condominiums. Further, sections 71 and 71(1.1) of the *Land Titles Act* apply and permit the

appellants to register a notice of an unregistered interest in respect of the clubhouse conveyance obligation.

- Lauwers J.A. then cited the root principle of *Newrey*, per Wilson J.A.:

[A]s soon as a unit purchaser enters into an agreement of purchase and sale of a unit he becomes the equitable owner of the unit and the interests appurtenant thereto even although the agreement cannot be closed until registration of the declaration. (*Newrey* at para. 15, quoted at para. 57)

- Lauwers J.A. concluded that it applied only to common law elements and fixtures — of which the clubhouse was neither — and therefore did not apply here.

- Issue 2

- The court concluded that the condominium documents did not contain a provision prohibiting Blue Shores from granting encumbrances on the clubhouse, and they were therefore entitled to place a mortgage on it. The vendor could do anything that did not cause prejudice to the appellants' interest — it could still comply with the terms of the conveyance obligation.

- Issue 3

- The court decided that the issue of priority as between Duca and the appellants was premature and might never arise, and so made only cursory remarks about giving effect to the language of the documents.

- Issue 4

- There was no error in the application judge's reasoning that no prejudice had resulted from Blue Shores' failure to register the clubhouse as a unit and hence there was no right to a remedy. Since Blue Shores indicated its willingness to convert the clubhouse, the dissenting judge granted an order to amend the declarations and descriptions to convert the clubhouse to a condominium unit; the majority indicated that the appellants could bring an application on consent to the Superior Court under section 109 of the Act for the necessary order.

- Issue 5

- The EACSA agreement allowed for a 10 per cent annual increase in fees regardless of operating costs (so the "non-profit" preamble did not affect the clause) and those amounts could be put towards paying bills in the ordinary course of business, which included making payments on the Duca

mortgage. There was no basis for an accounting of clubhouse expenses and profits under the EACSA.

- Issue 6
 - The appellants did not meet the 12-month deadline for challenging the terms of the EACSA as set out in section 113 of the *Act*, and were therefore limited to claiming damages for breach of its terms.
- Issue 7
 - The application judge was correct to determine that Blue Shores had not violated the appellants' contractual or property rights nor was there evidence of unfair conduct that undermined their reasonable expectations.

8. *Talon International Inc. v. Jung (2013) (ONSC) affirmed on Appeal*

- An application to enforce a 2005 agreement for the respondent ("Jung") to purchase two commercial hotel condominium investment units in the Trump International & Tower Toronto. At the time of the agreement, the applicant ("Talon") provided Jung with a disclosure statement in accordance with the *Condominium Act, 1998* as well as an updated disclosure after delivery of the units. Upon receiving the updated disclosure Jung attempted to rescind the agreement. MacKinnon J. found that none of the project changes as delivered by Talon "individually or cumulatively, constitute[d] material change under the *Condominium Act*." (para. 3) As such Jung had no right to rescind the agreements.
- Jung took delivery of two units on February 29, 2012. On May 1, 2012, an updated disclosure statement and summary was delivered. A notice to rescind the agreement for one of the units was dated June 1, 2012, pursuant to section 73 of the *Act* and a second notice for the remaining unit was dated June 4, 2012, pursuant to section 74(7) of the *Act*. Talon asserted that the rescissions were void and that Jung was still bound by the original agreement since none of the disclosures constituted a material change under the *Act*. Jung sought an order to dismiss the application and to have refunded to him, all deposits paid, net common expenses for interim occupancy charges, and accrued statutory interest.
- Section 74(6) of the *Act* requires that if a notice delivered to a purchaser constitutes a material change the purchaser may, before accepting the deed to the unit in a registerable form, rescind the agreement within ten days of the latest of:
 1. The date on which the purchaser receives the revised disclosure statement;
 2. The date on which the purchaser becomes aware of a material change if no revised disclosure statement was provided; and

3. The date on which the Superior Court of Justice makes a determination that the change is material, if the purchaser has made an application for this determination.

- This application was brought by Talon pursuant to section 74(8) of the *Act*, and it had the burden of proving that the revised disclosure statement did not constitute a material change. If Talon could meet this burden, then Jung's rescission notices were statute-barred for time limitation.
- Section 74(2) of the *Act* governs what constitutes a material change. The Court of Appeal in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), (*sub nom. Budinsky v. Breakers East Inc.*) 27 R.P.R. (2d) 157, 1992 CarswellOnt 620 (Ont. C.A.), found that a material change occurs when a reasonable purchaser would regard the change or amendment as sufficiently important to his or her decision to purchase, had the disclosure statement contained new or amended information at the time it was delivered. The question to ask is: If the disclosure statement had contained the new amendment information at the time of signing, would the purchaser have gone ahead with the transaction or have rescinded the agreement within the 10-day period? The onus is on the applicant to prove on an objective basis that a reasonable purchaser would have still entered into the agreement. Further, a broad and flexible approach is to be utilized in determining whether a particular disclosure statement is missing enough detail or content, or so inclusive and lengthy, so as to render the agreement non-binding. This takes into consideration the rights of both parties since not every defect can render an agreement non-binding.
- Jung alleged that the May 2012 disclosure statement did not identify any changes from the 2005 disclosure and the summary that accompanied it identified only some, but not all, of the changes.
- Jung argued that no mention was made in the 2012 summary regarding the changes to the percentage contribution to common expenses and percentage interest in common elements. Jung showed examples where fees were increased and ownership interests in the common elements were changed. MacKinnon J. determined that these did not constitute a material change since the investment value to the unit holders remained the same. Thus, there was no material change that objectively would have impacted a purchaser of a unit. MacKinnon J. was persuaded by the expert testimony of Joel Rosen who testified that there was no change in the value of the commercial investment.
- Jung also asserted that the lack of access to PATH, an underground walkway linking shopping, services and entertainment, was a material change. The 2005 disclosure stated that there would be PATH access; however, that was no longer the case and was absent in the 2012 disclosure. Talon asserted that it would like to have PATH connection but, thus far, no deal had been reached. Talon also asserted that this was a subjective complaint that would not result in any lost income to Jung. Jung did not provide any evidence as to any change in the value of the investment.

Though MacKinnon J. found the lack of access to PATH to be a "troubling failure," he was persuaded by expert testimony that a reasonable purchaser of this commercial unit would not have regarded this as sufficiently important to the decision to purchase.

- Jung asserted that Talon had "usurped" property of the purchasers regarding the parking, storage, office and restaurant units based on the changed percentage of ownership. However, the 2005 disclosure statement contemplated changes in the ownership structure of the condominium and, objectively viewed, these changes were not significant or material.
- Jung asserted that reduction in building height from 70 storeys to 60 storeys was a significant change. While this might seem significant the reduction was taken from the residential floors rather than the hotel floors. Thus, the net reduction of the hotel units was only four. Jung further argued that being one of the tallest mixed-use buildings in the city, at 70 floors, was material. MacKinnon J., however, was persuaded by the fact that the hotel portion of the building did not materially change. As well, the 2005 disclosure stated that the developer had the right to increase and decrease the number of floors and the number of hotel units. Based on this, MacKinnon J. determined that a reasonable purchaser would not regard this change as sufficiently important to the decision to purchase.
- Since none of the project changes was deemed material under the *Act*, Jung had no right to rescind. Jung was bound by the agreement of purchase and sale; the notices of rescission were deemed void. The decision was upheld on appeal.

9. *Jiang v. Jade-Kennedy Development Corp. (2014) (Ont. S.C.J.) – Affirmed on Appeal*

- An action for rescission of an agreement of purchase and sale pursuant to section 74(6) of the *Condominium Act, 1998*, S.O. 1998, c. 19.
- The plaintiff, Mr. Jiang, entered into an agreement of purchase and sale (the "APS") for a commercial condominium unit from the defendant, Jade-Kennedy Development Corporation ("JKDC"). Prior to purchasing the unit, Mr. Jiang saw a model of the mall, which depicted the units with floor-to-ceiling glass windows. Mr. Jiang was also given a marketing brochure, which showed pictures of condominium units with floor-to-ceiling glass frontage. Additionally, Schedule B of the APS included the following provision: "Storefront/Entry — Storefront entry shall be commercial grade entrance system with clear glass, tempered glass door and locking hardware." Upon entering into the APS, Mr. Jiang was given a disclosure statement, a supplemental disclosure statement, and the proposed declaration. Mr. Jiang also received the draft plan for the project and an enlarged sketch of the floor plan, both of which depicted the front of the store with a straight line.

- Upon inspection of the condominium unit after it was built, Mr. Jiang discovered that an 11-foot wide floor-to-ceiling concrete pillar had been constructed in the middle of the unit covering over 50% of the floor-to-ceiling glass frontage. Mr. Jiang submitted that the depiction of the unit in all the documents he was given was intended to show that the condominium would have uninterrupted glass paneling from floor to ceiling through the entire frontage of the unit. Accordingly, Mr. Jiang alleged that the condominium delivered by JKDC was materially different from that described in the APS, and sought rescission of the APS pursuant to section 74(6) of the *Act*.
- The issue to be determined by the court was whether the features of the constructed condominium unit purchased by Mr. Jiang, which was the subject of the APS, constituted a material change that was not disclosed in the material provided to Mr. Jiang pursuant to the *Act*. The *Act* defines a material change in section 74(2) as follows:

"material change" means a change or a series of changes that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the right to rescind such an agreement of purchase and sale under section 73, if the disclosure statement had contained the change or series of changes...
- Mr. Jiang submitted that information with respect to the material of the storefront and the fact that pillars were going to be present was information that was required to be disclosed under the *Act*. Since this information was not disclosed, Mr. Jiang argued that JKDC had the obligation to disclose it to him when it became a material change under the *Act*. Mr. Jiang relied on Schedule B of the APS, and the straight line drawing in the sketch and draft plan as the basis for his argument. JKDC submitted that the disclosure statement did not, and was not required to, contain details about the materials used in the storefront of the unit; these were details that should have been negotiated by Mr. Jiang in the APS. Since there was no representation with respect to the materials used for the storefront in the disclosure statement, JKDC argued that there could be no material change as defined by the *Act*.
- Pollak J. stated that, in order to establish entitlement to the rescission remedy pursuant to the *Act*, the burden of proof was on Mr. Jiang to establish that the installation of the concrete pillar was a "material change" from the information disclosed in the disclosure statement or required to be disclosed. Section 74(6) provided that: if a change or a series of changes set out in a revised disclosure statement or a notice delivered to a purchaser constitutes a material change or if a material change occurs that the declarant does not disclose in a revised disclosure statement or notice as required by subsection (1), the purchaser may, before

accepting a deed to the unit being purchased that is in registerable form, rescind the agreement of purchase and sale...

- Pollak J. noted that, in order to qualify as a material change, the change must be to information contained in the disclosure statement.
- With respect to Mr. Jiang's argument based on Schedule B of the APS, Pollak J. held that it was clear that the provision was making reference to the entry, and not the entire storefront. With respect to Mr. Jiang's argument regarding the draft plan and the sketch, Pollak J. held that the use of a straight line to show the exterior of the unit did not indicate that the unit would have uninterrupted floor-to-ceiling glass, and was consistent with the wall being constructed entirely of any single building material. Further, Pollak J. noted that Mr. Jiang could not rely on the other documents he received (*e.g.*, the marketing brochure), since these documents did not form part of the disclosure statement under the *Act* and therefore could not be relied on to exercise the rescission remedy under the *Act*. On this basis, Pollak J. held that Mr. Jiang had not met his burden of proving that the requirements of section 74(6) of the *Act* had been met, since there had been no "material change" as defined by the Act. The action was dismissed.
- The plaintiff appealed to the Ontario Court of Appeal. The appeal was dismissed, the court holding that the draft plan was only intended to provide the purchaser with an overview of the condominium and not to indicate the absence of a pillar.

10. *Harvey v. Talon International Inc. (2016) (Ont. S.C.J.) – Affirmed on Appeal*

- An application by purchasers for the return of their deposits in connection with the rescission of an Agreement of Purchase and Sale of a new condominium unit.
- The applicant, Adrian B. Harvey ("Harvey"), was an investor seeking to purchase a unit in the Trump Tower, a luxury condominium development project owned by the respondent. Harvey was interested in purchasing a unit on level 22, since levels 22 to 28 were marketed as luxury units and would command a higher nightly rate for hotel guests.
- On March 7, 2007, through his holding company, Harvey Legacy Holdings Ltd. (HLH), Harvey concluded an Agreement of Purchase and Sale (APS) for the purchase of a hotel condominium unit. The price paid was \$727,000 and deposits totalling \$145,400 were provided to the respondent.
- On October 3, 2011, at the respondent's request, Harvey executed an amendment to the APS that changed the unit purchased by HLH to one located on level 20 instead of level 22. On February 17, 2012, Harvey was informed that, pursuant to the terms of the APS, he was obliged to enter into a Hotel Unit Maintenance Agreement (HUMA) with the hotel operator. The HUMA contained terms that were materially different from those indicated in the disclosure statement, particularly

with respect to projected expenses. On February 24, 2012, Harvey sent a letter to the respondent providing notice of termination of the APS and requesting the return of the deposits. The letter referred to the material changes created by the terms of HUMA as the basis for termination. The respondent did not respond to the letter and never returned the deposits.

- Harvey and HLH commenced an application for return of the deposits. The applicants claimed that the letter dated February 24, 2012, constituted proper notice of rescission of the APS pursuant to section 74(7) of the *Condominium Act, 1998*. Since the respondent had failed to challenge the rescission within 10 days (as provided under section 74(8)), the applicants were entitled to the return of the deposits pursuant to section 74(9) of the *Act*. The respondent argued that the February 24, 2012 letter did not constitute proper notice of rescission pursuant to section 74(6) since rescission of the APS was not specifically mentioned. On the basis that rescission cannot be implied, the respondent took the position that the letter only constituted a notice of termination of the APS, which did not require that the respondent to bring an application under section 74(8).
- Before the court were two issues. First, whether the application was fatally flawed because the applicants had not specifically requested the rescission of the APS in addition to the return of the deposits. Second, whether the February 24, 2012 letter constituted proper notice of rescission.
- On the first issue, the court held that rescission did not need to be specifically pleaded given that return of the deposits was the remedy for rescission of the APS. Furthermore, the respondent could not argue that it had been taken by surprise with respect to the remedy sought by the applicants since it was clear from the pleadings that Harvey viewed the February 24, 2012 letter as rescission of the contract.
- As for validity of the notice of rescission, the court held that not all notices of rescission given under section 74 of the *Act* need to include the term "rescission." Rather, all that section 74(7) requires is that the notice of rescission be in writing, be delivered to the declarant and state the material change upon which rescission is based. Since beyond that, there exists no requirements as to form, the court held that the February 24, 2012 constituted proper notice of rescission. After all, the notice was in writing, it contemplated the ground for rescission (*i.e.*, the material change created by the HUMA) and it expressed the applicants' clear intention to rescind the agreement. To impose additional requirements would fundamentally conflict with the *Act's* intended purpose with respect to consumer protection.
- On appeal, the Court of Appeal held that the plaintiffs had rescinded their agreements of purchase and sale, even though the word rescission was not contained in their correspondence, and that the parties were entitled to the return of their deposits. The *Act* must be broadly interpreted since it is consumer protection legislation.

- The Court of Appeal upheld the trial judge's decision even though the wording used to end the transactions was not precise as to the claim for rescission. The court decided that the meaning was clear to Talon. The court agreed with the trial judge that the actions of the purchasers and the legislation met the requirements of the *Act*.
- The Court of Appeal also agreed with the trial judge that even though Yim had not commenced her action within two years, the claim for a return of deposit arising from an agreement of purchase and sale should be governed by the Real Property Limitations Act, R.S.O. 1990, c. L.15, and that the limitation period for such a claim was 10 years.

11. *Ram v. Talon International Inc. (2015) (Ont. S.C.J.) – Affirmed on Appeal*

- An action by purchasers for the return of the deposit provided in accordance with an agreement of purchase and sale.
- On February 17, 2009, the plaintiffs, Ganesh Ram and GFunk (a corporation owned by Ganesh Ram), entered into an Agreement of Purchase and Sale ("APS") pursuant to which they agreed to purchase a hotel condominium unit in the Trump International Hotel & Tower being developed by the defendant, Talon International Inc. The purchase price was \$913,000 of which \$228,250 was paid in the form of a deposit.
- Paragraph 2(a) of APS provided that occupancy was to take place on the "Closing date". This date was specified to be August 1, 2012. The APS also gave the defendant the unilateral right to extend the closing date, provided that all extensions in the aggregate did not exceed 24 months.
- On September 28, 2011, an amendment was executed by the parties in which a closing date of January 31, 2012 was set. Again, the defendant was provided with the unilateral right to extend the closing provided that "all such extensions in the aggregate not to exceed two months". Therefore, this amendment established a final deadline for closing of March 31, 2012.
- On February 6, 2012, the defendant's solicitor delivered a Statement of Adjustments indicating a closing date of February 14, 2012. On February 17, 2012, the closing date was again changed by the defendant 's solicitor to February 24, 2012.
- On February 21, 2012 the plaintiffs discovered that the common expenses attributable to the unit had increased by 40%. This matter was brought to the attention of the plaintiffs' solicitor, who informed the defendant's solicitor that this constituted a material change to the disclosure statement thus requiring the defendant to produce a revised disclosure statement. In response, the defendant's solicitor left the plaintiffs' solicitor a voicemail stating that the closing date would be extended to an unspecified date in the future while the issue was sorted out. By

March 31, 2012, the transaction had yet to close and neither party tendered on the other. The defendant refused to return the deposit and the plaintiffs commenced an action for its return.

- At trial, the plaintiffs took the position that that the transaction did not close by the deadline specified in the amendment to the APS, and that they therefore were entitled to the return of the deposit. This argument relied on paragraph 19 of the APS which provided that in the event that the APS was terminated through no fault of the purchaser, all deposit monies were to be returned. On the other hand, the defendant alleged that the plaintiffs were in breach of the contract by failing to close the transaction, and as such, had forfeited the deposit. In primary support of its position, the defendant argued that the Interim Statement of Adjustments that disclosed the 40% increase in the common expenses constituted a "notice" of material change under section 74. This notice had triggered the plaintiffs' rights under section 74(5) and (6) of the Act to commence an application or rescind the agreement within 10 days. Because the plaintiffs did not do so, they were obliged to close the transaction which they had clearly breached.
- The defendant argued that the plaintiffs were, in effect, relying on promissory estoppel in making their argument, but could not do so because there was no detrimental reliance. The court reviewed the law on promissory estoppel, citing the classic statement expressed in Snell's *Principles of Equity* and quoted with approval in *Sola Developments Ltd. v. ICI Canada Inc.* (2009), 83 R.P.R. (4th) 8, 2009 CarswellOnt 1673 (Ont. S.C.J.):

"Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it." (quoted at para. 15)
- It found that the response from the defendant's counsel regarding the plaintiffs' concerns was an "unambiguous assurance" that the plaintiffs did not have to be concerned with closing the transaction as originally scheduled, and that the closing of the transaction would be extended for a few days until the plaintiffs' concerns were sorted out. This assurance from the defendant's counsel was intended to affect the legal relations between the parties in that it amounted to an extension of the closing date. It was acted upon by the plaintiffs. The plaintiffs did not close on February 24, 2012.
- In considering the defendant's argument, the court noted that section 74 provides a purchaser with several remedies upon receiving a revised disclosure statement or a notice delivered to a purchaser under this section. In the court's view, a notice under section 74 must clearly inform the purchaser that section 74 of the *Act* is being engaged. The court emphasized that a valid notice would include wording such as "this notice is being delivered to you pursuant to section 74 of the Condominium

Act." In light of this, the court concluded that an Interim Statement of Adjustments could not be said to constitute a notice under section 74 because it failed to put the purchasers on notice that the time limit for exercising their rights under section 74 had begun to run. Accordingly, because the time period for the exercise of the plaintiffs' rights under section 74 never began to run, the court rejected the defendant's position that the APS had been breached.

- Turning to the plaintiffs' position, the court then considered whether the agreement had been terminated through no fault of the plaintiffs. This raised the question of whether the plaintiffs could be faulted for pointing out the 40% increase in common expenses as a concern and requesting an amended disclosure statement. In the court's opinion, the change constituted a valid concern and the defendant's lawyer had extended the deadline to an undefined future date. Because the defendant never again communicated with the plaintiffs' lawyer until after the March 31, 2012 deadline, the plaintiffs could not be faulted for the transaction's failure to close. On this basis, the court found that the plaintiffs were entitled to the return of the deposit pursuant to paragraph 19 of APS. The court allowed the action and awarded judgment against the defendant in the amount of \$228,250 plus pre-judgment interest.
- The appeal was dismissed.

12. *Chiu v. Pacific Mall Developments Inc. (1998) (Ont. Gen. Div.)*

- The action arose out of a series of transactions between the developer of a shopping mall and a number of buyers who sought to resile from their agreements of purchase and sale. The purchasers had obtained a court order on an *ex parte* motion to register certificates of pending litigation. The vendor sought the balance of the purchase price, fees and expenses as well as an order discharging the certificates of pending litigation. The vendor argued that the purchasers had failed to elect whether to seek specific performance or the return of their deposits. The purchasers on this summary application sought to have the agreements of purchase and sale set aside and the return of their deposits and damages; two of the purchasers applied for certificates of pending litigation.
- The purchasers claimed that the vendor did not complete the agreements of purchase and sale within the time specified, that the vendor did not deliver what the purchasers had bargained for and that the project, a two-storey shopping mall, was not constructed as the vendor had represented.
- At the time of the hearing all the units on the main floor had been sold and the transactions completed; the purchasers occupied their units and carried on business. The purchasers involved in this dispute were buyers of units on the second floor of the complex.

- The parties disagreed as to what the vendor agreed to deliver and the purchasers expected to receive. The vendor maintained that the purchasers received substantially what they bargained for. The purchasers allege that the vendor failed to disclose that the units were subject to the declaration, description and by-laws of the condominium, that the units could be used for purposes other than restaurants, that parking would be leased on terms that were not disclosed and that the agreements restricted the purchasers' right to sue on various matters. The purchasers argued that they relied on the real estate agents to bring to their attention anything in the agreements or documents that might have been material.
- With respect to the building itself, the purchasers alleged that the project was not constructed as represented, that there were no public washrooms on the second floor and that its design was not conducive to the operation of a food court; there were no storage facilities, no access for deliveries and disposal of garbage was inadequate. In addition, they argued that they were not advised of extra fees that would be charged for the grease trap and fire-rated ceiling.
- The purchasers also argued that the vendor failed to complete the properties in the time specified in the agreements of purchase and sale. On the *ex parte* motion the purchasers were successful in obtaining certificates of pending litigation. The vendors alleged that the affidavit material submitted by the purchasers on that application was misleading.
- The Court refused to grant the purchasers' summary application and the vendor's motion to remove the certificates of pending litigation was granted. Himel J. stated:

[I]f the provisions of an Agreement of Purchase and Sale are clearly worded and prohibit the registration of a certificate of pending litigation, the court will give effect to such a clause even if it can be established that the Vendor was in breach of the agreement or that the agreement is at an end.
- The Court agreed that the purchasers had at the time of the motion not relinquished their claim for specific performance and that there was a triable issue as to the purchasers' interest in the land. The Court also held that the clause in the agreement of purchase and sale that prohibited the registration of certificates of pending litigation was enforceable and should have been disclosed to the Court when the purchasers sought the certificates. The Court also found that the vendor had, within the agreement of purchase and sale, the authority to extend the time for closing and therefore there were genuine issues for trial.
- Where an agreement of purchase and sale is governed by the provisions of the *Condominium Act, 1998*, the provisions referred to above will no longer need to be included in the agreement of purchase and sale as all the rights contained in sections 72 to 75 with respect to disclosure and rescission will apply.

Size of the Unit

Residential Units:

- It is the practice in the development industry to sell condominiums at a price based on the square footage of the unit, for example, \$600 per square foot. The square footage, however, is not based on the interior measurements of the unit. The square footage is determined by taking the measurements of the unit to the outside walls and the middle of the partition walls between the units. The difference in size between the square footage upon which the sale price is determined and the useable square footage can be 5 to 10%. Even though condominiums are usually sold this way, square footage will not necessarily be the basis on which common expense contributions are determined nor unless the unit is commercial will the vendor express the price per/square foot in the Agreement of Purchase and Sale.
- Any specific requirements your client may have with respect to the way the unit or common elements should be completed or any other issues, which are important to your client should be set out in the Agreement of Purchase and Sale. If the issue is important to your client, make sure that the provision is included in the Agreement of Purchase and Sale; as you know it is a binding contract and neither party can make amendments to it.
- When individuals purchase a new condominium from a developer, the *Condominium Act* (the "*Act*") requires that they be given a Disclosure Statement This is the package of documents that a developer prepares and gives to a buyer when he or she signs the Agreement of Purchase and Sale. A Disclosure Statement is a brief narrative description of the most important features of the condominium project and will include a table of contents, copies of the Declaration, By-laws, Rules, and other information that the *Act* requires.
- Once the Disclosure Statement and an accepted Agreement of Purchase and Sale for the purchase of a new unit is received from a developer, the *Act* provides a 10-day cooling-off period – allowing for the termination of the agreement without cause. If the agreement is cancelled in writing within the 10-day period, the individual receives his/her deposit back. This 10-day cooling off period does not apply to the purchase of a resale condominium unit.
- However, when an individual purchases a condominium unit in an existing building, he/she will be able to see what they are going to get. He/she will be able to assess the size of the unit and the condition of the building. However, in this case, the individual is not entitled to the same disclosure rights and rescission period that an individual has when they purchase a new condominium unit. It is therefore very important to ensure that the offer to purchase the unit is conditional on receiving and being satisfied with the information contained in the Status Certificate and the accompanying documents.
- The Status Certificate is the resale equivalent of a Disclosure Statement and needs to be reviewed by you and your client thoroughly. It is important to review all the material that comes with the Status Certificate to ensure that your client is satisfied that both the condominium unit and the condominium corporation are suitable for him/her.

Commercial Units:

- Generally, the purchase price of a commercial unit is based on a quoted dollar value per square foot, multiplied by the total number of square feet of the unit. The purchaser should insist that the final gross floor area of the completed unit, when registered as a condominium, be certified by a duly qualified surveyor, and that the purchase price be adjusted to reflect any variance from the original intended size of the unit as depicted on the vendor's initial plans. Some vendors will insist on a threshold variance level of at least 2% to 3% of the original intended size of the unit, before being prepared to grant the purchaser a proportionate decrease in the purchase price.
- In addition to ensuring that the size of the proposed unit will be sufficient to meet his or her present *and* future business needs, the purchaser should also bear in mind that in some municipalities, the applicable zoning by-laws may stipulate that the proposed or intended use of the premises will dictate the minimum size of the premises. For example, an M-1 zoning designation, which permits light industrial and warehouse uses within the unit, also limits the permitted accessory retail or service-shop uses within such premises, to a maximum of 10% of the total gross floor area on the ground floor of the unit. In addition, within this zoning designation, an office use that is incidental to the main industrial or primary warehouse use is permitted, provided that the office component does not exceed 49% of the total gross floor area (on the ground floor) of the unit. Therefore, in order to comply with the applicable zoning by-law(s), a purchaser of industrial premises in an M-1 zoning area who wants to use up to 100 square feet of the proposed commercial unit for ancillary retail purposes, must ensure that the total gross floor area of the unit on the ground floor is not less than 1,000 square feet.
- Finally, the purchaser should be certain as to how the square footage or gross floor area of the unit will ultimately be measured. In today's commercial marketplace, it is customary to calculate the gross floor area of the unit from the outside face of exterior walls, to the centre line of any demising wall dividing units (or to the vertical plane dividing legally created units, as more particularly described and illustrated in the condominium's description), with such gross floor area generally including all interior partition walls and columns.
- In order to be assured that the owner's intended use of the proposed unit will be lawfully permitted, the purchaser must have regard to the relevant zoning by-laws of the local municipality that are applicable to the project, as well as any relevant provisions of the declaration that might restrict or regulate those uses that would otherwise be allowed under the applicable zoning by-laws. Section 7(4)(b) of the *Act* provides the mechanism by which the declarant may, through appropriate provisions inserted in the declaration, regulate the occupation and use of the units and common element areas. Therefore, undesirable commercial operations, or noxious or pernicious unit uses within the condominium that would likely depress the market value of the project, or those uses that would place an inordinate burden on the project's services and/or facilities, can be restricted or wholly prohibited. For example, a restaurant use would likely attract excessive vehicular and pedestrian traffic, compared to other business uses, and would require sufficient parking to be ultimately allocated to the unit owner wanting to carry on that business, in order to enable the owner to comply with the applicable zoning by-laws. Depending on the hours

of operation and the type of clientele attracted thereto, this type of use might create potential security problems. To ensure a proper mix of business uses, the declarant should limit the number of units in a condominium project that can carry on the same type of establishment or business operation. The developer may also prohibit certain uses completely such as massage parlours, night clubs, schools, religious facilities, manufacturing, etc. These prohibitions must be included in the declaration. If a lawyer is representing a purchaser, reviewing these provisions is critical. Also, if your client's use of utilities such as water are not separately metered or your client's use may create noxious smells, excess garbage or require additional security – your client may be separately charged for same.

- Moreover, the declarant might endeavour to reduce the excessive effects of certain commercial operations on the project's overall services and facilities, by limiting the number of parking units available to a particular unit owner, or by restricting the size of that owner's unit in a municipality where the applicable zoning by-law(s), the size of the unit and/or the number of parking spaces available to the unit owner, dictates the permitted uses that may be lawfully operated from the unit. Therefore, if the purchaser wants maximum flexibility with respect to future changes to his or her currently intended uses, he or she should ensure that the applicable zoning by-laws and the condominium's declaration do not contain provisions, which require a higher parking ratio to be met on any change of use, without having the ability to acquire the additional parking units from the declarant, at a later point in time.

Case:

1. *Cheung v. York Region Condominium Corp. No. 759 (2016) (Ont. S.C.J.)*

- Dragon Boat Fusion Cuisine, a very popular restaurant, leased 3 units that were owned by the Applicant, Cheung. The units were part of the Respondent, York Region Condominium Corporation 759 ("YRCC 759").
- There were 162 parking spaces in total. In 2015, the YRCC 759's board (the "Board") passed a by-law that leased 4 common element parking spots to each unit holder. As a result of the 2015 by-law, Cheung only got 12 parking spots. Cheung argued that the 2015 by-law privatized parking that was previously available on a first-come, first-serve basis. Cheung argued that the privatization was contrary to the *Condominium Act* (the "Act") and YRCC 759's Declaration. Cheung wanted a declaration that the 2015 by-law was invalid and she also wanted an oppression remedy under the *Act*.
- In her materials, Cheung maintained that she needed all of the available parking spaces for the restaurant. On the other hand, YRCC 759 argued that the 2015 by-law was valid and was "trying to balance the interests of all unit owners in a fair manner". (para 4)

- In terms of the validity of the 2015 by-law, the court found that under section 21(1)(a) of the *Act*, the Board had the power to lease common elements. According to the court, section 21(1) of the *Act* permitted the Board's actions unless the Declaration stated otherwise. However, in this case, the Declaration did not prohibit the Board's actions regarding the parking spaces. The Declaration was mute on the issue and did not prohibit it in any way.
- The court also held that the 2015 by-law was not discriminatory as it was "obviously aimed at the parking situation".(para 27) According to the court,

[27] A by-law is not discriminatory simply because it aims at a problem caused by one-unit holder. It would only be discriminatory if it solved the problem by imposing different prohibitions or obligations on that one unit-holder. The solution in this case is to lease an equal number of parking spaces for all units. That does not discriminate against the Applicant; in fact it confers a benefit because the condominium corporation has allocated a larger number of parking spaces exclusively to her.
- The court further disagreed with Cheung's assertion about the Board's conduct being oppressive toward her as a unit holder. On the other hand, the court stated that it was Cheung's conduct that was oppressive. The court held that Cheung's expectations regarding the parking spaces were not legitimate or reasonable. The court found it "difficult to understand how the actions of the Board could be called oppressive when the owner of three units in a 33-unit development wishes to use 100% of the available shared parking for her tenant". (para 53)
- The court dismissed Cheung's application and agreed with YRCC 759. The court declared that the 2015 by-law was valid and that the Board's conduct was not oppressive toward Cheung.

Incomplete Units & Common Elements

Residential Units:

- A condominium corporation's first board of directors, after a turnover meeting, will have to deal with the completion matters and handle a number of construction deficiencies. Deficiencies can range from minor items, like missing light fixtures, to significant issues such as structural defects. These deficiencies can be found in the individual units or the common elements.
- The *Ontario New Home Warranty Plan Act* protects new residential condominium developments by providing a construction warranty, which includes coverage for common elements. The warranty covers defects in and non-completion of the common elements for one year, against water penetration and defects in the building for two years, and against

"major structural defects" for seven years. Coverage for common elements begins on the day the condominium corporation is registered and the maximum coverage is \$50,000 times the number of units, to a maximum of \$2.5 million.

- Most issues relating to construction defects are resolved between the builder and the condominium corporation. However, where a resolution cannot be reached the condominium corporation may ask Tarion Warranty Corporation, a not-for-profit corporation, to conciliate the dispute. The builder has ninety (90) days from the date of the condominium corporation's request for conciliation to carry out the repairs or resolve the claim. The condominium corporation and builder can reach an agreement regarding the sum that the corporation is prepared to accept as compensation for deficiencies.
- Nevertheless, many builders refuse to compensate the condominium corporation unless the corporation signs a Full and Final Release.
- Releases prepared by builders are often broadly drafted and can have legal implications which go far beyond the deficiencies in question. For example, a condominium corporation might release the builder after resolving some minor deficiencies only to discover, several years later, more significant building deficiencies that were not discoverable at the time the Release was executed. A broadly drafted Release can preclude a condominium corporation from seeking recourse against not only the builder but also the professionals and contractors who worked on the construction project and who may (and likely do) have insurance coverage.
- Boards of directors often wonder: Do we have to sign a Release? What benefits are associated with the Release? What happens if we refuse to sign the Release?
- The Tarion conciliation process does NOT require the condominium corporation to deliver a Release. The builder often demands a Release to ensure that the condominium corporation has no rights in the future against it or any of its principals, employees, agents, etc. The condominium corporation is not obligated to provide a Release. The scope of the Release should be part of the negotiations between the builder and the condominium corporation, and should reflect the compensation being provided by the builder.
- Although a Release generally benefits the builder, it may also benefit the condominium corporation in negotiating compensation. For example, a condominium corporation might want to sign a Release if significant dollar amounts are at issue and the builder is prepared to pay a premium in exchange for the Release.
- When asked to sign a Release, the condominium corporation's board should first ask its Performance Audit engineers to provide an opinion on what, if any, matters, which are considered "minimal" at this time, could present a risk of failure or defect going forward. A comprehensive Release should not be signed until this review has been conducted.
- The condominium corporation's board should then determine whether the monetary compensation being offered by the builder adequately reflects the scope of the proposed

Release. If the Performance Audit review raises concerns, the builder should be asked to pay a premium in exchange for the Release or the Release being provided should be limited to the specific defects at issue. Builders might not accept an amended Release, and the board will have to decide if the compensation being offered is enough to give up any future rights.

- Condominium corporations should never sign a general Release unless the compensation reflects the possibility that future defects may be discovered. As a general rule, the smaller the compensation the more limited that the Release should be.
- If negotiations with respect to the Release break down, the condominium corporation can simply refuse to provide a Release. If the builder fails to repair or resolve the claim, Tarion will compensate the condominium corporation from the guarantee fund or effect the necessary repairs. In our practice we have not yet come across an Instance where the conciliation process breaks down over the Release.
- As evidenced by the recent amendments, the Tarion conciliation process is an area of law that continues to develop. Nevertheless, one thing is certain; condominium corporations should ALWAYS get an engineering opinion and a legal opinion before signing a Release.

Case:

1. *TSCC 2095 v. West Harbour City (I) Residences Corp., (2014) (ONCA)*

- The defendant, West Harbour, was the Declarant of the plaintiff condominium, TSCC 20195. TSCC 2095's first board of directors were appointed by the Declarant. The first board of directors adopted By-Law 2.
- Under By-Law 2, TSCC 2095 had "to enter into a warranty agreement with the Declarant".(para 1) The agreement limited " the declarant's warranties in respect of the common elements of TSCC 2095 to the statutory warranties provided in the *Ontario New Home Warranties Plan Act*". (para 1) Further, the agreement also prevented "TSCC 2095 from making any warranty claim in respect of the common elements except through the process established for and administered by the Tarion Warranty Corporation, which administers the *Ontario New Home Warranties Plan Act*". (para 1)
- After a new board of directors was elected, "TSCC 2095 brought an application seeking a declaration that By-Law 2 and the warranty agreement were invalid on the grounds that enacting the by-law and entering into the warranty agreement were beyond the authority of the declarant-appointed board of directors". (para 2) Further, "TSCC 2095 also [maintained] that the by-law and agreement [were] unreasonable and therefore inconsistent with the *Condominium Act*". The application was dismissed and then appealed by TSCC 2095. (para 2)
- The Ontario Court of Appeal found By-Law 2 and the warranty agreement to be lawful and valid. The Ontario Court of Appeal held that, "there [was] nothing inherently unreasonable in a declarant limiting its liability for construction

deficiencies in the manner done here". (para 45) The Ontario Court of Appeal further stated that, "none of the provisions cited by TSCC 2095, either individually or read in the context of the *Condominium Act* as a whole, prevents a declarant from entering into such an arrangement". (para 45)

- According to the Ontario Court of Appeal, "whether developers should be prevented from limiting their liability to the statutory warranties provided in the *Ontario New Home Warranties Plan Act* is a matter of policy for the legislature and not one for judicial determination". (para 46)

Commercial Units:

- The *Ontario New Home Warranties Plan Act* is not applicable to commercial condominiums. The *Ontario New Home Warranties Plan Act* provides purchasers of residential condominium units with two types of protection: the first relates to deposit insurance, and the second to construction warranties.
- Most commercial condominiums are generally constructed only to the "shell stage" at the escrow closing date, with no wall or floor coverings, and only minimal services having been installed and/or "roughed-in" by the declarant. The purchaser is responsible to finish and fixture the unit, and provide utility and other service hook-ups thereto, at the purchaser's sole cost and expense. Because of this, the purchaser's solicitor should consider inserting clauses in the offer that specifically outline and define the standard and extent of construction completion expected from the declarant, so that the purchaser is not obliged to take possession of the unit and commence paying occupancy fees without the unit being completed to the stage where the purchaser can commence his or her finishing and fixturing installations and/or the purchaser's business operations. The purchaser should also endeavour to procure express contractual warranties from the vendor with respect to construction deficiencies pertaining to the unit and the common element areas.
- It is not uncommon to find provisions in a commercial condominium agreement of purchase and sale which oblige the purchaser to list all construction deficiencies and incomplete items which are outstanding as of the possession date; the list is intended to circumscribe the vendor's future liabilities for incomplete or deficient construction work, including latent defects. These provisions parallel the vendor's liability to a residential purchaser for construction deficiencies (based on the type of warranties, and the duration of the warranties, deemed to be given by a vendor of a residential unit under the *Ontario New Home Warranties Plan Act*).
- The purchaser of a commercial unit has to rely on "word of mouth," and on-site inspections of other comparable projects that have been developed by the proposed declarant, in order to properly evaluate the declarant's condominium expertise and quality of construction.
- The Ontario New Home Warranty Program's policies limiting and regulating extensions of the closing date are inapplicable to the commercial condominium scenario. The *Condominium Act* does not deal with the issue of delayed closing dates for condominium unit purchasers. The possession for a commercial purchaser is more important than the

closing date because that is when the purchaser can begin to implement the servicing and refurbishing plans with respect to the unit, and then commence business operations. The purchaser's solicitor must direct his or her attention to this issue at the time of entering into the agreement of purchase and sale.

- If the purchaser has any concerns about the vendor's ability to have the unit and common element areas suitable, sufficiently constructed, and ready for occupancy by the originally scheduled possession date (*i.e.*, substantially completed to the point where the unit is ready to be hooked up to the building's services and utilities), and/or if the purchaser has outstanding contractual commitments to a third-party landlord, which can only be terminated on adequate notice being provided, then the purchaser's solicitor should endeavour to negotiate provisions in the agreement of purchase and sale, which oblige the vendor to provide a minimum notice period before any extension of the possession date can occur. There should also be an outside date beyond which the possession date (and the requisite completion of the unit) cannot be extended. On this date the purchaser should either be entitled to possession of the unit, or the return of the deposit monies with interest if the agreement so provides or the contract is governed by the *Ontario New Home Warranties Plan Act*.

Status Certificates

Overview:

- Unlike the first purchase from a developer, Ontario legislation does not give a condominium resale buyer a 10-day rescission period. When purchasing a resale unit, the financial condition of the condominium corporation is equally important to the location, the physical layout of the unit and the project. Most purchasers and their solicitors do not pay adequate attention to these issues.
- Since there is no cooling-off period in a condominium resale transaction, the most important protection a purchaser's solicitor can offer his or her client is an offer that is conditional upon the purchaser or the purchaser's solicitor receiving a completed status certificate from the condominium corporation and having at least three business days to review and approve same. It should be noted that the status certificate must be complete not only with respect to the responses contained therein but also with respect to the documents which are to be delivered with it.
- Section 76(3) of the *Condominium Act* (the "*Act*") provides that a condominium corporation is required to deliver the certificate within 10 days of the request and the payment of the fee of up to a maximum \$100 inclusive of HST (s. 18(2) of *LGC Reg. 48/01*). Once the list of additional documents is provided and a request for copies of these is made, the condominium corporation is entitled to charge a reasonable amount for their reproduction and delivery (*i.e.*, the cost of reproduction and labour).

- If the certificate is not delivered, then section 76(5) of the *Act* provides that:
 - (i) the certificate is deemed to have been delivered on the 11th day;
 - (ii) there is no default in common expenses;
 - (iii) there is no increase in common expenses since the date of the budget; and
 - (iv) there are no levies of additional common expenses against the unit.
- However, the *Act* also states that if a certificate is issued and it omits any of the information required to be included in the certificate, then the certificate will be deemed to include a statement that there is no such information. It also provides that the condominium corporation is bound to the purchaser or mortgagee by the information the certificate contains or is deemed to contain, as of the date it is given.
- It is possible, although highly unlikely, that a condominium corporation would not deliver a status certificate and risk the more onerous deeming provisions contained in section 76 of the *Act*.
- No solicitor acting for a purchaser should complete a transaction on behalf of a client without obtaining a status certificate, unless there are exceptional circumstances and the solicitor obtains a direction to that effect from the client. If a condominium corporation fails to issue a status certificate and the transaction does not close as a result thereof, the vendor may have a cause of action against the condominium corporation for his or her losses due to the corporation's failure to comply with the requirements of the *Act*.
- As stated, in order to protect the purchaser, his or her solicitor should insert a condition in the purchase agreement that the purchaser's obligation to complete the transaction is conditional upon receipt of the status certificate and accompanying materials referred to in section 76 *Act*, the Status Certificate form (former Form 13 of LGC Reg. 48/01) and the purchaser or the purchaser's solicitor being satisfied with same.
- The agreement of purchase and sale may provide that the vendor will pay the cost of the certificate and accompanying documents required. The purchaser's solicitor should, however, also require that the vendor supply the name and address of the secretary or other officer or management agent of the corporation so that he or she knows whom to contact for the certificate.
- Section 77 of the *Act* entitles any person to request from the corporation, without the payment of any fee, the names and addresses for service of the directors and officers of the corporation, the person responsible for the management of the corporation and the name of the person authorized by the corporation to issue status certificates. The section, however, does not impose any time period within which this information must be provided or any penalty for not providing it. This section is intended to assist lawyers and realtors who

require this information so that a status certificate can be formally requested from the condominium corporation.

- Some condominium corporations will send additional materials with the status certificate. Some may be for the solicitor and some for the client. Solicitors should ensure that this information is passed on to the client and any forms completed, including the requirement, if applicable, to book an elevator for the move into the building.
- In addition, the purchaser's solicitor should include in the reporting letter to the client that if the purchaser intends in the future to lease the unit, he or she must comply with the provisions regarding notification to the condominium corporation.
- Although it is wise to obtain the status certificate shortly after the agreement is entered into, there may be some problems if the closing is several months later. A status certificate obtained in March may not be accurate in August and an updated certificate should be obtained prior to the closing. To further protect a purchaser from a significant change in circumstances in the interim, a clause could be inserted in the offer, providing that if there are any material amendments to an updated status certificate from what was received in the original certificate, the vendor will be responsible for the increased costs resulting therefrom and/or the purchaser will have the right to terminate the transaction. It is unlikely, however, that a purchaser would agree to this addition.
- It is the purchaser's solicitor's responsibility after closing to provide the condominium corporation with the following information:
 1. the name of the purchaser or purchasers and the legal description and municipal address of the property purchased;
 2. the name and address of service for the mortgagee of the unit; and
 3. if the unit is to be tenanted in compliance with section 83 of the *Act*:
 - (a) notification that the unit is leased,
 - (b) the name of the lessee,
 - (c) the purchaser's address of service if different from the unit address,
 - (d) a copy of the lease or renewal thereof or a summary of the lease (Summary of Lease or Renewal form (former Form 5 of Min. Reg.49/01)), and
 - (e) the owner is required to deliver copies of the declaration, by-laws and rules to the tenant.
- The purchaser's lawyer will normally be responsible for determining the "adequacy" of the status certificate. The lawyer must ensure that the common expenses, the unit and the parking spaces shown in the Agreement of Purchase and Sale match the Status Certificate information. The most important sections are the special assessments, POTL, increased expenses, section 98 agreements, and number of leased units. Lawyers must provide purchasers with the PAP form, owner/tenant information form, elevator reservation

agreement, and notice of lease if the unit is being tenanted. The lawyer must provide the corporation with the owner/mortgagee, the prescribed forms and the consent to accept electronic service.

- The lawyer must ensure that his/her client reviews the Status Certificate and approves it. The PIC might also be requested. The purchaser's lawyer must also check if there are any changes in the Status Certificate prior to closing.

Upcoming Change to the Status Certificate Form:

- Starting on May 1, 2018, a new Status Certificate form will be required. The new form is substantially the same with exception that it deals with any action the Condominium might be considering regarding the installation of electric vehicle charging systems.

Cases:

1. *Durham Condominium Corp. No. 63 v. On-Cite Solutions Ltd. (2010) (Ont. S.C.J.)*

- In one of the units in the corporation, a 10-inch-thick load-bearing wall, which supported the roof trusses, had been removed between the warehouse and the office and the pre-existing 36-inch doorway had been widened to 10 feet.
- On October 20, 2008, the respondent agreed to purchase the unit. A status certificate was issued and signed by the president of the corporation on October 22, 2008. On October 24, 2008, the president attended at the unit and conducted an inspection. The status certificate did not disclose any problem in the unit and the respondent completed the transaction on October 30, 2008.
- Within two weeks after the transaction closed, the corporation's solicitor sent a letter to the new unit owner stating that the wall had been altered without approval. The declaration included a provision prohibiting the removal of any wall without the prior written consent of the corporation on such conditions as the board of directors might wish to impose.
- The president gave evidence that he brought this to the attention of a representative of the owner at the time of his inspection and also on October 30, 2008, the date the purchaser took possession of the unit. The president did not have names of anyone to whom he allegedly spoke.
- The unit had been owned by the previous owner since 1984 and at that time of its purchase the wall had been removed. The previous owner provided affidavit evidence that at no time during its ownership had anyone ever advised it that the removal of the wall was in violation of the corporation's declaration.
- The issue was whether the corporation estopped from compelling the unit owner to restore the wall because the status certificate was silent on the issue.

- The corporation argued that the knowledge of the president did not constitute knowledge of the corporation and since the certificate was issued by the corporation, it could not be assumed to have the same knowledge as the president.
- However, the court stated that the president "is responsible for signing Status Certificates. Actual knowledge that he obtains in his capacity as president carrying out executive functions as required by the by-laws, such as a "routine inspection" must be imputed to the Corporation. Since the president has authority to sign a Status Certificate on behalf of the Corporation, he is obliged to take into account personal knowledge he acquires in his capacity as president..."
- The court found that the matter should have been disclosed in the status certificate since the certificate was intended to ensure that prospective purchasers and mortgagees of units were immediately given sufficient information regarding the property to make an informed buying decision. The issue of the unauthorized change to the wall could have affected the buyer's decision to purchase. Had he known about it he could have negotiated an abatement of the purchase price with the vendor of the unit.
- The court stated that the unit owner had paid to reinforce the wall even though he was not the one who removed it, and after reviewing section 134 of the Act, the court exercised his discretion to refuse to issue an order requiring the restoration of the wall on the grounds that it would be inequitable to do so.

2. *673830 Ontario Ltd. v. Metropolitan Toronto Condominium Corp. 673 (2014) (Ont. S.C.J.)*

- In October 2010, the City of Toronto expropriated a portion of the common elements of the respondent, Metropolitan Toronto Condominium Corporation No. 673 (MTCC 673). Subsequently, MTCC 673 received \$745,232.41 from the City as proceeds from the expropriation. It was the intention of the board to use these funds to pay for the costs of a roof replacement, which had been estimated at \$1.2 million. In September 2011, the appellant, 673830 Ontario Limited, entered into an agreement to purchase a unit in the respondent's building. The appellant received a status certificate, which stated that MTCC 673 had "no knowledge of any circumstances that may result in an increase in the common expenses for the unit." (para. 5) The status certificate did not disclose any information regarding the expropriation by the City, the funds received on account of the expropriation, the plan to replace the roof of the building, or the anticipated cost of the roof replacement. The appellant subsequently completed the purchase transaction.
- At a special general meeting held in February 2012, some unit owners sought to obtain their proportional share of the expropriation proceeds directly. It was determined that payment to the unit owners was not an appropriate means of dealing with these funds. As for the roof replacement, the board provided two payment options for the cost: (a) the unit owner could sign a direction allowing the

expropriation funds to be used to pay for the roof replacement directly; or (b) the unit owner could pay his or her proportionate share of the costs of the roof replacement and receive a share of the expropriation proceeds. The appellant objected to these options, and took the position that it was not required to pay its proportionate share of the costs of the roof replacement, since the roof project had not been disclosed in the status certificate. Further, the appellant took the position that it was entitled to receive its proportionate share of the expropriation funds.

- As a result, the appellant commenced an application for a declaration that the special assessment levied by MTCC 673 did not apply to the appellant's unit, and that the appellant was entitled to receive its proportionate share of the expropriation proceeds. The application judge dismissed the application, and 673830 Ontario Limited appealed.
- The court concluded that the application judge had failed to consider the legislative scheme and the established purpose of the status certificate, which amounted to an error of law.
- The court stated that the purpose of the status certificate is "to push a condominium corporation to disclose more, not less, information that could be financially material to the requester's purchase decision." (para. 16)
- The court assessed the status certificate provided by MTCC 673 and held that MTCC 673 had failed to make full and complete financial disclosure. Specifically, MTCC 673 had not disclosed the expropriation by the City, the funds received on account of the expropriation, or the plan to replace the roof of the building using the proceeds of the expropriation. The court included that the status certificate did not meet the standard of disclosing more, rather than less, information that could be material to a buyer's decision.
- However, a finding that the status certificate was deficient did not automatically lead to relief in the hands of the appellant. Rather, pursuant to section 76(6) of the *Condominium Act, 1998*, MTCC 673 was bound by the status certificate with respect to the information that it contained on the date that it was provided. This meant that MTCC 673 was prohibited from seeking additional funds from the appellant with respect to the roof replacement.
- The court concluded that fair and equitable relief constituted (a) a declaration that the status certificate issued by MTCC 673 to the appellant was non-compliant and deficient; (b) a declaration that, as a result of the non-compliant and deficient status certificate, the appellant was not required to pay any additional monies to MTCC 673 for the roof replacement costs; and, (c) a declaration that MTCC was permitted to pay out of the reserve fund the appellant's proportionate share of the costs of the roof replacement.

3. *895631 Ontario Ltd. v. Lambton Condominium Corp. No. 24 (1994) (Ont. Gen. Div.)*

- An application was brought by an owner of two units at Lambton Condominium Corporation No. 24 for an interlocutory injunction. Prior to the registration of the condominium corporation, a lease had been granted by the declarant over all of the common areas of the condominium corporation for the purpose of docking boats, gaining access to the demised premises, including the parking of motor vehicles in spaces demarcated as visitors' parking spaces.
- Prior to registration of the corporation, the grantee corporation, which had received the benefit of this right of way, granted a quit claim back to the declarant. These two corporate entities appeared to be related.
- After the declaration of the corporation was registered, a new right of way was granted to the same company by the condominium corporation for the following purposes: "gaining access to and from the demised premises, the right to use at least 9 parking spaces, and the right to use the pool and tennis facilities located on the common elements of the corporation, in addition to the dock spaces."
- The plaintiff purchased two units in the condominium corporation in June and October 1990. These purchases were not made from the declarant. The disclosure statement originally delivered by the declarant stated that a swimming pool and tennis courts would be constructed for the exclusive use of unit owners and their guests from time to time and provided that the dock and boat slips would be available for lease to individual unit owners.
- When completing his purchase, the plaintiff was provided with an estoppel certificate [now status certificate], which indicated that the corporation was not considering any substantial alteration, improvement to or renovation of the common elements or any substantial change in the assets of the corporation.
- The plaintiff objected to non-unit owners having the right to use the common elements of the condominium corporation.
- In March 1994, the directors of the condominium corporation passed a by-law authorizing the corporation to enter into the new lease referred to above. This by-law was confirmed by more than 80% of the unit owners at a meeting duly called for that purpose on April 9, 1994.
- There was no information in the judgment as to whether in March 1994 the declarant still controlled the condominium corporation. The plaintiff took the position that his use and enjoyment of the property was affected by the nuisance and general commotion arising from this grant of easement. The plaintiff also argued that the by-law was *ultra vires* the declaration, that it was not reasonable and that it contravened the relevant zoning by-law and created an offence under the Planning Act. The plaintiff further argued that the combined effect of the estoppel

certificate and the disclosure statement prohibited the corporation from entering into this special by-law.

- The responding parties argued that the by-law reflected arrangements that were in existence in accordance with the registered title since the plaintiff bought his unit and that, with the exception of the fact that the corporation now had a better financial relationship with the grantee of the easement and lease, nothing had changed. The respondents argued that there was no violation of the zoning by-law or the Planning Act and that the by-law was consistent with the declaration and, in fact, had been approved by a vote of 80% of the owners of the units.
- The court found that the plaintiff was not entitled to an interlocutory injunction. The plaintiff did not demonstrate a strong *prima facie* case that the use of the property should be enjoined. The corporation entered into its special by-law pursuant to section 9 of the Condominium Act. This special by-law was approved by a vote of more than 80% of the owners. There was no evidence that the special by-law was inconsistent with the declaration or that it was *ultra vires* the declaration, the Act and the relevant zoning by-law.
- With respect to the issue of the disclosure statement, the court found that since the purchaser had not bought from the declarant, there was no liability on the part of the declarant or the corporation with respect to what was disclosed therein. The plaintiff failed to establish that the responding parties had any liability to the plaintiff for statements made in the disclosure statement, nor did the plaintiff establish that the corporation could not pass a special by-law, notwithstanding that the terms of it were inconsistent with the provisions of the disclosure statement.
- With respect to the estoppel certificate, the court found that this special by-law did not substantially change the assets of the corporation from their state in February of 1990 when the estoppel certificate was issued and the court stated:
- In any event, if the special by-law does in fact substantially change a corporation's assets, the parties voting against such a by-law have a remedy in accordance with the *Act*.
- For the above reasons, the court dismissed the plaintiff's application.

4. *Olsen v. York Condominium Corp. No. 212 (1987) (Ont. Prov. Ct.)*

- The plaintiff had entered into an agreement of purchase and sale for a condominium unit on May 31, 1985. He obtained an estoppel certificate dated July 31, 1985 which indicated that the condominium corporation was not considering any substantial addition, alteration or improvement to a renovation of the common elements or any substantial change in the assets of the corporation as of that date. On October 6, 1985, the corporation passed a special assessment for money to perform work required at the property.

- The plaintiff took the position that at the time he was purchasing, certain members of the board of directors were aware of circumstances which might give rise to a special assessment. At the time the estoppel certificate was issued, no resolution of the board of directors had been passed. The evidence was that it was not until sometime in October that the corporation's board of directors realized that a special assessment would have to be implemented.
- The judge concluded that at the time the estoppel certificate was issued, the corporation did not have knowledge that a special assessment was going to be levied. The judge did concede that some directors might have contemplated such a development but that it was not until several months later when the board as a whole came to the conclusion that a special assessment was necessary that the matter was decided. Until that time the corporation did not have knowledge and, therefore, the potential for a special assessment did not need to be disclosed in the estoppel certificate [now status certificate] for the corporation. The plaintiff's claim was dismissed.

5. *Stafford v. Frontenac Condominium Corp. No. 11 (1994) (Ont. Gen. Div.)*

- An action was brought by the purchaser of a commercial unit in a condominium corporation who, eight months after the closing of his transaction, was advised by the corporation that it was levying a special assessment to carry out repair work to the property. The amount to be specially assessed against the plaintiff's unit was \$92,000.
- The plaintiff refused to pay the condominium corporation but had placed the funds in his solicitor's trust account and based his claim on two grounds:
 1. that the work which the condominium corporation intended to carry out was a substantial alteration to the common elements and, therefore, required an 80% vote of owners pursuant to section 38 of the Condominium Act (section 97 of the *Condominium Act, 1998*) and, in the alternative,
 2. that the condominium corporation issued an estoppel certificate [now status certificate] which did not disclose the magnitude of the problem to the purchaser and the corporation was, therefore, estopped from claiming this amount from him.
- The court found that the work being carried out by the condominium corporation was not a substantial alteration within the meaning of section 38 and, therefore, the vote of owners undertaken by the corporation was satisfactory.
- With respect to the purchaser's second claim against the condominium corporation, its estoppel certificate indicated that the corporation did not intend to increase its common expenses, nor was it anticipating any substantial alterations to the common elements "other than what an engineering study would reveal with respect to investigative work that was being carried out at the condominium corporation."

- The court found that in its estoppel certificate the corporation had disclosed the potential problem to the purchaser and that the purchaser had failed to make proper inquiry with respect to the work which had to be carried out.
- As a result, the court found that the purchaser was obliged to pay the special assessment levied by the condominium corporation.

6. *Armstrong v. London Life Insurance Co. (1995) (Ont. Gen. Div.)*

- Lynn Armstrong was the registered owner of a condominium unit when the plaintiff, Susan Armstrong, offered to purchase it. Lynn Armstrong's husband was a senior executive officer of London Life. After he was transferred, London Life paid the expenses relating to the condominium unit. London Life had Lynn Armstrong's power of attorney and entered into an agreement of purchase and sale with the plaintiff that referred to London Life as the vendor. That agreement contained representations and warranties that the vendor had not received a notice convening a meeting of unit owners of the condominium corporation concerning any substantial alterations, additions, or improvements to the common elements, or any change in the assets of the corporation.
- On the closing date London Life delivered to the plaintiff a statutory declaration containing those same representations and warranties. Prior to closing, the plaintiff obtained an estoppel certificate [now status certificate] from the condominium corporation that was incorrect since it did not disclose the fact that the corporation had identified two deficiencies in the common elements which might require repair and/or maintenance. That incorrect estoppel certificate matched an earlier one obtained by the plaintiff, as London Life had taken back a first mortgage on the property, and therefore these certificates formed part of its mortgage file. When the plaintiff defaulted on the mortgage London Life issued a notice of sale and the plaintiff commenced this action against London Life and Lynn Armstrong for fraud, misrepresentation or rescission of the contract for breach of warranty. London Life then brought a motion for summary judgment.
- London Life and Lynn Armstrong argued that they were not aware of any deficiencies which would require repair and claimed against the condominium corporation which claimed against its management company. In April 1992, the board had recommended commencement of legal proceedings concerning deficiencies at a meeting of unit owners. The transaction closed on June 25, 1992. London Life had in its files a copy of the notice of the annual meeting held on April 9, 1992, the agenda of that meeting and a copy of minutes of the previous meeting to be approved at that 1992 meeting, but neither the Armstrongs nor London Life representatives attended the meeting. London Life did not review those minutes but, had it done so, the court held that it would have been apparent that the representation that no legal action was contemplated by the corporation was inaccurate.

- Although the special assessment was not imposed until after the closing and no action was authorized until the April 1992 meeting, the court found that Lynn Armstrong had attended an earlier meeting which indicated that the condominium corporation had a potential claim concerning the deficiencies. The court further held that the representations and warranties were not correct on the date of closing and the vendor, London Life, was not relieved of liability by the incorrect estoppel certificate, which said the same thing as the warranties and representations, since London Life did not rely on that estoppel certificate in signing the agreement of purchase and sale or in making the statutory declaration.
- London Life's motion for summary judgment of the counterclaim was dismissed by the court and Leitch J. commented as follows: "London Life made representations in the agreement of purchase and sale and again in the statutory declaration without making any inquiries to the management company, the condominium corporation or to the Armstrongs as to the accuracy of those representations. There is a genuine issue for trial whether that conduct was recklessness amounting to fraudulent misrepresentation".

7. *Norris v. Waterloo South Condominium Corp. No. 1 (1996) (Ont. Small Cl. Ct.)*

- The plaintiff made an offer to purchase a condominium unit on May 13, 1993 with the closing date for the transaction being June 30, 1993. No copy of the offer was produced with the result that the court did not have any evidence before it with respect to representations and warranties. However, an estoppel certificate [now status certificate] was issued in respect of the unit which stated that the corporation had no knowledge of any circumstances that might result in an increase in the common expenses for the unit and that it was not presently considering any substantial addition, alteration or improvement to or renovation of the common elements or any substantial change in the assets of the corporation.
- The transaction closed on June 30, 1993, as scheduled and, almost a year later, the board of directors authorized the performance of work on siding, eaves, and downspouts to be paid for by means of a special assessment. Upon investigation the plaintiff discovered that minutes of the March 4, 1993 annual general meeting contained considerable discussion concerning siding. In addition, repairs had been made to the siding on individual units. The court held that it was abundantly apparent in March 1993, approximately four months before the estoppel certificate was issued, that substantial work was needed on all units and that a special assessment would likely need to be levied. The court distinguished *Stafford v. Frontenac Condominium Corp. No. 11, supra*, and granted judgment in favour of the plaintiff. The estoppel certificate issued by the corporation's management agent was incorrect and the court held that the manager knew that the costs were being considered and that repairs were imperative in the near future at the time the estoppel certificate was issued.

8. *Carson v. York Condominium Corp. No. 81 (1999) (Ont. Prov. Div.)*

- The issue before the court was whether York Condominium Corp. No. 81 was entitled to charge-back legal fees it incurred in obtaining Ms. Carson's compliance with the rules of the corporation. The owner's contravention of the rules related to the distribution of newsletters and pamphlets throughout the condominium corporation. The corporation's declaration contained the usual indemnification clause regarding the corporation's right to collect the costs incurred as common expenses.
- The corporation argued that Ms. Carson had breached the rules and, therefore, the corporation had the right to charge back any legal costs to her unit. Ms. Carson raised the issue that the estoppel certificate [now status certificate] was misleading as it included a clause claiming the legal fees the corporation had incurred.
- Ms. Carson also maintained that the lawyer acting for her on her sale was misled by the corporation, which caused him to provide a direction to the corporation to pay the amounts the corporation sought for the return of its legal fees.
- The court decided in favour of the condominium corporation and dismissed the plaintiff's claim. The corporation was awarded costs in the amount of \$625. The court was of the view that the board of directors had acted with full authority in charging back legal costs it had incurred in obtaining the compliance of Ms. Carson. The court was of the view that it was unjust to require all the unit owners to pay for legal fees that arose solely from Ms. Carson's persistence and determination. The court also commented on the fact that the plaintiff's solicitor on the sale should have been in court to give evidence as to whether he was misled by the corporation as to the form of the estoppel certificate or the requirement to pay out the charge back.

9. *Fisher v. Metropolitan Toronto Condominium Corp. No. 596 (2004) (Ont. Div. Ct.)*

- An appeal by the condominium corporation from a Small Claims Court decision. The claim was brought by a unit owner against the condominium corporation for the repayment to him of the amount he paid in a special assessment, levied by the condominium corporation for the repairs needed to the fireplaces and chimneys in the corporation plus the legal fees incurred in registering the lien.
- Shortly after the purchaser became the owner of his unit, the condominium corporation issued a notice of a special assessment. The amount attributable to the plaintiff's unit was \$3,899.97. The unit owner objected to paying the special assessment because it was not disclosed in the estoppel certificate. The corporation registered a lien against his unit and sought recovery of both the special assessment amount and the fees and out-of-pocket expenses for registering the lien. The purchaser initially refused to pay either but eventually paid the amounts owing and brought an action in Small Claims Court to recover these payments.

- The unit owner asked for access to engineering reports and the minutes of the board meetings, likely to determine whether the board of directors knew before the estoppel certificate was issued that there was a potential special assessment. On five separate occasions the plaintiff made written requests for access to these records of the corporation. He was repeatedly refused access on the grounds that the documents were protected by section 55(4) of the *Condominium Act, 1998*, which states that records relating to actual or pending litigation or insurance investigations do not constitute records of the corporation.
- In addition to the claim for the special assessment amount and the fees for registering the lien, the plaintiff claimed \$500 because of the corporation's refusal to give him records pursuant to section 55(8). In fact, the plaintiff sought \$2,500 in penalties, basing his claim on five requests for records and five refusals.
- The condominium did not dispute the issue of the negligent completion of the estoppel certificate but argued that the plaintiff should not be entitled to recover the amount of the special assessment plus the costs of registering the lien because he would have completed the transaction even if he had known about the special assessment.
- Ground J. took the position that there was no evidence to suggest that the plaintiff would have completed this transaction had he received an accurate estoppel certificate. In fact, the plaintiff testified that he would have either negotiated an abatement of the purchase price or insisted that the vendor pay the special assessment. Ground J. therefore agreed with the deputy judge that the condominium corporation owed the plaintiff the amount of the special assessment.
- Ground J. did find, however, contrary to the finding of the deputy judge, that the amount incurred by the plaintiff with respect to the registration of the lien was not recoverable from the condominium corporation. Section 84 of the *Condominium Act, 1998* states that the payment of common expenses must be made by all owners. Ground J. reversed the finding of the deputy judge on this issue and held that the amount of \$1,043.82 did not have to be refunded to the plaintiff.
- With respect to the plaintiff's claim for the penalty against the condominium corporation for its failure to make records available to him, the plaintiff took the position that these records were not related to litigation and therefore not exempt from delivery pursuant to section 55(4). The condominium corporation argued that these were records which were privileged in contemplation of litigation and the court agreed.
- Ground J. stated: [16] It appears to me that the purpose of clause 55(4)(b) is to maintain litigation privilege or solicitor-client privilege with respect to records of the condominium corporation that may relate to litigation or pending litigation between a unit owner and the corporation. It is clear from the evidence before this court that Fisher was making a claim against the condominium corporation and

contemplating litigation at the time that the requests for the records were made and accordingly, in my view, the exception in clause 55(4)(b) is applicable. Such records would not have to be produced until they are producible in the course of documentary discovery if not subject to litigation privilege or solicitor-client privilege.

10. *Elkishawi v. Metro Toronto Condominium Corp. No. 1130 (2004) (Small Claims Court)*

- An action brought in Small Claims Court in which the plaintiffs claimed damages for non-disclosure in the status certificate of the potential of a significant change in common expense contributions on a special assessment. In May 2001, the plaintiffs purchased a unit in Metropolitan Toronto Condominium Corp. No. 1130. The building at that time was approximately 30 years old. The purchaser was not unsophisticated and owned five or six other properties, although not condominiums. The status certificate disclosed that there was an adequate amount in the reserve fund to meet the expected costs of major repair for that fiscal year. It also disclosed that another reserve fund study would be conducted prior to May 2004. Prior to closing, a second status certificate was issued in August 2001. This was, however, after the date when the purchaser was obligated to complete the transaction. In that status certificate the board disclosed that there would be a special assessment of approximately \$76,500.
- The plaintiff's position was that had he known about the change in the reserve fund and the need for the special assessment he would not have purchased the unit.
- The judge found for the condominium corporation, commenting on the fact that the first status certificate was issued around the time that the *Condominium Act, 1998* became effective and that thereafter a new board of directors was elected at the condominium corporation and the new reserve fund study had not yet been completed. The judge concluded that at the date of the issuance of the first status certificate it was correct on its face for that period of time.

11. *Tse v. Sood (2015) (Ont. Div. Ct.)*

- An appeal by the defendant from a judgment allowing the plaintiff's action for the return of her deposit. The plaintiff, Ms. Tse, had entered into an agreement of purchase and sale (the "agreement") with the defendant, Mr. Sood, for the purchase of a condominium unit. The agreement warranted that the condominium's common expenses were to be \$285.96 per month and that no special assessments were contemplated by the corporation. It also provided that the agreement would be null and void if Ms. Tse's lawyer did not give written notice confirming his satisfaction with the status certificate. Should this happen, Ms. Tse's deposit was to be returned without deduction.
- The plaintiff refused to close the transaction upon learning that the common expenses were 10 per cent higher than warranted, and that a one-time special

assessment payment of \$457.87 would be owing. As a result, Ms. Tse's lawyer did not give notice in writing that he was satisfied with the status certificate.

- Ms. Tse filed a Small Claims Court action for return of the deposit. The deputy judge found in favour of Ms. Tse, holding that she had acted in good faith and that she was entitled to insist on satisfaction of the condition concerning the status certificate. The defendant appealed, arguing that the deputy judge's decision was an error of law and was reviewable on the standard of correctness.
- On appeal, Mr. Sood submitted that, under the agreement, Ms. Tse had no right to rely on the non-satisfaction of the status certificate because there was no objective deficiency in the status certificate. He maintained that he made no misrepresentation with respect to the monthly common expenses, because they were indeed \$285.96 per month at the time when he signed the agreement. Finally, although there was a breach of the agreement with respect to the special assessment warranty, Ms. Tse's remedy for that admitted breach of contract was to close the transaction and to sue for damages in the event that he refused to reimburse her for the assessment.
- Perell J. held that the deputy judge had not erred in his application of the status certificate condition. He noted that three of the four acceptable justifications for a purchaser refusing to close a real estate transaction were present in the case at bar. These four justifications are the following: [9] First, a purchaser may refuse to close because of the non-satisfaction of a condition precedent that the purchaser will not waive and that cannot be unilaterally waived by the vendor. Second, a purchaser may refuse to close if the vendor has breached a fundamental promise in the agreement of purchase and sale, a term classified as a condition as opposed to a warranty. Third, a purchaser may refuse to close if the vendor cannot perform his or her promise to convey the quality of title prescribed by the agreement of purchase and sale. Fourth, a purchaser may refuse to close if the vendor has made a false representation and the other elements of a claim for the equitable remedy of rescission are satisfied.
- While Perell J. conceded that no fundamental promise had been breached, he found that the warranty regarding special assessments was a hybrid term, consisting of both a warranty and a representation. As such, misrepresentation of the one-time special assessment constituted legal justification for refusing to close. Perell J. also agreed that the condition precedent regarding satisfaction of the status certificate had never been met and thus constituted further grounds for refusing to close. He dismissed the appeal, concluding that Ms. Tse's deposit should be returned.

12. *Yanos v. Darkeff (2008) (Ont. S.C.J.)*

- The plaintiffs, Mr. and Mrs. Yanos as buyers, and the defendants, Mr. and Mrs. Darkeff as sellers, signed an agreement of purchase and sale (the "first agreement"), on August 19, 2007. It purported to deal with the sellers' condominium unit. The

buyers paid a deposit of \$10,000 to the listing broker to be held in trust pending completion or other termination of the agreement.

- Some time following the execution of the first agreement, one or both of the parties' real estate agents realized that the sellers owned shares in a co-operative housing development, and not title to a condominium unit. Accordingly, a second agreement of purchase and sale (the "second agreement") in respect of co-operative organizations was substituted. At trial neither party produced the agreement; however, each assured Mungovan D.J. that it contained the following conditional clause, which was set out in the first agreement:

THIS OFFER IS CONDITIONAL upon the Seller providing the Buyer with the Condominium Corporation Status Certificate within 10 days of acceptance of the Agreement of Purchase and Sale. The *Buyer* shall have 2 banking days from receipt in *satisfying himself* with the information provided in this document. This Condition is included for the benefit of the Buyer and may be waived at his sole discretion. Otherwise this offer shall be considered null and void and deposit monies shall be returned in full without interest or deduction. [Emphasis added.] (p. 317 R.P.R., para. 3)

- Each party agreed that the status certificate had been issued by the Cooperative and sent to the buyers' solicitor for his review, and that the parties were in compliance with the time periods. Additionally, each party agreed that the buyers' solicitor, as opposed to the buyers themselves, was the one who was to be satisfied with the information contained in the status certificate. Neither party produced the certificate.
- The solicitor for the buyer was dissatisfied with the information found in the status certificate and requested the return of the deposit.
- The issue was: What standard must the buyers' solicitor use when "satisfying himself/herself with the information contained in the status certificate?"
- Mungovan D.J. found that it was implicit in the wording of the condition that the solicitor was entitled to exercise his or her discretion. However, he also held that this discretion was not absolute. The solicitor had to act honestly and in good faith. In addition, the solicitor had to pass the test of reasonableness. In this case, since there was no evidence of dishonesty or bad faith, the court was left with the test of reasonableness.
- The question, therefore, was whether an objective or subjective standard applied to measure the reasonableness of the exercise of discretion. Relying on Cronk J.A. in *Marshall v. Bernard Place Corp.* (2002), 47 R.P.R. (3d) 1, 26 B.L.R. (3d) 9, 58 O.R. (3d) 97, 2002 CarswellOnt 404 (Ont. C.A.), Mungovan D.J. held that the wording of the contractual condition itself, as set in the context of the subject-matter of that condition, must be scrutinized to determine which standard was to be used.

Cronk J.A. relied on *Greenberg v. Meffert* (1985), 18 D.L.R. (4th) 548, 50 O.R. (2d) 755, 7 C.C.E.L. 152, (*sub nom. Greenberg v. Montreal Trust Co.*) 90 O.A.C. 69, 1985 CarswellOnt 727 (Ont. C.A.), for the proposition that contracts that involve judgment are more likely to be construed as imposing a subjective standard, whereas those involving issues such as operative fitness, mechanical utility or marketability generally impose an objective standard of reasonableness.

- Ultimately, Mungovan D.J. held: [14] In this case the solicitor is supposed to review the status certificate, issued by the Cooperative, with a view to "satisfying himself with the information provided in this document." That suggests that the reviewing solicitor will apply both types of standards. (pp. 319-320 R.P.R.)
- Regarding the objective standard, it was held that acting reasonably, the solicitor for the buyers would be entitled, on behalf of the buyers, to have the agreement come to an end if he or she found something in the status certificate that was prejudicial to the interests of the buyers or simply not to their liking. The fact that the buyers were purchasing shares in a co-operative association, as opposed to a unit in a condominium project, directly affected the marketability of the item. As a result, the exercise of discretion, on an objective basis, was reasonable.
- Similarly, regarding the subjective standard, Mungovan D.J. stated as follows: [19] . . . It is clear that, when Mr. Wolkowicz advised the Buyers that buying an interest in the Co-operative through owning shares would not be in their best interest, he was exercising his judgment which is subjective in nature. Moreover, his exercise of judgment must be considered reasonable. It is not important to know his exact reasoning on this subject. To prefer the Condominium as a method of home-ownership as opposed to owning shares in a Co-operative constitutes an exercise of judgement I find imminently reasonable. (p. 321 R.P.R.)
- Accordingly, since the purchasers' solicitor had acted reasonably, the buyers were entitled to the return of their deposit. No order was made as to costs.

Pets

- While most condominium residents accept the limitations that come with condominium living, there are always some who refuse to live by the governing documents – this is particularly true when it comes to pets.
- Many condominium corporations restrict the type and number of pets permitted in residential condominium units whereas some corporations prohibit pets altogether. These provisions, of course, are subject to valid and legitimate human rights considerations.
- Enforcement of pet restrictions has resulted in countless disputes and lawsuits. We are beginning to see a new trend emerge in pet enforcement matters. We have seen an increase

in residents trying to keep pets in contravention of the governing documents by claiming their pet is a service or therapy animal whose eviction would offend human rights legislation. For-profit websites have sprung up selling equipment and documents which identify and certify any pet as a service animal.

- For a corporation, there are provisions dealing with pets in the declaration and in the rules.
 - Declaration – the pet provisions in the declaration are enforceable and do not have to be reasonable. If a corporation does not want to experience difficulty in enforcing its pet provisions, it is preferable if they are included in the declaration in order to ensure that the provisions can be enforced without the need for demonstrating the criteria that applies to the by-laws and the rules.
 - Rules – the pet provisions in the rules cannot be absolute. The courts will enforce the pet provisions in the rules when they meet the criteria set out in section 58(1) of the *Condominium Act* (the "Act"). Essentially, the provisions have to be reasonable. Also, the provisions have to be for the purpose of promoting the safety and security of the residents or to avoid unreasonable interference with the use and enjoyment of the property.
- It is important to note that pets that are required for recognized disabilities are excluded from any provisions, whether contained in the declaration or the rules as per human rights legislation.

Cases:

1. *Niagara North Condominium Corp. No. 46 v. Chassic (1999) (Ont. Gen. Div.)*

- The condominium brought an enforcement application and sought an order that a unit owner's cat be removed from the property. The condominium maintained that the cat constituted a contravention of the corporation's declaration and rules, which contained pet prohibitions other than for small caged birds, small fish and pets needed as seeing-eye dogs. On the other hand, the unit owner argued that the enforcement of the "no pet" provision violated the Human Rights Code.
- The court eventually determined that the unit owner was clinically depressed and her cat was the equivalent of a seeing-eye or hearing-assisting pet. According to the court, to force the unit owner to remove her pet would be a violation of her rights under the Human Rights Code. The court ultimately refused to grant the relief requested by the condominium corporation.

2. *York Condominium Corp. No. 382 v. Dvorchik (1997) (ONCA)*

- An application was brought under section 49(1) [section 134(1)] of the *Act* in which the condominium corporation sought to enforce a rule of the corporation that prohibited pets weighing in excess of 25 pounds.
- At trial, the court found that the rule was invalid and unenforceable as there was no evidence to show that a large dog was more of a threat to the safety, security and

welfare of the owners than smaller dogs or that large dogs unreasonably interfered with the use and enjoyment of the common elements and of other units more so than small dogs. The trial judge held for the corporation and the ONCA reversed the trial judge's decision.

- The ONCA held that when the board makes rules, it is not performing a judicial role and no judicialization should be attributed to its function or its process. The ONCA held that in an application brought under section 49(1) [section 134(1)] of the *Act*, a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. Further, in the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.
- The ONCA looked at the facts and stated that it did not consider the rule to be unreasonable or inconsistent with the *Act*. The condominium had several hundred units and over a thousand residents. Thus, it is reasonable and consistent with the legislation that there be a limit on the size or the number of pets in order to prevent the possibility of unreasonable interference with the use and enjoyment of the common elements and of the other units.
- The ONCA held that although the 25 pound rule is not the best rule or the least arbitrary, it is not unreasonable. According to the ONCA, the threshold for overturning a board's rules reasonably made in the interest of unit owners is a high one, and it was not met in this case.
- In this case, the ONCA changed the ground rules for what is required when a corporation wishes to enforce its rules. As per this decision, the responsibility to prove that a rule is not reasonable rests with the party challenging the rule. Thus, rules are deemed to be reasonable unless proven to the contrary by the party objecting thereto.

3. *Simcoe Condominium Corporation No. 89 v. Dominelli (2015) (Ont. S.C.J.)*

- The condominium corporation implemented a rule that restricted dogs over 25 lbs. The unit owners had a dog that was over 25 lbs. The unit owner claimed that the dog was needed for his girlfriend's therapy. The board denied the unit owners' requests for accommodation on the basis that there was no objective medical evidence that supported or identified the girlfriend's disability under the *Human Rights Code*.
- The issue for the court was whether the girlfriend had established that she had a disability within the meaning of the *Code* such that she required a dog over 25 lbs to meet her disability-related needs.
- According to the court, in order for a finding of disability, there needs to be some diagnosis of a recognized mental disability or at least a working diagnosis or articulation of clinically significant symptoms.

- The court reviewed the medical documentation and found that the doctor's notes provided never provided a diagnosis and did not specifically state that the girlfriend had a disability under the *Code*. The notes only pointed to signs of stress in addition to medical and emotional needs. The notes also contained a lack of impartiality, were partisan and argumentative.
- The court ultimately found that (1) the unit owner and his girlfriend failed to establish that there was a disability within the meaning of the *Code* and (2) even if there was a disability, they failed to establish that a dog weighing more than 25 pounds was necessary to meet the girlfriend's disability-related needs. The court found that there was no disability and ordered the dog to be removed.

Renovations

- The agreement of purchase and sale for a unit should include a condition that the purchaser receive, on or before closing, a clearance letter from the board of directors stating that any work done by the vendor (i.e., any additions, removals or improvements to the units) has had municipal approval, the board's approval if necessary, or has met the requirements of the board of directors and/or the corporation's documents. The purchaser's lawyer might also request the most recent PIC.
- If the purchaser is impressed with the unit because of its fenced-in yard, for example, the purchaser must verify that the fencing was erected in conformity with the *Condominium Act* (the "*Act*"), the documents and the local by-laws. A client would not be pleased if, after closing, the board of directors took action to have the fence removed because it was built without the proper approval of the corporation or was not in compliance with the corporation's rules. The *Act* requires that a status certificate disclose compliance with agreements entered into pursuant to section 98(1) with respect to alterations made by unit owners to the common elements. There is no similar requirement with respect to agreements that were entered into prior to the proclamation of the *Act*. The status certificate must indicate the existence of any agreement with a unit owner pursuant to section 98 of the *Act* and whether the owner is in compliance therewith.
- Many condominium corporations have historically allowed unit owners to make alterations and/or additions to the common elements if the unit owner entered into an agreement with the condominium corporation regarding maintenance and repair of same as well as extra costs incurred by the corporation. These agreements are designed to make the responsibility for these improvements that of the unit owner. These agreements are quite complex in form because the *Condominium Act*, R.S.O. 1990, did not provide that costs relating thereto could be collected as common expenses or that these agreements would be binding on successors and assigns. If such an agreement is delivered with the status certificate, the purchaser's solicitor should request that his or her client enter into a new agreement with the condominium corporation pursuant to section 98 of the *Act* rather than execute the old one.

- In addition to agreements regarding changes to the common elements pursuant to section 98 of the *Act*, many condominiums also require that owners enter into agreements with respect to changes made within the units. If such an agreement exists and it imposes on the unit owner any positive obligations, the condominium must also deliver this agreement with the status certificate and indicate if the unit owner is in compliance therewith. If a client wishes to install hardwood or tile flooring or wishes to renovate the unit, he or she will need the corporation's written permission.
- The purchaser's solicitor, in addition to determining whether the addition or improvement conforms with the Act and other documents, must also explain the responsibilities imposed by the agreement and the remedies available to the corporation if the unit owner fails to comply with the terms of the agreement.
- Some condominium corporations, for a fee, will carry out inspections before completing a status certificate with a view to putting prospective purchasers on notice of any violations and/or repairs that may be necessary and the costs thereof. This procedure, however, raises the question of whether the corporation has the authority to do this pursuant to section 19 of the *Act*. By requiring a clearance certificate from the corporation as a condition of the offer, the vendor will have no choice but to let the condominium's representatives inspect the unit. Some condominium corporations, however, will not carry out such an inspection.
- A simpler alternative might be to include in the request for a status certificate a separate request as to whether the unit contravenes any provisions of the *Act* or condominium documents. The response may not always be forthcoming from the condominium corporation and the client should be so advised. It is possible if a board of directors later attempted to have a new owner correct a pre-existing violation, that a board's failure to have responded to an inspection inquiry would act as an estoppel against the corporation.
- If the purchaser wants to renovate his or her unit (beyond basic decorating), the board's permission will be required, especially for flooring, plumbing and opening or moving walls. Purchasers need to be advised that the board's permission is required and that they will not have unfettered authority to make changes. Permission is also necessary for landscape installations on balconies, terraces and patios.

Cases:

1. ***Ronita Properties Ltd. v. York Condominium Corp. No. 320 (1981) (Ont. Co. Ct.)***
 - The Declarant, Ronita Properties, applied to the court for an order restraining the condominium corporation from levying a special assessment against the unit owners for the purpose of installing a new roof because the corporation did not have an 80 per cent vote of owners of units in favour of the work. Cornish Co. Ct. J. held that the replacement of a roof did not constitute a substantial addition, alteration, improvement to or renovation of the common elements, but was in fact a repair as contemplated by the *Act*.

2. *Menkes Development Inc. v. York Condominium Corp. No. 398 (1985) (Ont. Dist. Ct.)*

- This case arose out of an application by Menkes Development Inc. for an order pursuant to section 49 of the Condominium Act, R.S.O. 1990, requiring York Condominium Corp. No. 398 to call and hold a meeting under section 38 of the Act [S.O. 1998, s. 97] to vote on the proposed installation of a waterproof membrane in one level of the parking garage.
- The applicant claimed that the installation of a waterproof membrane constituted a substantial alteration or improvement or a renovation of the common elements within the meaning of section 38. It should be noted that the applicant was the developer of the condominium project and one of the unit owners. In order to pay for the installation of the membrane, the condominium corporation was forced to levy a special assessment which the applicant had not paid.
- The facts of this case were that the floor of the garage had been damaged by the salt put on the roads in winter. The garage had never had a waterproof membrane installed and the experts agreed that the installation of such a membrane might prevent damage in the future.
- The applicant did not dispute that the board had the power to carry out this work, but only maintained that it had to be voted on at a meeting of owners and that the installation of the waterproof membrane over the entire floor of the garage was an addition or improvement within the meaning of section 38 [s. 97]. The issue before the court was whether the proposed installation constituted maintenance or repair on the one hand or a substantial addition, alteration, improvement or renovation of the common elements.
- German J. stated:
 - It is also a principle of statutory interpretation that each word is assumed to have a meaning. Therefore, I assume that when the legislature gave the board the duty to maintain the common elements, that meant something other than repair. Certainly, the legislation is clear that "repair after damage" and "maintenance" are difficult. "Maintenance" is defined in Black's Dictionary — and it is variously defined — as "acts of repair and other acts to prevent the decline."
 - Relying on the cases and the dictionary definitions, I am satisfied that to "maintain" is broader than to "repair." The declaration gives the directors the duty and obligation to repair and maintain the common elements. In my view, what the directors proposed to do, that is, installing the waterproof membrane, is maintenance of the common element, because the purpose is to halt the damage from salt which will continue if all that is done is the chipping out of the damaged material and replacement with the same material as called for in the first phase . . .

- On the facts of this case, where the garage floor has deteriorated and will continue to deteriorate unless something is done to prevent it, I am satisfied that what the corporation proposed to do; that is, install the waterproof membrane, comes within the term "maintenance" and it is not necessary for me to decide if it is a repair.
- I am satisfied that s. 38 [s. 97] does not apply to the proposed acts of the Board.

3. *Boychuk v. Essex Condominium Corp. No. 2 (1987) (Ont. Dist. Ct.)*

- A group of unit owners brought an application seeking orders from the Court to the following effect:
 1. that the roof repairs carried out by the board of directors of the condominium corporation could not be done without a vote of 80 per cent of the owners of units because the work constituted a substantial alteration or renovation to the common elements;
 2. that the liens registered by the corporation for non-payment of the special assessment levied to pay for the roof repairs were invalid; and
 3. that said liens should be vacated.
- This was a 125-unit townhouse project registered in 1970. Problems with the roofs had begun in 1982 and the board had been carrying out repairs on an as-needed basis.
- It eventually became apparent that the roofs would require replacement and the board sought tenders for same. They ranged from \$250,000 to \$790,000. The board sought to inform the owners regularly at meetings of what was taking place with respect to the problems. At the second such meeting the owners passed a resolution authorizing the board to have the roofs repaired and to levy a special assessment of \$2,000 per unit to achieve same. At the time the special assessment was levied the corporation had \$50,000 in reserve and to obtain the contract the corporation needed all the funds at once.
- The applicants argued that the work being carried out was a substantial addition to the common elements. The respondent argued that the work was a repair and the corporation had a duty to effect the repairs by virtue of section 41(3).
- Zalev D.C.J. stated that:
 1. what is major or substantial is a question of fact to be decided on the evidence in each case;

2. to determine whether the work is repair or maintenance or an addition or alteration to the common elements, one must look at the state of the property before the work was carried out.

- Upon reviewing evidence presented, His Honour found that the work carried out constituted maintenance and that the definition of maintenance included repair and therefore the requirements of section 38 did not apply.
- His Honour continued, however, and it appears that he was somehow persuaded that a special assessment had to be approved by by-law before it could be levied. It was clear on the evidence that no by-law was put to the owners on the question of a special assessment. The corporation's by-laws require a vote of $66\frac{2}{3}$ per cent of owners of units to approve same. His Honour recognized that the amendments to the Condominium Act overrode the $66\frac{2}{3}$ per cent requirement because the Act superseded any provision in a corporation's documents which was inconsistent with the statutory requirements, but he went on to state that the board never actually went to the owners for their approval of the special assessment: "I also conclude that failure to call the Board's assessment resolution a by-law is immaterial, if there was proper confirmation of it by the owners." He stated that since the owners have the right to waive notice of the meetings and since 95 per cent of the owners paid the assessment, "I can think of no more emphatic way of voting in favour of the assessment."

4. *York Condominium Corp. No. 244 v. Matei (1999) (Ont. S.C.J.)*

- The applicant condominium corporation sought a court order permitting representatives of the corporation to enter the respondents' unit and install a relay timer to the electrical cable attached to the hot water tank.
- In 1998 the board of directors, in order to reduce energy costs, retained consultants who recommended changes to the baseboard heaters as well as the installation of a relay switch to regulate electricity to the hot water tank in each unit.
- This work had been carried out in all the units except that of the respondents, who had refused admission to their unit for this purpose. The respondents were concerned that the installation would result in inadequate hot water to meet their needs and believed that the projected cost savings were unrealistic.
- The common elements of the corporation included all pipes, wires, etc., used for power, cable television, gas, water and the like.
- Epstein J. did not deal with the issue of whether the system installed in all but one of the units was effective and generating the projected cost savings. The only issue she felt she was required to consider was whether the condominium corporation had complied with section 38 [S.O. 1998, s. 97] of the Act before it undertook this installation.

- The applicant corporation argued that the relay switch was an installation to rented hot water heaters and was therefore a change in service, not to assets of the corporation. The applicant further argued that the attachment of a relay switch constituted repair and maintenance, which was within the absolute jurisdiction of the condominium corporation.
- The respondents argued that the installation of the relay switch was an alteration to the common elements.
- Her Honour stated as follows:

I will first deal with whether the change was to an asset of the corporation. I find that it was. Technically the change was to the cabling that provides electricity to the hot water tank rather than to the tank itself. The relay did not control the flow of water but the flow of electricity. It was not a change to a service but to an asset, the wiring. It follows that unless it can be said to have been a mere repair or act of maintenance a vote was required under s. 38 [S.O. 1998, s. 97].

Even acknowledging the importance of giving the Act purposive interpretation in the sense of allowing the Board broad leeway in its obligations to make the myriad of decisions necessary to see that the corporation is properly managed, I do not see how one could categorize this type of change as "repair and maintenance." Clearly, attaching a relay switch to cabling so electricity flows differently for the purpose of more efficient use of hydro is far different than a repair. While the cost of the relay in each unit is quite low, the change to the whole development is quite significant. The change to the common element of the wiring and cabling alters when something as basic and important as electricity is available. The change goes far beyond the "coat of paint" that was used as an example in the case of *Menkes Development Inc. v York Condominium Corp. No. 398* or weather stripping or potted plant used as examples in the case of *Wicklum v. Metropolitan Toronto Condominium Corp. No. 559* [(March 19, 1987), Doc. M132504/86 (Ont. Dist. Ct.)].

...

The purpose of section 38 [section 97] is to make sure that the Board obtains approval from unit owners before it authorizes work to be done out of the ordinary course of simply maintaining the building. The work in question in this application is just that, out of the ordinary course. While arguably well-intentioned, the Board was wrong in not putting it to a vote of unit owners.

- Her Honour further stated:

I add somewhat gratuitously, that the facts of this case also demonstrate the importance of the Board's receiving opinions from the appropriate experts before it decides upon a course of action. In this case a great deal of expense may have been avoided if the Board had obtained a legal opinion about the need for a vote before proceeding with the work.

The corporation was ordered to hold a vote of owners within three months to seek approval for the installation. If approved by owners and the respondents refused admission to their unit, the court would grant the corporation's application for an order of admittance. If the vote was not taken within three months the respondents could seek dismissal of the application.

5. *Toronto Standard Condominium Corp. No. 1633 v. Baghai Development Ltd. and Rabba Fine Foods Inc. (2010) (Ont. S.C.J.)*

- Toronto Standard Condominium Corporation No. 1633 (TSCC 1633) brought a complaint against its developer-declarant, Baghai Development Limited (Baghai) and against Rabba Fine Foods Inc. (Rabba). Baghai had signed a lease with Rabba Fine Foods over the condominium's commercial space that granted Rabba the use of part of the condominium's common element sidewalk for displaying its merchandise. However, Baghai had not properly disclosed this right to the applicant nor its unit owners, and had failed to insert the easement into the applicant's declaration. The applicant's declaration, by-laws, and rules expressly prohibited Rabba from placing anything on the common element sidewalk in front of its store.
- Issue 1 – Was the two-year statutory limitation period breached for bringing TSCC 1633's claim?
 - Because Rabba's usage of the sidewalk was not uniform or constant but fluctuated from time to time, it was not an isolated act but a series of *different* and *separate* uses of the sidewalk, each of which constituted a fresh breach of the rules and a separate cause of action. Therefore, TSCC 1633 was well within the two- year statutory limitation for the most recent breach.
- Issue 2 – Did the registration of the notice of lease by Baghai bind the applicant and all unit-owners of the condominium?
 - The registration of the notice of lease was not registered against all units and therefore could not apply to those units. Furthermore, the provisions of the *Condominium Act, 1998* took precedence over the Land Titles Act and therefore the disclosure and other notice requirements of the *Condominium Act, 1998* must be met. Neither the lease itself nor the right to use the

sidewalk were referred to in the condominium's declaration and description nor in the disclosure statements given to purchasers. Therefore, Baghai could not impose its private agreement upon the condominium corporation and unit-owners.

- Issue 3 - Was there a triable issue?
 - There was a triable issue regarding whether the condominium entered into a binding agreement with Baghai or Rabba, or should be estopped from prohibiting Rabba from using the common element sidewalk.

6. *Toronto Standard Condominium Corp. No. 1633 v. Baghai Development Ltd. and Rabba Fine Foods Inc. (2011) (ONSC)*

- The court found that two agreements (of varying formality) were entered into between the applicant condominium and Rabba. Both of these agreements were breached by Rabba. More importantly, however, the court held that the agreements were not enforceable against the applicant since the Board never entered into a section 98 agreement, lease, licence or easement. Without such an agreement, the approval of a percentage of the unit holders, and an amendment to the condominium's by-laws, rules and/or declaration, the informal arrangement between the condominium and Rabba was not enforceable regardless of whether it was breached by Rabba.
- Furthermore, the court rejected Baghai's application for a section 135 remedy. The court held that neither of the two requirements for an oppression remedy had been made out: first, the reasonable expectations of Baghai were not breached since it was aware that the arrangements in 2005 and 2007 were only temporary and subject to a formal agreement with the Board and, secondly, the conduct of the condominium was not oppressive in any way but included "well-founded" complaints.
- The court therefore allowed the applicant condominium to enforce its by-laws, rules and declaration to the effect that Rabba must remove all of its displays from the applicant's common element sidewalks.

Section 98 Agreements

Overview:

Section 98 of the *Condominium Act* (the "*Act*") allows unit owners to make changes to the common elements that are not contrary to the *Act* or the Corporation's declaration if all of the following conditions are met:

1. The Board has approved the addition, alteration or improvement;
2. The owner and the corporation have entered into an agreement that allocates the following:
 - (a) the costs of the addition;
 - (b) allocation of the respective duties of the owner and the corporation; and
 - (c) any other matters prescribed by regulation (section 25(1) of *O. Reg. 48/01* states that the agreement shall specify who will have ownership of the proposed change);
3. The requirements of section 97 of the *Act* have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation;
4. The corporation includes a copy of the agreement entered into between the owner and the corporation with the notice to be sent to the owners in accordance with section 97(3) of the *Act*.

The above noted requirements do not apply where an owner wishes to make an addition to the owner's exclusive-use common elements. For an owner to make an addition, alteration or improvement to his/her exclusive-use common elements, the board must be satisfied that the addition, alteration or improvement:

1. Will not have an adverse effect on other units;
 2. Will not give rise to any increased costs to the corporation;
 3. Will not detract from the appearance of the buildings on the property;
 4. Will not affect the structural integrity of the property as so certified by a structural engineer, if the addition, etc. involves a structural change; and
 5. Will not contravene any provisions in the corporation's declaration or any prescribed requirements.
- The agreement is not binding until the conditions set out above have been complied with and the agreement is registered against title to the unit.
 - If the board exercises its discretion reasonably and documents the basis for approval, it is unlikely that other unit owners will be able to successfully challenge its decision.
 - If the owner fails to comply with the agreement, any costs incurred by the corporation in relation to it are a common expense against the unit (section 98(4) of the *Act*). All costs of preparation should be charged to the account of the owner seeking the agreement.
 - Any agreement entered into between the corporation and the unit owner is binding on any successor in title (section 98(5) of the *Act*).
 - Section 132 of the *Act* requires mediation and/or arbitration to resolve disputes in relation to section 98 agreements.

Amendments:

On a day to be named by proclamation of the Lieutenant Governor, section 98 of the *Act* as stated above will be repealed. The new section 98 will essentially be the same with the exception of the following changes:

- Currently, section 98(1) and section 98(2) refer to owners making an "alteration, addition or improvement". However, the new section 98 (1) and section 98 (3) will replace the words: "alteration, addition or improvement" with "modification". Then, the new section 98(2) will define "modification" to mean "an addition, alteration or improvement to the common elements or the assets, if any, of the corporation that is not contrary to this *Act*, the declaration, the by-laws or the rules". Thus, under the new amendments, owners will be able to propose and possibly make modifications to the corporation's assets. In addition, the modifications cannot be contrary to the rules and the by-laws, in addition to the declaration and the *Act*.
- Further, in discussing the process for an owner to modify exclusive-use common elements, the amendment changes the first requirement to require the owner to satisfy the board that "*the other owners, on an objective basis, would not regard the proposed modification as causing a material reduction or elimination of their use or enjoyment of units that they own or the common elements or assets, if any, of the corporation, as determined by the regulations*". The amendment also changes the last requirement to require the owner to satisfy the board that the proposed modification will not contravene the declaration, by-laws, rules or the prescribed requirements (if any).
- Currently, section 98 of the *Act* states that the any agreement entered into between the corporation and the unit owner is binding on any successor in title. However, under the amendment, the agreement will bind the owner's unit and adds that any easement or covenant, whether positive or negative in nature, in the agreement, shall run with the unit.
- The amendments will also add an entirely new sub paragraph in relation to enforcement. The new section 98 (7) will state that a party to the agreement, the owner, any subsequent owner of the unit as well as the corporation and any of its successors and assigns may enforce the easement or covenant against each other.

Cases:

1. *Wentworth Condominium Corp. No. 198 v. McMahlon (2009) (Ont. S.C.J.)*

- the corporation sought an order requiring a unit owner to remove from his rear yard, which was a exclusive-use common element area behind his unit, a hot tub. The corporation argued that the hot tub was an "addition, alteration or improvement" under section 98 of the *Act* and therefore could not be placed in the yard without board approval.

- The court defined the words: "addition" – something that is joined or connected to a structure; "alteration" – something that changes the structure; "improvement" – betterment of the property or enhancement of the value of the property. However, the court held that an item that increases the enjoyment of the property, but does not increase the value of the property, is not an improvement.
- The hot tub was 6 feet wide, 7 feet long, 4 feet high, weighed 300 pounds, occupied approximately 25% of the space, was not embedded into the ground and was removable with substantial effort. The court held that the hot tub was not an addition because it was not connected to a structure, the hot tub was not an alteration since it did not permanently change the structure of the property, and the hot tub was not an improvement because it was not a fixture and did not attach to the condominium unit or the property as part of the property and could not increase its value. Hence, the court dismissed the corporation's application to have the unit owner remove the hot tub from the yard.
- The court also said that under different circumstances, it would be possible for a large freestanding item to become an addition, alteration or improvement if it were so difficult to move the structure that it became a permanent part of the property.
- The decision was affirmed on appeal.

2. *East Gate Estates v. Kimmerly (2003) (Ont. S.C.J.)*

- Unit owners requested the corporation to approve a flower garden outside their unit. The board approved the landscaping at nine feet in depth. However, the landscaping constructed ended up being twice the approved depth. The corporation asked the unit owners to reduce the size. On the other hand, the unit owners stated that there were other units with landscaping that exceeded their depth. According to the court, the board did approve the landscaping but not to the extent that the defendants installed it. The court held for the board of the corporation and gave an order declaring that the flower garden in question violated and exceeded the authorization of the board. The court ordered the unit owners to rectify the landscaping in 15 days.

3. *Peel Condominium Corp. No. 108 v. Young (2011) (Ont. S.C.J.)*

- The unit holder had constructed a vent through the outside wall of her unit (a common element) when installing a tankless gas water heater in the unit. Since the unit holder had not obtained prior authorization from the corporation's board, the board sought an order to remove the vent. The unit owner argued that the declaration had been selectively enforced against her. The issue for the court was whether the declaration could be selectively enforced against the unit owner even if it had not been enforced against several unauthorized contraventions in the past.
- The court held that "once registered, the declaration has the force of the law, at least as far as the unit holders are concerned". The court held that "there is an interest, in the collective, in having the declaration enforced, even if some transgressors have

been allowed to violate it". The court maintained that "the collective's interest in having the declaration enforced must prevail over the private interest of the respondent". Ultimately, the corporation's application was granted and the vent was ordered to be removed. According to the court, in this situation, "the declaration must prevail over the private interests of the [unit owner] because its selective enforcement did not amount to non-enforcement".

4. *Peel Condominium Corp. No. 283 v. Genik (2007) (Ont. S.C.J.)*

- A unit owner installed a satellite dish without permission from the corporation. The court found that the satellite dish had been installed in violation of the legislation.

Information Certificates

General Overview:

- To ensure that boards inform owners of what is happening in their condominiums, the *Act* now requires that "information certificates" be delivered to owners during the year and updated upon the occurrence of certain events.
- The government has created a prescribed standard form for the certificates which will alleviate some of the workload for corporations.
- Condominium Corporations must produce three types of information certificates.

3 Types of Information Certificates:

1. Periodic Information Certificates ("PIC")

- Information contained in a PIC is similar to that found in a Status Certificate.
- A PIC contains information about: whether the corporation is in compliance with its obligations to the Condominium Authority, names of the board members, insurance information, finances, reserve fund, budget, etc.
- A PIC does not bind the corporation like a Status Certificate does.
- A PIC must be delivered to the owners twice during the corporation's fiscal year – the first within 60 days of the end of the first fiscal quarter and the second within 60 days of the end of the third fiscal quarter.
- A copy of the most recent PIC and ICU must be made available at the corporation's AGM.

2. Information Certificate Updates ("ICU")

- An ICU must be delivered to the owners upon the occurrence of a "trigger" event.
- Trigger events include: a change to the corporation's address for service, a change to insurance coverage, and board vacancies.
- The timeline to deliver an ICU depends on the nature of the event.
- A corporation may also pass a by-law to require the ICU be sent out on a more frequent basis or upon the occurrence of additional trigger events.

3. New Owner Information Certificates ("NOIC")

- A NOIC provides new purchasers with up-to-date information concerning the corporation.
 - A NOIC must be delivered to new unit owners within 30 days after an owner has advised the corporation of his/her new ownership in the condominium.
 - The NOIC must include a copy of the most recent PIC and ICU that was sent to the owners.
- However, Corporations are exempt from the having to provide information certificates in any fiscal year if: (a) a turnover meeting has been held; and (b) each year the owners of at least 80% of the units (who have not been in arrears of common expenses for 30 days or more) consent in writing to dispense with the requirements to distribute the certificates.

Condominium Authority of Ontario (CAO), the Condominium Authority Tribunal & the Dispute Resolution Process

General Overview of CAO and Purpose:

- Bill 106: *Protecting Condominium Owners Act, 2015* (PCOA) created the Condominium Authority of Ontario (CAO)
- The CAO is an Administrative Authority – Administrative Authorities assume complete financial, operational and legal responsibility for administering legislation, which includes delivering day-to-day delegated services such as licensing, inspection, enforcement and fee setting. They are managed by independent Board of Directors and are self-financed from fees collected from regulated individual condo managers and condo management firms.
- CAO's Mandate:
 - Provide information, tools and resources for condo communities.
 - Develop Ontario's first online dispute resolution service, the Condominium Authority Tribunal (CAT) which launched on November 1, 2017

- Develop new, mandatory Director Training for condo directors, which launched on November 1, 2017
- The CAO began offering services to the public on September 1, 2017.
- The CAO has asked all approx. 10,000 Condo Corp's to register and provide details regarding their Corporation; as well as pay their annual assessment fee.
 - Annual assessment fee calculated on equivalence of \$1 per voting unit per month
 - Payable by the corporations – part of operating budget and added to the common expenses (per the Act)
 - Owners pay in same manner as any common expenses (% in declaration)
- Condominiums must be registered and must have paid the new assessment fee by December 31, 2017. In order to register a condominium, you must have either login information or an invitation code. Invitation codes are being provided to individual condominium corporations through the mail, or, in some cases, directly to management companies.
- Condominium corporations that have not done so will be unable to maintain a proceeding before the new Condominium Authority Tribunal, will be unable to maintain a proceeding in court (unless it obtains leave from a judge to do so), and may be subject to the prosecution of an offence under the Act. The CAO can charge interest for non-payment of the assessment which we suspect may be significant. In addition, a corporation's failure to comply with the requirements of the CAO must be noted on Periodic Information Certificates.
- Visit the website to get more information on what services are available www.condoauthorityontario.ca
 - CAO provides condominium communities with tools and resources on various topics, including: Condominium living, Condominium owners' rights and responsibilities, Building management and governance and Buying a condominium.
 - Free online resources to assist individuals with identifying and resolving common issues before they escalate into disputes:
 - Based on surveys and feedback in the consultations and online surveys, the CAO has developed an easy to follow, tabbed guided pathway for each of the most common (10) issues raised by owners.

- Current common issues include: records, noise, personal property, meetings, odours, issues with condo managers, pets, neighbours, rules, short-term rentals.
- Guided pathways offer online self-help tools, templates and how-to guides on a number of topics (e.g. pets, noise, access to records, etc.)
- The flow of information includes first a general Overview > Legislation and Rules > Solutions > Additional Help

General Overview of Tribunal:

- The Condominium Authority Tribunal (CAT) has been established under the *Condominium Act* (the "*Act*") (section 1.32) and is an adjudicative tribunal within the Condominium Authority of Ontario (CAO).
- The recent review of the *Act* revealed a need for an easier and more cost-effective method for resolving disputes in condo communities. To meet that need, the CAO was given the authority to launch an online dispute resolution forum for condo disputes, which is the CAT.
- The CAO manages the operations of the Tribunal. It protects the independence of the CAT and allows the Tribunal members to resolve disputes, and make decisions in a fair and impartial way.
- The CAT is an online dispute resolution forum with well trained adjudicators, providing individuals with a fast, efficient and cost-effective way to help resolve disputes.
- The types of disputes that can be filed for resolution with the CAT are specified in regulations to the *Act*.
- The government has recently introduced *O. Reg 179/17*, which identifies disputes regarding records under section 55 of the *Act* as the first type of dispute that can be filed for resolution with the CAT. This regulation came into force on November 1, 2017.
- Thus, at the moment, only Section 55 “records disputes” can be filed with CAT.
- Other types of disputes that may be within CAT’s exclusive jurisdiction, in the future:
 - enforcement of declarations, by-laws and rules;
 - procurement processes;
 - procedures for requisitioning meeting of owners; and
 - voting and/or proxies.

- The CAT does not have jurisdiction to accept applications relating to:
 - disputes regarding liens;
 - disputes regarding amalgamation and termination; and
 - disputes determining title to real property.
- Existing dispute resolution mechanisms will continue to apply for disputes outside the Tribunal's jurisdiction.

3 Stages of the CAT Dispute Resolution Process:

1. Negotiation

- The first stage, Negotiation, allows users to file their case, and for a fee of \$25.
- The users are provided with access to the CAT's online dispute resolution (ODR) system to negotiate in a neutral forum and attempt to resolve the dispute themselves.

2. Mediation

- If the dispute cannot be resolved at the Negotiation stage, the users can move to stage two, which is Mediation, for a cost of \$50.
- In this stage, a dedicated CAT mediator will join the case and assist the users in resolving the dispute.

3. Tribunal Decision

- If still unresolved, the dispute moves to the third and final stage, Tribunal Decision.
- At this stage, a dedicated CAT member will conduct a formal adjudication of the dispute for a cost of \$125.
- A decision and order from the Tribunal Member at Stage 3 is final and binding.
- A user can appeal the decision to Divisional Court, but only on a question of law. This means that users can file an appeal only if the member incorrectly interpreted or applied the legislation. Users cannot file an appeal with Divisional Court just because they disagree with the outcome.

- At the conclusion of a proceeding before the CAT, the CAT can order:
 - a party to take, or refrain from taking, an action;
 - a party to pay compensation for damages incurred by another party for an amount up to \$25,000, or as prescribed;
 - costs payable to another party, or to the Tribunal;
 - any costs ordered by the CAT can be added to or subtracted from an owner's common expenses; and
 - anything else the CAT considers fair in the circumstances.
- In cases where the users do not comply with the Tribunal order, the decision can be enforced through the courts.

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BUYING AND OWNING A CONDOMINIUM: WHAT YOU NEED TO KNOW

By Audrey M. Loeb, LSM LL.B., LL.M., ACCI

Download this booklet with our compliments at:
<http://www.shibleyrighton.com/BuyingAndOwningACondoBooklet.pdf>

www.shibleyrighton.com



@SRCondoLaw



Audrey M. Loeb, B.A., LSM LL.B., LL.M., ACCI
Shibley Righton LLP
250 University Avenue
Suite 700
Toronto, ON Canada M5H 3E5
Tel: 416.214.5267
Fax: 416.214-5467
Toll Free: 1.800.214-5200
Email: aloeb@shibleyrighton.com

Audrey Loeb carries on a focused practice in real estate and condominium law, advising with the others in the Real Estate & Condominium Practice Group, developers, buyers, sellers and condominium corporations on issues of corporate governance and operations.

Audrey is AV Rated by Martindale – Hubbell and recognized by both Best Lawyers (Canada) and Lexpert as one of Canada’s leading Real Property Lawyers with a focus on condominiums.

Audrey was awarded The Law Society Medal in 2008.

The Law Society Medal, established in 1985, recognizes outstanding Ontario lawyers whose service reflects the highest ideals of the profession.

Audrey was awarded the medal for her significant contributions to the profession, and to her community as the founder and Chair of the “Weekend to End Breast Cancer” (now the Weekend to End Women’s Cancers) benefiting the Princess Margaret Hospital Foundation.

She is the author of the leading texts on Condominium Law in Ontario entitled - Condominium: Law and Administration and The Condominium Act: A User’s Manual, published by Thomson Reuters.

She is Professor Emeritus of Ryerson University, School of Business Management.

She is a frequent lecturer for the Law Society of Upper Canada, the Ontario Bar Association and Toronto Real Estate Board. She is a regular columnist in the Toronto Real Estate Board News. She is a frequent guest expert on the CBC and City TV on issues relating to condominium law.

She is a former member of the National Board of Directors of the Canadian Condominium Institute (CCI), the Consumer Advisory Committee of the Board of Directors of the **Tarion** Home Warranty Program and the Board of Directors of the Real Estate Council of Ontario and has written regular columns for both the Globe and Mail and the Toronto Real Estate News.

Education

London School of Economics and Political Science (LL.M.)
Osgoode Hall Law School, York University (LL.B.)
McGill University (B.A.)

Additional information

Recipient of the Law Society Medal (2008) in recognition of her outstanding service in accordance with the highest ideals of the legal profession. Fewer than 135 Canadian lawyers have received The Law Society Medal since it was struck in 1985.

She is the recipient of the Gold Key Alumnae award from Osgoode Hall Law School at York University and the Award of Excellence in Real Estate from the Ontario Bar Association

She is recognized by the following organizations as a leader in her field: Leading Practitioners; Best Lawyers in Canada and Martindale and Hubbel



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Buying and Living in a Condominium: What you need to know.

Audrey Loeb B.A LSM. LL.B. LL.M. ACCI

This booklet is designed to help you understand the process of buying a new or resale condominium as well as what a condominium corporation is, how it functions and what laws and documents will apply and affect your rights and obligations as a unit owner and/or resident.

The term "Condominium" applies to a type of property ownership. It does not refer in any way to the physical structure of the building or building complex. Residential condominiums, which now account for one out of every three new homes built in Ontario, can be apartment style units (either high-rise or low-rise), townhouses, (some known as freehold condominiums), detached houses, stacked townhouses – any configuration of housing you can imagine. Non-residential condominiums can be industrial, commercial and/or retail. What makes them "Condominiums" is not their physical structure but the way in which owners have agreed to share the ownership of the common areas of the property, known as "common elements", while retaining individual ownership of the parts of the property which constitute their "units".

The condominium property is made up of units and common elements. Everything that is not specifically designated as a unit is known as common elements. Accordingly, condominium ownership has a dual nature; a condominium unit owner has freehold title to his or her unit and, at the same time, shares the ownership of the common elements jointly with the other unit owners. The unit owners share the costs of operating the property through the payment of their respective shares of the common expenses.

The *Condominium Act, 1998, as amended in 2015* by the *Protecting Condominium Owners Act (the "Act")* governs the ownership of both residential and non-residential condominiums in Ontario. This booklet is designed for the residential unit owner.

The Act is divided into several parts:

- the Condominium Authority of Ontario ("CAO")
- the development of condominium corporations;
- the types of developments permitted;
- the sale of condominium units; and
- the ownership and governance of condominiums

What are the advantages of living in a condominium?

There are many advantages to buying a condominium. Some of these are:

- It is sometimes more economical than comparable non-condominium housing.
- It enables people of moderate and middle incomes to own their own homes.
- It makes private ownership possible in areas where land values would ordinarily make this too expensive.
- It eliminates some of the problems of upkeep and maintenance often associated with home ownership, since

the cost of maintenance and repair of the common elements is generally shared by all the unit owners and the responsibility of the condominium corporation through its property management.

- It allows ownership in a multi-unit property with each owner being responsible for paying his or her realty taxes and mortgage and an owner's failure to make any of his or her payments will not affect other unit owners.
- It gives the owners a right, in various ways, to participate in decisions which affect their homes.

What is a Condominium Corporation?

A condominium corporation is a method of property ownership. It is not a business corporation. It is created solely to manage the affairs of the condominium corporation including the maintenance and repair of the buildings that form the condominium property. A condominium's affairs are regulated by the *Act* and documents known as the *Declaration, Description, By-laws* and *Rules (collectively, the "Governing Documents")*.

The *Declaration* is the equivalent of the constitution of the corporation. It outlines the division of ownership within the corporation by identifying the units, the common elements and the exclusive use common elements, if any. It also sets out the percentages of ownership each unit has in the property and the percentage that each unit contributes to the monthly common expenses, which are usually the same but are not required to be. It specifies the obligations regarding maintenance and repair of the units and common elements by the corporation and the unit owners. The *Declaration* will also include which costs are to be common expenses of the corporation and paid for by the owners' contributions to the monthly common expenses.

The *Description* is a detailed plan of the boundaries, layout and location of the units, common elements and exclusive use common elements in the condominium.

The *By-laws* of the corporation indicate how the corporation will be organized. They deal with matters such as the qualifications of members of the board of directors, the officers of the corporation, the conduct of meetings, the collection of common expenses, occupancy standards, insurance deductibles and other matters as permitted by the *Act*. *By-laws* are made by the board of directors and approved by the unit owners. Effective November 1, 2017, the *Act* will define records as Core and Non-Core and will set out the length of time records must be kept, where they must be kept and owners' rights of access to them.

There are also *Rules* of the corporation which regulate the owners' and residents' day-to-day living environment. The board of directors makes the *Rules*. The owners are required to receive notice of the *Rules* and have a right to call a meeting and vote to amend or repeal them.

The initial **Governing Documents** are prepared by the developer. There is neither independent review nor any input from unit owners.

The primary purpose of the condominium corporation is to manage the condominium property. The *Act* provides standards regarding the keeping of records, the rights of owners to access them and the conduct of business generally. The *Act* and the *By-laws* outline procedures to be followed by the corporation, such as the giving of preliminary notices and notices of meetings, when and where meetings of owners are to be held,

the use of proxies, as well as qualifications and disqualifications for board membership, and the election, removal and replacement of directors.

Owners and residents are required to comply with the *Act* and the **Governing Documents** of the condominium corporation. If there is an issue/ dispute, the corporation or individual owners may enforce the *Act*, and the **Governing Documents**, either through mediation and/or arbitration, by an application to the courts or an application to the Condominium Authority Tribunal ("CAT"), once it is operational. Starting November 1, 2017 disputes relating to access to records of the corporation will be directed to the CAT for resolution. In the future other disputes, as indicated in the regulations to the Act, will be dealt with at the Tribunal. The *Act* also provides the right to apply to a court where an owner or the corporation believes that his/her/its rights have been unfairly affected by the conduct of either the board of directors or other unit owners.

The *Act* and the *By-laws* set out provisions regarding the business of the condominium corporation and outline procedures to be followed by the corporation, when notice is to be given to owners for when different types of meetings are to be held, for the holding and conducting of general and special meetings, the quorum requirements for meetings as well as the election, removal and replacement of directors.

Are there other types of condominium developments besides the "typical" condominium?

All condominiums that were created prior to May 5, 2001 and most condominiums built since then are considered "standard" condominium corporations. The *Act* provides for additional types of condominium developments that differ from the standard condominium. The additional types of condominium developments are vacant land, leasehold, common elements and phased condominiums.

Vacant Land - allows a developer to register parcels of land as condominium units without the need for buildings. The unit then consists of the land and whatever is built on it; the common elements will usually be the roads, sewers, water systems and recreational facilities, if any. The developer may set specifications for what can or cannot be built on the units so that there is uniformity in the homes that are constructed. Usually the developer will build the house and the transaction will close upon completion of the house. The unit owner is responsible for all costs relating to the unit including the complete repair and maintenance of the home. The condominium corporation can provide services and carry out maintenance and repair to the unit, if the unit owner fails to do so, and recover its costs against the unit.

Leasehold Condominium - is like a traditional condominium except that the condominium is on land that is leased by the developer as opposed to being owned by the developer. The purchaser of the condominium unit therefore buys an interest that is limited as to its duration. The *Act* states that this lease cannot be less than 40 years or more than 99 years, plus rights of renewal. At the end of the lease the condominium building reverts to the property owner/landlord. The common expenses include rent payable to the landlord. Leasehold condominium

corporations are most often seen on land that cannot be sold, such as that held by a hospital or other public institution.

Common Elements Condominium - is where only the jointly owned property is part of the condominium. The individually owned parcels of land, which are tied to the condominium through an ownership interest in the condominium, are not part of the condominium corporation. They are called parcels of tied land and are commonly referred to as POTL's. This type of project allows property owners to jointly share in the costs of the common property such as roads and recreational areas, with a mechanism for ensuring that contributions to pay for these facilities are made. The surrounding properties, however, are not part of the condominium. Unpaid common expense contributions can be collected by way of a lien against the POTL. The condominium corporation can only provide services and carry out maintenance and repair to the unit if there is a separate contract with the POTL owner. There is however no lien mechanism for recovering these costs against the POTL.

Phased Condominium - is where the developer builds a condominium project, for example a group of townhouses or a high-rise building and intends to build more than one phase of the project. The condominium is registered and ownership of the units is transferred to the individual purchasers. When the second phase of the project is built and registered, it is collapsed into the existing condominium and the first condominium and the second phase become one condominium corporation. However, far more commonly in Ontario, multi-phased projects are registered as separate condominium corporations and they are bound by "reciprocal agreements" for the purpose of accessing, governing and paying for the shared facilities.

Who is responsible for what?

All condominium projects consist of two parts: the *unit* which is individually owned; and the *common elements* which are shared and jointly owned by all of the unit owners. Some common elements, such as balconies, front and back yards, patios and in older buildings parking spaces and lockers, are designated as exclusive use common elements. Although owned by all the owners, they are attached to one or more units for all time and are for the sole use of the unit or units to which they are linked in the *Declaration*. Exclusive use common elements cannot be bought and sold. The *Declaration* and/or the *Description* of the condominium corporation will describe these in detail.

The contents of *Declarations* can differ. Areas designated as common elements in one condominium corporation might be parts of individual units in another. Most often the unit is defined by its surrounding walls; however, in some cases, normally townhouse style properties the unit may include additional areas such as front and back yards (these are sometimes known as "Freehold condominiums"). These distinctions can be important when it comes to the question of who is responsible for the payment for window-washing and landscaping services and/or repairs to the exterior brick or roof.

A typical residential unit in an apartment style condominium project consists of a living room, kitchen, dining room, bedrooms, bathrooms, entranceway hall and closets. Townhouses and detached units might include basements,

garages and front or back yards as well. The unit is the property of the owner and the unit owner is usually responsible for its maintenance and/or repair.

The *common elements* are the parts of the property other than the individual units. These can consist of corridors, lobbies, and elevators, and mechanical and electrical systems in apartment style condominium projects as well as recreational facilities, parking areas, the grounds and structural parts of buildings. Their maintenance and repair are normally the responsibility of the corporation, although a *Declaration* may allocate the responsibility differently.

The *exclusive use common elements* may be maintained and/or repaired by either the owner or owners who benefit from their exclusive use or the corporation, depending on what is provided in the *Declaration*. Generally, balconies, parking spaces, storage lockers and lawns in townhouse condominiums are exclusive use common elements; the owners are often responsible for maintaining them but the corporation is responsible for their repair. Since each developer has the right to determine what part of the property will constitute the units and common elements, whether exclusive use or not, every condominium may be slightly different. Since each condominium may have different allocations as to who is responsible for maintenance and repair, it is important that you learn what your responsibilities are and make sure you comply with them. Failure to do so can have financial consequences.

“Buyer Beware”

I am buying from a Developer, how do I know what to look for in all these documents?

When you purchase a new condominium from a developer, the *Act* requires that you be given a **Disclosure Statement**. This is the package of documents a developer prepares and gives to a buyer when he or she signs the Agreement of Purchase and Sale. Once you receive the **Disclosure Statement** and an accepted Agreement of Purchase and Sale for the purchase of a new unit from a developer, the *Act* provides you with a **10-DAY COOLING-OFF PERIOD**. This allows you to terminate the agreement without cause and receive your deposit back if you cancel the agreement **in writing** within the 10-day period set out above. Once the 10-day cooling-off period has expired, you are bound by the terms of the contract and must complete the purchase according to those terms. Under *the Act* any changes that you want must be made before you sign the agreement or within 10 days of signing it. ***This 10-day cooling off period does not apply to the purchase of a resale condominium unit.***

Unless you are a lawyer, familiar with condominium purchase and sale documents and with the Governing Documents of condominium corporations, the language of these materials can be very confusing. If the salesperson or developer suggests that pets are permitted in the condominium units or are available only to certain groups of people (e.g. pensioners, or adults only, etc.) be wary.

You have a responsibility to read through these materials and make sure you understand just what it is you are buying and how being in a condominium will impact the way you live. Remember the Agreement of Purchase and Sale and the

condominium's Governing Documents were prepared by the developer's lawyer and are not reviewed independently by any government or civic agency.

Condominium living is not the same as living in a single-family property. The *Act* and the Governing Documents, will govern what you can and cannot do when you live in the condominium. You should be familiar with these and be willing to accept any limitations they may impose.

Never rely on verbal statements.

Any specific requirements you may have with respect to the way the unit or common elements should be completed or any other issues, which are important to you should be set out in the Agreement of Purchase and Sale. Be wary of statements made by sales representatives. If the issue is important to you make sure that the provision is included in the Agreement of Purchase and Sale; it is a binding contract and neither party can make amendments to it. Both parties must agree.

Either before or after you see your lawyer to review the Agreement of Purchase and Sale and the disclosure documents you should review them. **It is imperative that you tell your lawyer any points of particular importance to you and discuss with your lawyer any conditions in the documents that might affect your lifestyle.**

How are prices determined for new condominium units?

You should know that it is the practice in the development industry to sell condominiums at a price based on the square footage of the unit, for example \$600 per square foot. The square footage, however, is not based on the interior measurements of the unit. The square footage is determined by taking the measurements of the unit to the outside walls and the middle of the partition walls between the units. The difference in size between the square footage upon which the sale price is determined and the useable square footage can be 5 to 10%. Even though condominiums are usually sold this way, square footage will not necessarily be the basis on which common expense contributions are determined.

What are the conditions by which the developer or owner can terminate the agreement to purchase?

When signed by both parties, an Agreement of Purchase and Sale is a binding contract and it freezes the price of a unit. The agreement can be terminated by the developer if the agreement includes early termination conditions, included for the benefit of the developer, and any of those conditions are not met. These conditions typically relate to the developer achieving a certain number of unit sales, obtaining planning approval for the project and securing financing approval for both the Vendor and Purchaser. These conditions must be listed in the Agreement of Purchase and Sale. If any of the specified conditions are not met the Developer can terminate the Agreement of Purchase and Sale and the purchaser will be repaid his or her deposit with interest. These conditions have to be met by specified dates, which are often far into the future.

You should be aware of how long you may have to wait before you will know for sure if the project is going to proceed. Other than for these conditions, for condominium purchases governed

by the *Tarion Home Warranty Plan Act*, the developer cannot terminate the agreement unless you either consent in writing or the developer obtains a court order. **[See *Tarion Addendum to the Agreement of Purchase and Sale*]**

There are 2-types of conditions which can be included in an Agreement of Purchase and Sale for Tarion governed projects. They are listed in Schedule "A" to the *Addendum*. For conditions provided for in par.1(b) of Schedule "A", if the developer does not give written notice within 5 days of the condition date as to whether the conditions have or have not been satisfied, the conditions are deemed to be met and the agreement is binding. For conditions in 1(c) of Schedule "A", if the developer does not give notice that the conditions have been met, it means the agreement is at an end.

For those condominium projects not governed by Tarion purchasers do not have the same protection. The developer must disclose in the documents if the project is registered with Tarion.

When will I get to move into my new condominium unit?

Until the condominium corporation is created, there is no "Unit" for ownership transfer purposes and so you cannot get Ownership of the Unit (title) nor can you enter into a mortgage on the Unit. In most situations involving new condominiums, purchasers are required to occupy their units before the developer is able to transfer ownership of the units. This is called an "**occupancy closing**" and from the time the Purchaser is required to "occupancy close" until the purchaser receives the transfer of title to his or her unit is known as "interim occupancy".

Look at the present state of construction of the project in which you are interested. Does it seem reasonable to expect construction to be completed by the date shown in the agreement or the *Tarion Addendum*. The *Addendum* contains provisions which allow developers to extend the dates when units will be available for occupancy and title closing. They occasionally include provisions which allow for the acceleration of these dates. Again the **Tarion** provisions only apply to condominiums governed by the *Tarion Home Warranty Plan Act*.

If the developer is unable to meet the tentative, firm or delayed occupancy dates and/or fails to provide the required notices in the stipulated times, the Purchaser is entitled to compensation to a maximum of \$7,500. **[See *Tarion Addendum*]**

A purchaser of a residential condominium unit, governed by **Tarion** has the right to terminate an Agreement of Purchase and Sale if a unit is not ready by the "outside closing date" and the purchaser follows the required procedures. You will want to talk to your lawyer about this.

If you buy right at the beginning of the developer's sales campaign, you can usually expect that it may be at least 2 years before your unit will be ready. The *Addendum* provides that the developer can extend this time period. This may be necessary because the developer will usually not secure financing to start construction until there are binding sales agreements for at least 60-70% of the units. Depending on how quickly the sales take place, i.e. how hot the market is, this time frame will vary. The

longer the time it takes the developer to complete sales, the longer you will wait to get occupancy of your unit. It is important to know that it is common in the condominium industry for purchasers not to occupy their units on the tentative closing date as set out in the *Addendum*. These dates will probably be extended periodically. The developer has the right to extend these dates provided the final date for closing is not later than the Outside Closing Date. The projected dates for Tentative and Outside Closing Dates are set out in the Critical Dates Addendum attached to the Agreement of Purchase and Sale, if the project is covered by **Tarion**.

The Addendum must also disclose whether construction has begun or, if not, the expected date for commencement of construction, Within 10 days after zoning approval is obtained and/or construction has commenced, the developer must, provide written notice to that effect to a Purchaser.

If you buy when construction has already begun, the developer should be able to estimate a more reliable date for your occupancy closing. If time constraints are an issue for you or you feel you do not want to buy from plans and you need to see the finished project, you should consider waiting until the condominium is closer to completion or consider buying a resale unit. **[See www.tarion.com]**

What Rules does the developer have to follow when selling units? What is a Disclosure Statement? What happens to my deposit?

The developer occupies a unique place in condominium housing. The developer has a particular interest in selling the units and registering the project.

The *Act* regulates the developer's sales practices and influence on the project through several important provisions.

All money the developer receives from a purchaser towards the purchase of a unit must either be held in trust by the developer's lawyer or a trustee or guaranteed by a **Tarion** deposit receipt or other prescribed security. You are supposed to receive a form from the developer advising you that your money is being held in trust.

If you are in a position to pay all cash for your unit, you can elect, to pay all cash on occupancy closing, if you advise the developer of your intention to do so within the 10-day cooling-off period.

You are entitled to interest on any money you have paid, towards the purchase price from the date you pay it until the occupancy closing. The interest rate is 2% below the Bank of Canada rate (see www.bankofcanada.ca for rates).

The developer must give you a **Disclosure Statement**, which, will include a brief narrative description of the most important features of the condominium project and will include a table of contents, copies of the *Declaration, By-laws, Rules*, and other information that the *Act* requires.

The documents the developer gives you should contain a table of contents, which includes a list of topics which the Government has determined are important issues for a purchaser to consider when buying a condominium unit. The

table of contents will tell you where to look in the relevant document for information on the topic. For example the table of contents includes a listing for “pets”. The table of contents will indicate if there is a provision regarding pets in either the *Declaration, By-laws* or *Rules* and will direct you to the appropriate document and page for the provisions, which will apply in this condominium. The **Disclosure Statement** should also include information on any agreements to which the corporation will be a party, including Shared Facility or Reciprocal Agreements. These are agreements which bind the corporation to obligations and responsibilities with either other condominium corporations, commercial properties, retail properties and, in some projects, hotels.

The **Disclosure Statement** will also include a Budget for the condominium corporation for the first year after registration, the Standard Unit definition used for insurance purposes, a list of the amenities to be included in the project and when they will be available and copies of most of the documents, which will govern the condominium corporation once it comes into existence.

Condominium corporations, in the first year after registration, have to carry out a Performance Audit, a reserve fund study and two Financial Audits, one within 60 days after the developer turns over the corporation to the owners and the second at the end of the first fiscal year. These costs are part of the common expenses of the corporation in the first year after registration.

Once Agreements of Purchase and Sale are signed, the developer must take all reasonable steps to register the project as a condominium corporation without delay, and transfer the ownership of the units to the buyers as soon as possible. This means that once the developer decides to proceed with the project, purchasers cannot be told that the developer has decided not to obtain the condominium status (except in very exceptional circumstances).

If the developer underestimates the projects’ total amount of common expenses for the first year after the condominium is registered, the Act requires the developer to make up the shortfall. This provision is intended to protect new condominium owners from a developer who might deliberately underestimate the cost of common expenses in order to make owners of a unit appear more attractive to you. There is however no guarantee of recovery. Some developers absorb costs in the first year, so they do not appear in the budget at all, and some developers collect extra funds from purchasers at the time of closing to top-up the operating account so that there will be no shortfall.

Purchasers should also be aware that common expenses almost always increase by a fixed percentage before you take occupancy of the unit. There is an Inflation factor included in the budget, which sets out that if the condominium is not registered by a particular date the common expenses will increase by a set percentage beyond what is provided for in the developer’s first year budget. When you take occupancy of your unit, it is likely that the common expenses will already have increased. For most purchasers, you will find that common expenses will often increase by varying amounts in the second year after registration.

What are occupancy fees?

Occupancy fees are payable by the purchaser from the time of the occupancy closing until the registration of the condominium corporation. The Act provides that these payments cannot exceed the maximum amount the purchaser would pay for the following:

- Estimated common expenses according to the developer’s disclosure budget;
- Estimated realty taxes for the unit as if the unit was separately assessed; and
- Interest on “unpaid balance due on closing” on the purchase price.

Until the condominium corporation is created, there does not legally exist a “Unit”; ownership cannot be transferred and the purchaser is unable to obtain a mortgage. Therefore, from the date of interim occupancy until title closing, the developer will normally not receive the full purchase price from the purchaser. That unpaid amount is known as the “balance due on closing”. For example, if the purchase price of a unit is \$500,000 and the deposits paid by the purchaser total \$50,000, the difference is known as the “balance due on closing”. The \$450,000 is the amount upon which the purchaser is entitled to interest during interim occupancy.

The amount of interest payable on the unpaid balance due on closing is the rate that the Bank of Canada has most recently reported as the chartered bank administered interest rate for a conventional 1-year mortgage as of the first of the month in which the purchaser occupancy closing occurs (see www.bankofcanada.ca for rates).

What happens if, after signing the Agreement of Purchase and Sale, the developer delivers new documents?

The developer may make changes to the documents you were given when you signed the Agreement of Purchase and Sale. If you receive any new documents from the developer, you should review them immediately to see where they differ from the material you were given originally. Do not ignore or sign anything received from the developer or its solicitor without reviewing it carefully and you should definitely discuss this with your lawyer. You may, if the changes are “material”, have the right to cancel the contract.

Are there additional costs or charges you should know about?

For new construction, there is a one-time **Tarion** enrolment fee, which starts at \$373.75 for a \$100,000 unit and increases to a maximum of \$862.50, tax included. There is also Land Transfer Tax which is payable on the purchase of every property in Ontario of approximately 1 ½% of the purchase price. In the City of Toronto a second Land Transfer Tax of 1 ½% is also payable on properties above a certain dollar value. You should check this with your lawyer. First time purchasers buying property under \$450,000 are exempted from Land Transfer Tax payments.

You may also be obligated in the Agreement of Purchase and Sale to pay a variety of extra charges. You should make sure you are aware of the additional costs, which developers typically pass on to purchasers at the time of closing of the transaction. Many developers require that purchasers make additional payments for utility installations, development charges, sewer imposts, as well as towards the initial funding of the reserve fund. Some developers require purchasers to lease HVAC equipment in the units.

Some developers collect extra funds from purchasers to offset first year operating expenses. Often purchasers do not learn about these extra expenses for which they will be responsible until very late in the process and just before the closing of the transaction; many are completely unprepared for the "sticker shock". These extra charges will be listed in the Agreement of Purchase and Sale and can sometimes be negotiated and/or capped to a maximum dollar amount during the 10-day cancellation period. Review these with your lawyer. If you do not ask for this you will not get it.

Many developers require that condominium corporations purchase superintendents and guest suites from the developer and finance these through a mortgage in favour of the developer. This mortgage expense forms part of the monthly common expense payments until the mortgage is paid off.

Most developers sell their units with the cost of HST included. The HST rebate which you are entitled to receive if the purchase price of the unit is below the maximum permitted by law and you or a member of your family will be living in the unit, will be assigned by you to the developer. If you are buying as an investor you will be able to claim back the HST but will be required to pay it at the time of closing.

The costs listed above will not apply to a residential resale condominium.

When a buyer takes possession of a condominium unit on the occupancy closing, he or she will have to pay the balance due on occupancy closing (the difference between the down payment and the amount to be paid when title is transferred), post-dated cheques for the occupancy fees as well as payment for the Adjustments.

In addition, the following costs have to be met:

- Your lawyer's fees;
- Adjustments (depending on what is included in the Agreement of Purchase and Sale);
- Land Transfer Tax (payable to the government on every property transfer in Ontario). In the City of Toronto a second Land Transfer Tax is payable on properties above a certain dollar value. You should check this with your lawyer; and
- HST on extras or upgrades, if they are not included in the purchase price (for a new purchase).

Is there any warranty on my property?

Yes, the **Ontario New Home Warranty Program Act administered by the Tarion Warranty Corporation** provides protection for condominium buyers of newly constructed

residential units. However, **Tarion** does not apply currently to properties which are renovated or built on existing foundations. There are two ways in which **Tarion** provides protection.

It guarantees the buyer that any deposit or down payment made by the purchaser of a new condominium unit up to a maximum of \$20,000 will be returned if the developer is unable to complete the transaction.

It warrants the construction of the units from the date of occupancy, and the common elements from the date of registration, provided a claim is reported within 1 year against most defects, 2 years for the mechanical and electrical systems, the building envelope and water penetration, and for 7 years against major structural defects.

In addition, there is a warranty for substitutions of key elements in the unit made by the developer without the consent of the purchaser. For further information on what rights you have under the Tarion Warranty Corporation you can contact them at **1-877-982-7466** or **www.tarion.ca**.

Is buying a resale condominium different? What is a Status Certificate?

When buying a condominium unit in an existing building, you will be able to see what it is you are going to get. You will be able to assess the size of the unit and the condition of the building. You can tell how well a building is looked after by its appearance.

You are not entitled to the same disclosure rights and rescission period that you do when purchasing a condominium unit. It is therefore very important that you should ensure that your offer is conditional on receiving and being satisfied with the information contained in the **Status Certificate** and the accompanying documents.

The **Status Certificate** should be accompanied by a current budget, the last year's financial statements, a summary of the reserve fund study, the standard unit definition, if there is one, and the insurance certificate. It is to be delivered with the documents which govern the condominium corporation and in some cases, a list of those documents, which also affect the corporation, but are not attached. Once the list of agreements is reviewed, you or your lawyer may also wish copies of some or all of them for review. There can be an extra charge for these documents.

The **Status Certificate** is the resale equivalent of a **Disclosure Statement** and you and your lawyer should review all the material that comes with it to ensure that you are satisfied that both the condominium unit and the condominium corporation are suitable for you.

The **Status Certificate**, for which there is a fee of \$100 inclusive of HST, must be delivered within 10 days of the request for it and the payment of the fee. It discloses whether the owner of the unit you are buying is current in the payment of common expenses as well as a picture of the condominium corporation's financial affairs.



What are the expenses I will have to pay when I own my unit?

This is a question that many buyers don't consider carefully enough when purchasing a condominium. The financial obligations you will have to meet typically include:

- Mortgage payments;
- Property taxes;
- Monthly common expenses, including an amount for the reserve fund;
- Utilities and cable if not included in the common expenses; and
- Depending on how the project is designed, you may also have to pay a heat pump or HVAC rental.

Every Agreement of Purchase and Sale is different, so you must read it carefully.

You should also consider what the monthly operating costs are going to be? Does the estimate of common expenses you were given seem reasonable? Bear in mind that you are directly responsible for your share of the common operating and reserve fund expenses of the condominium. You and the other owners will have to increase your monthly common expenses to keep up with rising costs. Like everything else condominium common expenses will tend to increase.

How are common expenses determined?

The developer is responsible for allocating the percentage of common expenses payable by each unit. Usually the developer bases the allocation on the size of the unit; the larger the unit the greater the amount for which it is responsible. A developer however is not required to use this basis for common expense allocation.

Our condominium is registered, what happens now?

To protect the owners' interests, the *Condominium Act, 1998*, requires that within 42 days after the developer transfer 50% of the units to the owners and loses majority control of the project, all of the new owners are entitled to elect a board of directors.

The *Act* also requires that once 15% of the units are owner-occupied, the owners of those units are entitled to elect 1 representative to the board of directors.

What is the Condominium Authority of Ontario (CAO)?

Effective September 1, 2017 the CAO has been established as an Administrative Authority by the province.

It will be funded by the payment of annual fees collected from the condominium corporations. The purpose of the CAO is to make online information easily accessible to condominium residents, to provide mandatory training for directors and to provide dispute resolution processes.

The CAO also oversees a dispute resolution tribunal. The tribunal will be able to make orders equivalent to court orders on the matters over which it will have jurisdiction, starting with access to records and expanding in the future

All condominium corporations are required to register and file information about the condominium with the CAO and pay the annual assessment. Condominiums will have to file notice of changes of board membership as they occur. Each condominium will pay a fee, calculated on the number of voting units in the corporation, but payable as part of the monthly common expenses. Failure to comply with the obligations regarding the CAO set out in the Act can result in restrictions on access to the CAT and the courts.

What is a reserve fund?

A reserve fund is a separate trust account which all condominium corporations are required to establish. A portion of the monthly common expenses paid by the owners is transferred to this separate account in the name of the corporation. The reserve fund is the unit owners' savings account for the major repair and replacement costs of the common elements, which occur as a building gets older.

The contributions made are based on a reserve fund study, usually prepared by an engineer, which establishes the amount the board of directors must ensure is contributed. The *Act* requires that all condominium corporations carry out a reserve fund study and update it every 3 years. If the amount in the reserve fund account is inadequate, the board is required to develop and implement a plan to 'top-it-up'.

A healthy reserve fund is a sign of a financially healthy condominium corporation. The amount in the reserve fund will vary. Where the reserve fund is low, it may be because the corporation has done a lot of work recently and the corporation will be starting to rebuild its fund. If the low figure in the reserve is not the result of major work having been recently completed, and the amount in the reserve fund does not comply with the engineer's recommendations for funding, then you should do further investigation. The notes to the financial statements, provided to owners at the annual general meeting, will indicate if the corporation is not compliant with the contribution levels set out in the reserve fund study.

Who manages the property?

Usually, a property management firm, under the direction of the board of directors, runs the day-to-day affairs of a condominium corporation. Some condominium corporations are self-managed. The board is responsible for carrying out the obligations of the corporation as set out in the *Act*, the

Governing Documents and any contracts to which the corporation is a party.

While a property management firm under contract to the corporation normally makes the day-to-day management decisions, final authority for policy decisions rests with the board of directors of the corporation.

Directors are elected and can be removed at any time by the owners. Some corporations have By-laws which allow the board members in specific circumstances to remove a director. A director's term is usually 3 years.

If the condominium corporation is unhappy with the agreements entered into by the developer on behalf of the condominium corporation, the *Condominium Act* permits the board of directors and/or the owners to terminate these agreements, with a few exceptions.

Under the *Condominium Management Services Act, 2015*, which will be effective November 1, 2017, property management providers and managers will need to be licensed by the Condominium Management Regulatory Authority of Ontario.

The property manager must abide by a Code of Ethics, take educational courses and, among other obligations, ensure that all money paid by owners towards common expenses is held in separate operating and reserve fund accounts in the name of the condominium corporation.

Do I have a say in what happens in the condominium?

Owners have the right and should participate in the affairs of the condominium corporation.

Decisions made by the board of directors will directly influence the use of common elements and what you can do with your unit. For this reason, you should be well informed about what is happening in your corporation. The condominium corporation provides that some decisions are the sole responsibility of the owner-elected board but others are subject to approval of the unit owners.

The *Act* contains provisions designed to allow unit owners a voice in the running of the corporation.

The *Act* ensures that all the condominium records are available for examination by any purchaser, owner or mortgage lender. Commencing November 1, 2017, the *Act* creates two types of records: core and non-core records and designates the length of time records must be kept. Owners are entitled to access core records quickly for no fee. Non-core records can be accessed by a request for records and for fees established in accordance with the regulations under the *Act*.



Who and when should I contact someone at the condominium?

If you have a problem or a question and you are a resident or an owner of a condominium unit, you should contact management about it. You should first direct your inquiry to the property manager who will respond if it is within his or her authority.

If you want to submit materials to be added to the agenda for a meeting or a requisition to have a meeting called you have to use the forms in the regulations prepared under the *Act*. Each condominium corporation has an official address of service, which is contained in the Declaration. If it has been amended, as it often is, the address can be obtained from the management office or it will be contained in the Information Certificate which condominium corporations are required to provide to owners.

Owners and residents should typically address all their requests to property management. Management will then take those matters, which the board must consider to the next board meeting. Don't expect that you will get an answer to your question immediately. Depending on what the question is you may need to wait until the next board meeting is held and the board members have had an opportunity to review your request.

How does condominium living affect me as a home owner?

Condominium living may be very different from your accustomed style of life. Condominium ownership is unlike either freehold house ownership or renting. The following items point out just some of these differences.

Are there restrictions on what I can do with my unit?

Yes, your ownership is more restricted than other homeowners. The following examples indicate some of these limitations:

- A condominium owner must abide by all the provisions of the *Act* and the **Governing Documents**;
- Some condominiums prohibit all pets, others just pets of a certain size or weight;
- Some condominiums prohibit smoking on the common elements and some prohibit smoking anywhere in the building;

- No owner may damage or neglect his or her unit. To do so depreciates the value of the condominium property as a whole;
- If you or someone for whom you are responsible fails to look after your unit or does something, which results in damage to your unit, other units and/or the common elements, you may be responsible for the costs arising from the damage.
- Most Declarations for residential condominiums specify that units can be used only for residential purposes in accordance with the zoning by-law and not for commercial purposes, including AirBnB style rentals; and
- Usually the owner is forbidden from any actions which could threaten the project's insurance coverage (like having a barbecue on the balcony, for example), making any structural changes to a unit or changes to the common elements without the consent of the condominium's board of directors.



What if I want to do renovations in my unit? Can I make changes to the Common Elements? Can I fence in my garden, install a satellite dish or install a patio?

Every condominium has varying restrictions which are set out in the **Governing Documents** regarding what an owner can do with his or her unit. Usually you will be able to decorate the inside of your unit as you wish but you may not do anything that changes the appearance of the building or the exterior. Some condominiums require that the exterior of all window coverings be white or off-white. Some prohibit laying carpet or tiles on balconies.

Usually you cannot remove a wall, change plumbing fixtures, install appliances or replace flooring without the permission of the Board.

Many condominium corporations require that owners, who wish to make more than just cosmetic changes to the interiors of their units, seek permission from the board of directors. If you are buying with a view to renovating the unit, be cautious. You may not be able to do whatever you want. Depending on the renovation the corporation may engage the services of an engineer at your expense. Many corporations require that you sign an In-suite Renovation Agreement so that you are fully responsible to ensure, among other things, that the construction is done properly and within specific hours, etc.

If you want to build a fence, install a satellite dish or a patio or make other changes to the common elements, the *Act* requires that you must have the approval of the board of directors and/or the corporation depending on the change.

You will also have to meet the requirements imposed by the board and sign an Alteration Agreement, which sets out your obligations with respect to the change. This Agreement will make you responsible for the maintenance and repair of the alteration as well as all costs relating thereto including the preparation of the Agreement and the associated legal costs.

Can I rent my condominium unit? Are there any restrictions on renting?

Unless restricted from doing so by provisions of the *Declaration* and/or the *Rules* a condominium owner can sell, rent, lease or transfer the title of his or her unit as he or she chooses. Some corporations do not allow owners to sell or rent parking units to persons who do not live in the building. AirBnB is not permitted in most condominium corporations as it contradicts the single family residential zoning. In addition many condominiums have *Rules* prohibiting leasing of units for a term of less than anywhere between 3-12 months, with the intention of eliminating the rental of units for short term hotel style rentals.

An owner who leases his or her unit must deliver to the corporation a summary of the lease or a copy of the lease which includes the name(s) of the tenant(s) and other information.

Many condominiums have owner and tenant information sheets that must be completed by owners and/or tenants before they can move into their units. Many also have elevator reservation agreements.

An owner who rents his/her unit and the tenant are both responsible to the corporation. If an owner whose unit is rented fails to pay his/her common expenses, the tenant can be instructed to pay rent to the corporation. If the tenant does pay the corporation, that amount can be deducted from the rent due to the unit owner and the tenant is not subject to termination of the lease for non-payment of the rent.

The tenant is bound the *Act* and/or the **Governing Documents**, exactly as owners are. If a tenant does not comply with the *Act* and/or *Governing Documents*, the condominium corporation can take action against the owner and/or the tenant.

Can anyone enter my unit with or without permission?

The *Act* states that any person authorized by the corporation may enter any unit on reasonable notice at any reasonable time to carry out its duties. In an emergency, immediate entry will be permitted. The corporation may correct any condition which violates the corporation's insurance policy or the **Governing Documents**, whether in the unit or on the common elements. Most condominiums prohibit the installation of additional locks and are entitled to a key to your unit and will change the locks to the unit, at your expense, if required.

Who is responsible for the maintenance and repairs?

Generally, repairs to common elements are the responsibility of the corporation; repairs to the unit are the owner's responsibility. For example, if the swimming pool in a condominium needs resurfacing, the condominium corporation must take care of this, with the cost paid from the common expenses. If a unit owner is responsible for maintaining and/or repairing the unit and/or a portion of the common elements, then the owner is responsible

and if the owner fails to do it, the corporation can do it and recover the cost of the repairs from the unit owner.

Maintenance to parts of the common elements, which are exclusively used by the unit owner – such as a balcony or a patio, may be the responsibility of the individual owner or the corporation, depending on what the *Declaration* provides.

If repairs must be made inside your unit – if, for example, your sink doesn't drain – the responsibility for the repairs is normally yours. For this reason, it is a good idea, in a new project where appliances and fixtures have been provided, to find out about the guarantees and warranties. Are you responsible for parts and labour costs? The builder is not responsible for such costs, nor is the corporation.

What is an Information Certificate?

There are three types of information certificates, in forms set by the government, that boards must distribute to owners at different times – a Periodic Information Certificate, an Information Certificate Update, and a New Owner Information Certificate. They will include information on the corporation's insurance, the members of the board of directors, compliance with the CAO and other matters similar to items currently included in Status Certificates. The Periodic Information Certificate must be updated by the board of directors and delivered at least twice a year.

Can I stop making monthly payments if I'm not happy with the Board or management?

No. You are legally bound to pay the monthly common expenses whether or not you are happy with management and/or the board of directors. Common expenses include the cost of insurance, accounting fees, as well as utilities, reserve fund contributions and costs for the physical upkeep of the property.

If you do not make your monthly payments, the corporation can put a lien against your property for the amount owing, together with any interest and legal costs incurred. Your mortgage lender may pay these arrears on your behalf and add the amount to the principal outstanding on the mortgage, but the non-payment of common expenses constitutes default under your mortgage. If neither you nor the mortgage lender pays the arrears, the corporation can collect from tenants, if any, in the unit, seek vacant possession, where necessary and sell your unit to collect the amount owing.

If you are not pleased with how the condominium is run, bring it to the attention of the board of directors or raise your concerns at an annual meeting. If the property manager is not fulfilling the terms of the management agreement, the board can take appropriate action.

Do I have to get involved?

You should get involved. You have made an investment in this condominium. The least you can do is attend general meetings, and vote on the issues. If your corporation uses proxies, whether paper or electronic, you can still cast your vote on the issues on the agenda for the meeting. Remember though, if you or your lawyer have not notified the condominium of your

ownership of the unit or you are in arrears of your common expenses for more than 30 days, you are not entitled to either notice of a meeting or to vote at a meeting.

As an owner, you can agree, in a form set by the government, to receive notices electronically and many condominiums are now using electronic voting.

In many ways, a condominium community operates much like a small town. It is essentially the fourth level of government. Just as a town's local residents elect a town council, so condominium unit owners elect a board of directors to take responsibility for the running of the condominium corporation. The condominium corporation works best when there is active interest by all members.



I'd like to be on the Board of Directors. What should I do?

Let the people in your condominium know that you are interested and the qualifications you have to handle the job. If you are living in a new project, a meeting must be held 42 days after the developer no longer holds majority ownership of the units. A new Board, replacing the developer's Board, will be elected at that time.

The *Act* requires that there be at least 3 directors on the corporation's board. Your corporation's *By-laws* may specify that there are to be more than three directors.

The owners electing the directors do not determine which person will hold which position on the board (i.e. who is president, treasurer etc.); the elected individuals decide who will hold what position.

Directors may be elected for terms of up to 3 years and may run for re-election. Ideally, the first directors elected serve staggered terms and thereafter 3-year terms. That way, there will always be experienced individuals on the Board.

The changes to the *Act*, becoming effective November 1, 2017, will require that a board of directors send a pre-notice to all owners asking persons to indicate if they are interested in becoming board members. If you wish to be a board member, you should check the *By-laws* to see if you meet the qualifications. As of November 1, 2017, as a candidate, you will need to disclose information required by the *Act*. The *By-laws* may also require additional disclosure information and an

obligation to deliver it in writing before the notice of meeting is sent to the owners.

Can the owners remove a board member?

To remove a member of the board of directors a requisition for removal, signed by not less than 15% of the owners entitled to vote, must be submitted to the board of directors. Once a valid requisition is received, the board must call and hold a meeting for that purpose. At that meeting, the members who together own a majority of all the units may remove directors from office by a vote in favour of removal. If removed, the owners will elect other eligible persons to complete the unexpired portion of the removed directors' term. If a vacancy occurs on the board due to a resignation or death, the *Act* allows the board to appoint an eligible individual to fill the vacancy until the next annual meeting.

What is a director's role?

As elected representatives of the owners, the board takes responsibility for managing the condominium property and its business affairs. The *Condominium Act* requires that at least a majority of the directors be present for the board to transact business. Board meetings are generally held on a pre-arranged basis, usually monthly. The *By-laws* of the corporation may allow for meetings to be held electronically.

Every board has certain duties, specified under the *Act*. It must ensure that the corporation registers and maintains its filings with the CAO, along with paying the annual fee/assessment, the corporation's monies are held in trust and properly invested, retain professional services keep and make available for inspection the records required by the *Act*, enter into contracts for property management, service and maintenance, as well as for major repair and replacement. In addition, the board is responsible for enforcing the provisions of the *Act*, and the **Governing Documents**. The *Declaration* and *By-laws* of the corporation elaborate on the duties of the Board. In general, the directors are responsible for the upkeep and maintenance of the project and other business matters, usually by supervising the actions of the property manager.

Directors also have other specific powers as elected representatives of the condominium corporation. They can hire personnel - either individuals or management companies - to maintain the common elements. They can enter into legal contracts and, with the consent of the percentage of unit owners specified in the *Act*, acquire additional property or sell existing property.

Each officer of the board has a specific function:

- the president presides over board meetings and leads the board that is charged with the responsibility for the corporation's affairs;
- the vice-president assists and can substitute in the president's absence;
- the secretary is responsible for the minutes of meetings, giving notices of meetings, keeping the records for the corporation, including the record of owners, mortgage lenders and leases; the treasurer is responsible for expenditures and financial records. Generally, the

management company takes care of all day-to-day business affairs of the corporation, reporting to the treasurer by means of financial statements and bank statements; and

- some condominiums have a general manager who serves as liaison between the board and the management company.

Since the treasurer and the board of directors have ultimate responsibility for the business affairs of the corporation, no management company should be given a free hand with expenditures and it should be reporting regularly on all financial matters. The treasurer and/or one other board member should be required to co-sign any cheques made out by the property manager. The treasurer is also responsible for overseeing the corporation's annual audit.

What makes a good director?

Directors, although they usually receive no fee for their work, are expected to take on a great deal of responsibility. Their decisions have far-reaching consequences and they are responsible for large sums of money. Many corporations *By-laws* require that board members agree in writing to abide by a Code of Ethics.

It is helpful if a director possess some expertise in business matters. A working knowledge of the legal intricacies of condominium living would also be a tremendous asset to any director.

To avoid potential personal liability, the *Act* says that directors should seek out and rely on the advice of professionals whose expertise applies to the issues being considered. For example, if the board of directors consults the corporation's accountant on a financial issue, or lawyer on a legal issue, and makes a decision based on that professional's advice and the decision results in a loss, the board members will be protected from personal liability. If however the board members do not seek the necessary professional advice and make a decision, which results in a loss to the corporation, they may not be protected from personal liability, as they may not have met the standard of care imposed upon them by the *Act*.

Board members should receive advice from several sources before hiring anyone to provide professional services. Boards should not sign a contract prepared by the other party to the agreement without having it reviewed by the appropriate professional. It is wise to seek legal advice on contractual matters since such undertakings can involve large sums of money.

Board members must remember that property managers do not have the engineering, accounting or legal training to qualify them to give engineering, accounting or legal advice.

All board members, elected after November 1, 2017 will have to complete mandatory training. For those board members who want additional training, there are courses available. Contact your corporation's lawyer or the Canadian Condominium Institute for information.

For the protection of the condominium owners who must indemnify the directors for actions they might take (unless such actions are dishonest), the condominium corporation is supposed to carry directors and officers liability insurance.

What are the responsibilities of the property manager?

The property manager is an agent of the corporation and, as the name suggests, takes care of the day-to-day management of the property, under the direction of the Board.

On the authority of the Board, the property manager is responsible for collecting and disbursing common expense money. This money, which must be held in a trust account, is used to maintain and repair the property, pay insurance premiums, etc. Cheques issued by the property management company should be co-signed by at least one director of the corporation.

Ontario has introduced the *Condominium Management Services Act, 2015*. The first part will become effective late in 2017 and will obligate all management companies and managers to be licensed and to take educational courses, comply with standards of conduct and a code of ethics. When the second part becomes effective, management will be subject to discipline procedures. A manager or a management company that is not licensed will find its contract is unenforceable against the corporation.

When are meetings held and who calls them? What kind of notice am I entitled to receive?

The first, a general meeting of a new condominium corporation, must be called within 3 months after a project is registered. It is usually combined with the Turnover meeting called by the developer once 50% of the ownership of units has been transferred to purchasers. After that, the *Act* requires that annual meetings must be held no more than 6 months after the end of the corporation's fiscal year.

The amendments to the *Act* require that before any meeting of owners is called by the board of directors a preliminary notice of the meeting must be sent to all owners. This notice will be in a form prescribed in the regulations and must be sent 20 days before the notice of meeting is sent to owners. The Preliminary Notice of meeting will have to indicate the purpose of the meeting. If it is to elect directors, the Preliminary Notice will call for candidates and the required disclosure information. It will also ask if owners want any materials added to the Notice of Meeting that will be sent later. The board is not required to include these materials unless 15% of the owners have signed the request to include them with the Notice of Meeting.

Annual general meetings are run like the meetings of any other corporation. A chairperson, usually the president or the corporation's solicitor, will preside at the meeting and remarks will be addressed to him or her. The chairperson's permission is required to address the floor. Minutes of the meeting must be kept to record the proceedings, including matters put to a vote. Motions will be presented and seconded; each motion will be discussed and put to a vote.

Owners at meetings will receive reports on the condominium affairs, elect directors to the Board, appoint the auditor and vote

on any matters for which notice has been given to the owners and mortgage lenders. Members of the corporation will bring forward issues of general concern for discussion.

Attendance at general meetings normally is restricted by the *By-laws*. Usually only owners, those to whom they have given their proxies, their agents and mortgage lenders and guests of the corporation may attend. Others must have approval of the members, or the chairperson of the meeting, before being allowed to attend.

If owners are unhappy or want to discuss matters with the board of directors they have the right to requisition a meeting. Owners of 15% of the units entitled to vote may sign a requisition asking the board to call a meeting of the corporation. At that meeting, depending on the business set out in the requisition, owners may or may not have the right to vote.

Who makes up the quorum for a meeting and who is allowed to vote?

The quorum for an owners' meeting is 25%, of the owners, or higher if a by-law so provides, entitled to receive notice and vote at the meeting who are present in person or by proxy, including electronic proxies. As of November 1, 2017, if the 25% quorum cannot be achieved at two meetings, at the third meeting called the quorum will be reduced to 15% unless the *By-laws* of the corporation provide for a greater quorum. To determine who is eligible to receive notice and vote, the corporation keeps a Record of owners and mortgage lenders. This Record lists the owners' names and addresses. Each owner listed in the Record on the 20th day before the meeting is held is served with notice of the meeting, as required by the *Act* at the address shown on the Record and has the right to vote at members' meetings. Owners who are in arrears of common expenses for more than 30 days prior to the meeting and who do not pay the amount owing in full prior to the meeting are not entitled to be counted in the quorum or to vote at the meeting.

It is every owner's responsibility to ensure that his or her name is included in the corporation's Record of Owners and Mortgagees. The *Act* requires that owners deliver information regarding their ownership to the corporation. Failure to do so will result in the owner not receiving notices of meetings. There is a form that must be completed for this purpose. It is not the corporation's responsibility, unless properly notified to add an owner's name to the Record.

When a mortgage is held on a condominium unit, the person or institution holding the mortgage will probably, by virtue of the mortgage agreement, have the right to exercise the owner's voting right, provided the owner and the corporation are notified of the lender's intention to vote 4 days in advance of a meeting. It is, however, most unusual for a lender to exercise its right to vote.

How do you change the condominium documents?

In theory, members of the condominium corporation have almost unlimited power to change the documents by which they live.

In practice, however, amending these documents is not easy. Changing the *Declaration* or the *By-laws* will take a great deal of

perseverance on your part. The *Act* requires either 90% or 80% consent of all the owners of all the units or a court order on limited grounds before a *Declaration* can be amended.

By-laws can be made or amended by the board by resolution and confirmed, with or without amendment, by a vote in favour of members who own at least a majority of all the units. Suppose, for example, you want to have a By-law setting qualifications for board members beyond what is included in the *Act*. To make this change, you need the support of a majority of all the units, and the board must approve it first. Some By-laws can be amended with a majority vote of a quorum but these are on more minor matters.

Rules are created or amended by the board of directors and notice of the *Rules* is given to the owners, advising that unless a meeting is requisitioned and the majority of owners vote to defeat the rules they will be effective 30 days after the notice is sent.

How is the condominium insured?

The *Act* specifies that the corporation must insure its obligation to repair the condominium property to its replacement value, subject to a reasonable deductible. The directors must have the condominium assets appraised from time to time to determine that the corporation's insurance needs are being met.

The insurance premiums are part of the common expenses that all owners pay. While the insurance covers the full replacement value of the units and common elements, it does not cover the improvements to a unit or the personal property of the owner, the cost of living out of your unit or if you have a tenant the loss of rental income. It will also not cover a unit owner's responsibility for any insurance deductible.

Your unit owner's insurance should cover the improvements made to your unit (such as wallpaper, upgraded carpets and cabinetry, light fixtures, window coverings, etc.), as well as your personal property, your liability to third parties and any deductible which may be charged back to the unit for damages flowing from your unit and, in some condominiums with the appropriate *By-laws*, where the corporation is not responsible for the loss. It is wise to contact an insurance broker who is either responsible for the corporation's insurance or familiar with it, to make sure you are properly insured and there are no gaps in coverage between your insurance and the corporation's.

You will also want to know if the corporation has established what portions of a unit are considered part of a Standard Unit for insurance purposes. Eventually, condominiums that do not have a standard unit definition will be deemed to have their standard unit set out in the regulations to the *Act*. All condominium corporations registered after May 5, 2001 should have a document stating what forms the standard unit; condominiums registered before that date may have passed a *By-law* to establish the "standard unit" for insurance purposes. As a unit owner you are responsible to insure anything not included in the standard unit. If damage covered by the insurance contract occurs to the condominium property, the insurance company will be contacted in writing by property management or the board. Usually, the board will then take charge of appraisals, the hiring of contractors or whatever else is necessary to effect repairs. Owners are not entitled to deal directly with the corporation's

insurer nor should they repair their units before checking with management to establish if the damage is insured.

What about additional recreation facilities? Can the board of directors change the services I expect to receive?

Yes, it can. A corporation does have the power to purchase property on behalf of the condominium. It is possible that it could purchase a golf course or even a small farm for members to grow their own produce. Such a purchase, however, would have to be for the use and benefit of the owners, not for investment purposes. It is more usual, however, for a condominium corporation to decide to extend existing facilities on its own property by the addition of further structures – a tennis court or a children's playground, for example.

The corporation also has the right to sell property, and to add, eliminate or vary the services the owners receive.

If the addition, alteration, renovation or change in service is substantial, a vote of 66⅔% of the owners in favour of it is required. The *Act* defines what is substantial as something, which costs more than 10% of the corporation's annual budget or anything the board decides is substantial. Changes, which are not substantial, can be made without a vote of owners. The board alone can make some changes with no notice to owners; other changes may require that notice be given to the owners who then have a right to requisition a meeting and vote against the change.

There are many changes coming to the Condominium Act. Are they all going to happen at once?

There are a lot of changes coming and they will not all become law at the same time. I have included a significant number of the changes that will be effective November 1, 2017 and these are the ones I think you want to know about; not all of them are included.

To Sum-Up.

Buying and living in a condominium is more complicated than in a single family home. You must understand what it is you are purchasing and whether the lifestyle will suit you and your family. Now that you have made your decision, and with the benefit of the information in this booklet, I hope you discover that the advantages of condominium living are many and that you find it a rewarding experience!

Prepared by

Audrey Loeb LSM B.A.LL.B. LL.M.

Sibley Righton LLP

Barristers & Solicitors

250 University Avenue

Toronto, ON M5H 3E5

Tel: 416.214.5267

Fax: 416.214.5467

E-mail: aloeb@sibleyrighton.com



SHIBLEY RIGHTON LLP
Barristers and Solicitors

SHIBLEY RIGHTON LLP
CONDOMINIUM GROUP



2018 GUIDE TO
LEGISLATIVE
CHANGES
AFFECTING
CONDOMINIUMS

Obtaining a General License requires completing educational and examination requirements, and at least two years of work experience. Individuals can only hold a Transitional General License for three years, which means that Transitional General Licensees must complete the educational and examination requirements within that time.

Limited Licensees must become General Licensees within five years.

What about new property managers?

New property managers must first apply for a Limited License. They may apply for a General License after completing the prescribed educational and examination requirements and 2 years of supervised work experience.

What does this mean for directors?

Directors must ensure that their condominium management service provider(s) are licensed. As of February 1, 2018 a corporation cannot enter into a management agreement with an unlicensed manager. Directors should also ask for certificates of insurance for fidelity coverage and errors and omissions insurance.

Code of Ethics

Property managers are now required to comply with a Code of Ethics. Failure to do so can result in disciplinary action. The Code of Ethics requires, among other things, property managers to:

- provide services fairly, honestly and with integrity, and not engage in disgraceful, dishonourable, or unprofessional behaviour;
- be financially responsible in providing management services;
- endeavour to treat all person equally, without harassment;
- prevent error, misrepresentation, fraud or any unethical practice;
- keep the condominium informed; and
- promote the best interests of the condominium; and not to arrange or provide services if the services cannot be provided with reasonable knowledge, skill, judgement and competence.

The Condominium Management Services Act, 2015

Anyone providing "condominium management services" must now be licensed, insured, and must comply with other requirements set out in the *Condominium Management Services Act, 2015* (CMSA).

"Condominium management services" are defined broadly to include services performed under the delegated authority of the corporation (e.g. collecting common expenses, making payments or negotiating contracts on behalf of the corporation). However, certain professionals such as lawyers, engineers and accountants are excluded from the licensing regulations.

There are 3 different types of licences

1. Limited Licence: Limited Licensees must be supervised by other licensees when performing key tasks such as entering into, extending, or terminating contracts, spending more than \$500 of operating funds or delivering notices to owners and mortgagees. Limited Licensees cannot spend reserve funds or sign status certificates.

2. General Licence: A General Licensee can perform any management task. General Licensees must have at least two years' experience as a property manager.

3. Transitional General Licence: A Transitional General Licensee is an individual who has at least two years' experience as a property manager but has not completed the educational and examination requirements necessary to apply for a general licence.

So how do you get licensed?

If you have been employed as a property manager as of November 1, 2017, you were required to apply for a license by January 29, 2018. If you failed to do so, it is against the law for you to provide condominium management services.

Individuals were required to apply for a Transitional General License, unless the individual had been employed for less than two years as of November 1, 2017 (limited licensees).

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Phase 1 of the Condominium Act Reforms

On November 1, 2017, phase 1 of the reforms to the legislation governing condominiums in Ontario became law. These include changes to the *Condominium Act, 1998* and the implementation of the *Condominium Management Services Act, 2015*.

These initial reforms are designed to implement minimum standards of knowledge for managers and directors, increase communication between boards and unit owners, and encourage condominium corporations to keep records electronically.



The reforms directly impact owners, directors, and managers. The changes with the most immediate impact are:

1. licensing of condominium property managers.
2. mandatory training for directors elected, re-elected or appointed after November 1, 2017;
3. requiring corporations to deliver Preliminary Notices of Meetings and Information Certificates;
4. implementing procedures for requesting access to the corporation's records;
5. disputes over access to records will be resolved by the new Condominium Authority Tribunal; and
6. creating a database or registry of condominium corporations and their directors and managers which will be maintained by the Con-

List of Prescribed Forms

The following are some of the new forms prescribed under the *Condominium Act* which are available at the CAO's website.

Information Certificates & Notices of Owner Posting

1. Periodic Information Certificate
2. Information Certificate Update
3. New Owner Information Certificate
4. Notice of Online Posting of Information

Meeting of Owners

1. Preliminary Notice of Meeting of Owners
2. Meeting of Owners under s. 34(5) of the *Condominium Act*
3. Submission to Include Material in the Notice of Meeting of Owners
4. Notice of Meeting of Owners
5. Proxy Form

Access to Records

1. Request for Records
2. Board's Response to Request for Records
3. Waiver by Requester of Records

Records of the Corporation (Optional)

1. Notice Relating to Record of Owners
2. Notice Relating to Record of Mortgagees
3. Agreement to Receive Notices Electronically

New Procedure for Passing Rules

The manner in which rules are passed has changed. Previously, when the Board proposed a new rule, owners had an opportunity to requisition a meeting of owners within thirty days to vote on the rule. If owners requisitioned a meeting to challenge the rule, the rule had to be approved at the meeting, otherwise the rule would not be in force.

As of November 1, 2017, when a board proposes a new rule, owners still have the right to requisition a meeting to vote on the rule. However, the new rule will only be defeated if a majority of owners vote against it at the meeting. If quorum is not achieved at the meeting, the rule will automatically come into force on the date set out in the notice.

This new procedure will no doubt be a welcome change for those corporations that were previously unable to make rule changes because of a small minority of vocal residents.



Legislative Changes to Come

Protecting Condominium Owners' Act, 2015

Only a relatively small part of the condominium reforms are currently in force. Many more will be introduced over the coming months. The following legislative reforms have been announced:

- enhanced disclosure obligations for developers;
- formal tendering will be necessary for certain contracts;
- new notifications will be given to owners of budgets and budget overages;
- there will be additional requirements regarding reserve fund studies and the creation of annual reserve fund budgets;
- changes to a corporation's ability to recover an insurance deductible from an owner;
- changes to a corporation's ability to apply chargebacks and an owner's ability to challenge them; and
- a specific legislative prohibition against unreasonable noise.

Short-Term Leasing: Many zoning by-laws are expected to change to restrict residential condominiums from being turned into hotels. Effective June 1, 2018, the City of Toronto's by-laws will mandate that short-term leasing only occur within an individual's primary residence. Other municipalities are expected to adopt similar restrictions.

Vehicle Charging Stations: The Province of Ontario has announced that charging stations for electric vehicles may become mandatory in certain condominium buildings and is creating new regulations to facilitate the installation of vehicle charging stations in condominiums.

The ***Protection for Owners and Purchasers of New Homes Act, 2017*** will establish stronger warranties and protections for purchasers of new homes. Parts of this legislation are already in force.

The use of **cannabis** is expected to become legal in July, 2018. Condominiums may impose conditions on cannabis smoking, similar to what is done with cigarettes, cigars and e-cigarettes.

The ***Reliable Elevators Act, 2017***, will impose new obligations on elevator maintenance contractors and will specify the maximum amount of time for which an elevator can be out of service.

The Green Energy Act

The *Green Energy Act*, which is now in force, requires condominium buildings without separate metering to report electricity and gas consumption. This applies (with limited exemptions) to condominiums with more than 10 units and a gross floor area of at least 50,000 sq. ft. This requirement is being phased in as follows:

- non-residential condominium corporations larger than 250,000 sq. ft. must begin reporting on July 1, 2018;
- all condominium corporations larger than 100,000 sq. ft. must be reporting as of July 1, 2019; and
- condominiums between 50,000—100,000 sq. ft. must begin reporting on July 1, 2020.

The *Green Energy Act* also prevents condominium corporations from prohibiting clotheslines on the ground floor of residential buildings.



Information Certificate Update (ICU)

An ICU must be delivered to owners upon the occurrence of a "trigger" event. Trigger events include a change of the corporation's address for service, a change to insurance deductibles, director and officer changes, and loss of quorum on the board. The timeline to deliver an ICU depends on the nature of the event.

A corporation may also pass a by-law to require that ICU's be sent out on a more frequent basis or upon the occurrence of additional trigger events.

New Owner Information Certificate (NOIC)

The NOIC must be issued to new owners and includes up-to-date information concerning the corporation. A NOIC must be delivered to new unit owners within 30 days after an owner has advised the corporation of his/her purchase of a unit. The NOIC must include a copy of the most recent PIC and ICU sent to owners.

Avoiding PICs, ICUs, or NOICs

Corporations are exempt from having to provide information certificates in any fiscal year if:

- a developer turnover meeting has been held; and
- each year the owners of at least 80% of the units (who have not been in arrears of common expenses for 30 days or more) consent in writing to dispense with the requirements to distribute the certificates.

A Tip to Reduce the Cost of Providing Information Certificates

Depending on timing, corporations may be able to reduce the cost of providing information certificates by including the PIC and any ICU with the AGM package.

Corporations can reduce these costs further by having owners consent to receive documents electronically (discussed earlier in this booklet).

Information Certificates

Various changes have been introduced to improve communication among boards, owners and mortgagees.

To ensure that boards inform owners of what is happening in their corporations, the *Condominium Act* now requires that "information certificates" be delivered to owners at specific times during the year and updated upon the occurrence of certain events. The government has created prescribed forms for the certificates which will alleviate some of the workload for corporations.

Corporations must now produce three types of information certificates:

1. Periodic Information Certificates;
2. Information Certificate Updates; and
3. New Owner Information Certificates.

Periodic Information Certificate (PIC)

The information contained in a PIC is similar to that found in a status certificate. The PIC will include the names of the board members, information on insurance, finances, reserve funds, the budgets, information from director disclosures and more. The PIC must be delivered to owners twice during the corporation's fiscal year, within 60 days of the end of the first and third fiscal quarters. A copy of the most recent PIC (and ICU, if any), must be made available at the corporation's AGM.



The Fair Workplaces, Better Jobs Act, 2017

This legislation became law on November 27, 2017 and introduces many changes, some of which may affect your condominium corporation:

- **Minimum Wage Increase:** The minimum wage has increased from \$11.60 per hour to \$14.00 per hour.
- **More Vacation Pay:** After five years of service, employees are now entitled to three weeks' vacation pay (previously two weeks).
- **Public Holiday Pay Calculation:** There is a new formula for calculating holiday pay.
- **New Personal Emergency Leave:** All employees are entitled to 10 personal emergency days per year, two of which must be paid by the employer.
- **Wage Parity:** Effective April 1, 2018, part-time and other employees must be paid the same wage as full-time employees who perform substantially the same work, unless there is a legitimate basis for the wage difference.
- **Leave Periods:** There are increases to medical, pregnancy, parental and other leave periods. There are also new leave entitlements for domestic or sexual violence and child death.

The following changes will become law on January 1, 2019:

- **Reporting Pay:** Employees who regularly work more than three hours per day must be paid at least three hours' pay upon reporting for work, even if they work less.
- **On-Call Pay:** Employees who are on-call and not called into work, or who are called into work for less than three hours, must be paid at least three hours' pay.
- **Shift Cancellations:** If an employee's shift is cancelled with less than 48 hours' notice, the employee must be paid at least three hours' pay (with limited exceptions).
- **Right to Refuse Work:** Employees have the right to refuse work where the request is made within 96 hours of the start of the shift.

The Condominium Authority of Ontario

The Condominium Authority of Ontario (CAO) is an Administrative Authority which is an independent, not-for-profit corporation created by the Government of Ontario. It is funded by condominium owners. The CAO is developing a registry of all the condominium corporations in Ontario. The CAO is responsible for educational resources and provides training for condominium directors. It also provides information and services to the public and administers the Condominium Authority Tribunal.

All condominium corporations in Ontario must be registered with the CAO by February 28, 2018. Corporations can register on the CAO's website. There are repercussions for corporations who have not registered and paid their fees.

Condominium Returns

Condominium corporations are required to file returns with the CAO. Corporations must disclose prescribed information, including the names and addresses for service of the directors and the property manager, the date of the last AGM, and if an inspector or administrator has been appointed. Returns will be available on the CAO website after March 1, 2018.

- **Annual Return:** Must be filed by each corporation between January 1 and March 31 each year.
- **Notice of Change:** Must be filed when information filed in a return has changed. The Notice of Change must be filed within 30 days of the changes.
- **Transitional Return:** Corporations created on or before December 31, 2017 are required to file a one-time transitional return by March 31, 2018.

3

The Requester's Response

The requester must respond on the prescribed form confirming which records he/she wants and paying any applicable estimated fee. This does not apply if the requester asked only for only core records delivered electronically.

Abandonment

A request is deemed to be abandoned if the requester does not respond within 60 days or apply to the Tribunal within 6 months.

4

Delivering Records

Once the requestor pays the fee, the Board must provide core records requested in paper format within 7 days and non-core records within 30 days of receiving payment.

If the actual cost of providing the record is more than the estimate, the requester is obligated to pay the difference up to 10% more than the estimate. If the cost was less than the estimate, the Corporation must refund the difference.

Procedure to

1

The Request

The requester must deliver the prescribed form indicating the records being sought and whether hard copies or electronic are requested.

2

Deliver Core Records

If core records are requested electronically, the Board must provide the records within 30 days at no cost, even if the Board is required to make redactions or photocopies.

or Board's Response on Prescribed Form

If non-core records are requested, or if core records are requested in hard copy, the Board must respond on the prescribed form within 30 days identifying records to be produced and the estimated cost.

Corporations can charge up to \$0.20 per page for copies plus labour if a labour cost was paid by the corporation.

The Condominium Authority Tribunal

The CAT is a new adjudicative body set up to resolve condominium disputes in a cheaper, easier, and faster manner than the courts. It began operating on November 1, 2017 and is currently only hearing disputes regarding access to condominium records. The plan is for the CAT to eventually deal with a broad range of condominium issues.

The CAT's dispute resolution process is entirely online. In order to initiate a dispute, an individual must create an account on the CAO's website, provide the information requested, and pay a non-refundable \$25 fee. An application to the CAT goes through three stages:

1. **Negotiation** – In this initial stage, the parties exchange documents and communicate with each other and try to settle the dispute. No CAT staff or adjudicators are involved at this stage. There is an automated system for exchanging binding settlement offers. If the parties agree to a settlement, the online tools generate a settlement agreement.
2. **Mediation** – If the dispute is not settled during the first stage, the CAT appoints one of its members as a mediator to assist the settlement negotiations. The fee for mediation is \$50. If no settlement is reached, the Applicant may apply for a tribunal decision.
3. **Tribunal Decision** – At this stage the CAT assigns an adjudicator who controls the process and decides how the hearing will proceed. The adjudicator will then make a decision based on the parties' written arguments and evidence. The adjudicator can schedule a teleconference, video conference, or live proceedings in order to make a decision. The fee for the tribunal decision process is \$125.

The CAT's decision is binding and carries the same legal effect as a court order. Like a court, the CAT can also award costs to the parties. It can also levy a penalty in limited circumstances.

Parties may be represented by a lawyer or paralegal during the CAT process, but it has been designed so that legal representation is not required.

Mandatory Training for Directors

Board members elected or appointed to a board on or after November 1, 2017 are required to complete mandatory training within six months of their election or appointment. Individuals who already sit on a board as of November 1, 2017 do not have to complete the training until they are re-elected or appointed. Once a director has completed the training, it must only be renewed every seven years.

The training requirement was implemented to ensure that board members have a minimum level of condominium knowledge. This was done in response to submissions to the government that some board members are not well enough informed to make good decisions on behalf of their condominium corporations.

The director training is run by the CAO. It is free and is delivered online in a series of "modules". Director training takes approximately 3 to 5 hours to complete. There is no test at the end. There are periodic multiple choice questions but, if they are answered incorrectly, the viewer is given further opportunities to answer until the correct selection is made.

Within 15 days of receiving evidence that he or she has completed the training, an individual must: (1) notify his/her corporation that the training has been completed, (2) provide the evidence of completion to the corporation, and (3) provide written evidence of any costs the individual incurred for the training. Condominium corporations are required to reimburse directors for those costs within 30 days. Failure to complete the training will result in automatic disqualification from the board of directors.



4. Disputes regarding access to records must be brought before the CAT. The maximum penalty the CAT can award for failing to produce records is now \$5,000, payable to a unit owner who is found to have been improperly denied access to records.

A records request is deemed abandoned by an owner if he or she does not respond to the board's response within 60 days, or if no application is brought to the CAT within 6 months of the initial request.



5. There are now minimum retention periods for all records. Most operating and financial records must be retained for 7 years after the year they were produced, while others (Declarations, By-laws and Rules, agreements to which the corporation is a party, including insurance policies) must be retained indefinitely. Retention periods are extended if the records are part of a litigation matter or a records request.

6. Records can now be stored either electronically or in hard copy. Electronic records are acceptable as long as they can be reproduced and there is protection against their loss. Safeguards, such as passwords, should be in place to protect against unauthorized access. Hard copy records must be kept in a location "reasonably close" to the condominium, or at the manager's offices.

7. The Condominium Act identifies records that a corporation does not have to provide. Owners do not have a right of access to all records. There are exclusions such as employee information and email addresses of owners.

Now is a good time for corporations to update the manner in which they store their records. We recommend that all core records be posted on a corporation's website or portal, if one exists, or stored electronically so that they can be quickly and easily provided to unit owners.



Record Keeping and Access

The ability of unit owners to access records may be the area most affected by the legislative changes enacted to date. Previously, the process by which owners requested and obtained (or were denied) access to records was not regulated. The legislative changes introduce the following concepts and procedures:

1. There is a new procedure for requesting records. A records request must be in a prescribed form and be submitted to the board. The board must issue a response within 30 days indicating what they will and will not provide, and the estimated cost of production. The requester must then send a response identifying which records they would like and pay the estimated cost.

2. Records are now defined as either "core" or "non-core" records. Core records include the Declaration, By-laws, Rules, Financial Statements, Minutes of Meetings, and Notices. If owners request electronic copies of core records, they must be provided free of charge. Corporations can charge \$0.20 per page for core records that are requested in paper format but cannot charge for labour. Corporations are required to produce records within certain timelines, depending on the type of document requested and the method of delivery.

3. Corporations can charge for the cost of producing non-core records and for making copies of core records, but can only charge for the actual costs incurred by the corporation. Labour costs can be charged for non-core records and must be reasonable. Copying/printing costs cannot exceed \$0.20 per page. If records are delivered electronically, printing costs cannot be charged.



Serving Notices Electronically

Condominium corporations were previously able to deliver notices and documents electronically (usually by email) to those owners who consented to receive electronic correspondence. This practice was welcomed in many corporations because it reduced printing, mailing, and administrative costs.

The amendments to the *Condominium Act* have added new, mandatory procedures about how this must be done. Condominium corporations that wish to deliver notices electronically are required to take the following steps (even those corporations that were communicating electronically with owners before the amendments came into force).

The Board of Directors must first pass a resolution stating what methods of electronic communication it will use for serving notices on owners or mortgagees. This will often be via email but could include other methods like posting the notices on a portal. An owner or mortgagee must then provide the following to the corporation, in writing:

1. their name and unit number;
2. their preferred method of electronic communication, selected from the list of methods approved by the Board; and
3. a statement that the owner or mortgagee agrees that, if this electronic method is used, they are sufficiently served, as described in section 54 of the *Condominium Act*,

The Ministry has released an optional form entitled "Agreement to Receive Notices Electronically". However, any series of correspondence providing the above three required items will suffice.

A common question from condominium corporations which have already been delivering notices electronically is whether they need to collect new consents from owners in order to continue doing so. Unfortunately, unless those corporations' prior form of consent contained all of the language required (including reference to section 54 of the *Condominium Act*), they will need to update their consents.

Notices of Owners' Meetings

The procedure for calling meetings has changed. Boards must now follow a two-step procedure to call a meeting of owners. The first is to deliver a Preliminary Notice of any meeting to owners informing them that a meeting is going to be held, then provide the Notice of Meeting itself.

The *Condominium Act* continues to place the obligation on the owners and mortgagees to provide the corporation with prescribed information, such as changes in ownership. Corporations are not required to verify the ownership of the unit when sending notices to owners.

The Preliminary Notice of Meeting

A Preliminary Notice of meeting must now be delivered in a form prescribed by the regulations.

The Preliminary Notice must be sent at least 20 days before the Notice of Meeting is given (unless the meeting has been requisitioned by owners in which case the Preliminary Notice must be given at least 15 days beforehand). It must state the nature of the business to be dealt with at the meeting. For example, if the meeting is to elect board members, the notice must state the number of board members, the number of vacancies, the term of each vacant position, if any positions are reserved for voting by owner-occupied units.

The Preliminary Notice must ask owners if any of them wishes to stand for election to the board and indicate how and when candidacy and disclosure information are to be delivered to the corporation. If a candidate provides notice of his or her intention to run for the board, the mandatory disclosure for director candidates must be delivered in writing to the board.

The corporation must also comply with any additional meeting notice requirements found in the corporation's by-laws.

By-laws with Lower Voting Requirements

Previously, passing a by-law required the support of a majority vote of all the units. Some by-laws may now be passed by a majority vote of owners present at the meeting. By-laws that can be passed with this reduced voting threshold may include provisions to:

- increase disclosure obligations for prospective directors and governing the manner in which individuals notify the board of their candidacy for the board;
- permit and govern electronic voting and electronic communication with owners;
- increase the frequency of or require additional information to be included in information certificates;
- govern information to be presented at owners' meetings; and
- govern the manner in which individuals include material within a Notice of Meeting of owners.

Quorum

There is now an ability to have a reduced quorum for owners' meetings if the 25% threshold is not achieved at the first two attempts to hold the meeting. On the third and subsequent attempt to hold an owners' meeting, the quorum will be 15% of the units entitled to vote. The Act allows corporations to impose a higher quorum by by-law.



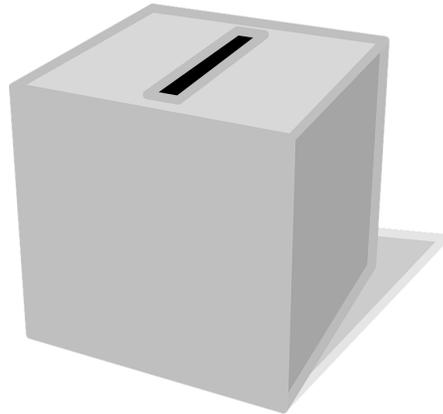
Voting

The *Condominium Act* now allows owners to vote at a meeting by "telephonic" or "electronic means" as long as the by-laws so permit. This includes voting by fax, email, touch-tone telephone, or computer.

The *Condominium Act* provides no guidelines or framework as to how "telephonic" voting is to take place. Those details will have to be set out in the by-law.

Secret Votes will Stay Secret

Although the *Condominium Act* already stated that owners are not entitled to view records that relate to specific units or owners, the new regulations specify that any portion of a ballot or proxy that identifies specific units does not have to be disclosed.



Proxies

Proxies must now be in the prescribed form. This is no longer optional.

If the by-laws so provide, a corporation can establish procedures governing the time by which proxies must be delivered and the place for delivery. Some corporations already have by-laws addressing this.

Ballots and proxies are records of the corporation. Both must be kept for at least 90 days. However, if the corporation receives written notice of actual or contemplated litigation relating to them during the 90 day retention period or at any point before it has destroyed them, the corporation is required to retain them until the litigation has been resolved. If no litigation is commenced, they can be destroyed six months after the corporation received the notice that litigation was contemplated.

The Preliminary Notice of meeting must also indicate how owners may add any materials to the Notice of Meeting. The board is required to add materials provided by owners to the Notice of Meeting if the request has been signed by owners of 15% of the units, and is otherwise compliant with the *Condominium Act* and the regulations. However, if an owner asks to add materials to the Notice of Meeting and the request is not accompanied by signatures of 15% of owners, the board has the authority to decide if it wishes to include the material.



Notice of Meeting

The Notice of Meeting cannot be delivered until at least 20 days have passed since the Preliminary Notice of meeting was given. This notice must also be in a prescribed form. However, we recommend allowing additional time between the date that candidates must provide their names and additional materials are to be delivered, and the delivery of the Notice of Meeting.

Additional information and materials, as prescribed in the regulations, will also have to be included in the Notice of Meeting. These include a statement of quorum for the transaction of business at the meeting and other items. Section 12.8 of O. Reg 48/01 lists the additional information that must be included in the Notice of Meeting. The corporation must also comply with any additional requirements set out in the corporation's by-laws.

The Preliminary Notice and Notice of Meeting are deliverable in the same way as all notices under section 47. Owners and mortgagees can be served electronically if they have provided the required consent.

Disclosure Requirements for Directors

Candidates for the board of directors must now comply with mandatory disclosure obligations. These obligations are imposed so that owners are better informed about the candidates running for the board.

Candidates who advise the corporation of their intention to run for the board are required to submit a disclosure form to be included in the Notice of Meeting package. If nominated from the floor or appointed by the Board, the candidate can make the disclosure orally at that time. Anyone who is or becomes a director is subject to ongoing disclosure requirements for the duration of his or her term.



It should be noted that the requirement is only that the candidate or director *disclose* the information. The disclosure does not disqualify a person from being a director, even if, for example, the person is a party to a contract with the developer or is involved in litigation against the corporation. The corporation would have to pass a by-law if it wanted to prevent persons from serving on the board on the basis of their responses to the disclosure requirements (or for any other reason). Failure to disclose, however, does prevent a person from acting as a director.

The requirement to disclose "offences" relates only to offences of which the person has been convicted (not just charged) under the *Condominium Act*. There is no obligation to disclose criminal charges or convictions unless the corporation's by-laws so require.

Shibley Righton has prepared candidate and director disclosure forms (candidate form shown on the following page) which are available for download on our website.

SAMPLE OF A CANDIDATE DISCLOSURE FORM

(the complete form is available for download on our website)

CANDIDATE INFORMATION			
Name: _____			
To: _____ (Condominium Corporation)			
OWNERSHIP/OCCUPANCY STATUS			
1	I am a registered owner of a unit in the Corporation.	Yes	No
<i>[If you answered "Yes" to the above]</i>			
	The contributions to the common expenses payable for my unit(s) are in arrears for 60 days or more.	Yes	No
2	I am an occupant of a unit in the Corporation.	Yes	No
LEGAL PROCEEDINGS			
3	I, my spouse, my child, my parent, my spouse's child, my spouse's parent, an occupier of a unit I own, an occupier of a unit my spouse owns, and/or someone with whom I occupy a unit is/are a party to a legal action to which the Corporation is a party.	Yes	No
<i>Insert description if applicable</i>			
CONDOMINIUM ACT CONVICTIONS			
4	Within the past 10 years, I have been convicted of an offence under the <i>Condominium Act, 1998</i> , as amended or under the regulations to the <i>Condominium Act, 1998</i> , as amended.	Yes	No
<i>Insert description if applicable</i>			
CONFLICTS OF INTEREST			
5	I have a material interest, either directly or indirectly, in a material contract or transaction to which the Corporation is a party (other than in my capacity as a purchaser, mortgagee, owner, or occupier of a unit).	Yes	No
6	I have a material interest, either directly or indirectly, in a material contract or transaction to which the declarant or an affiliate of the declarant is a party (other than in my capacity as a purchaser, mortgagee, owner, or occupier of a unit).	Yes	No
<i>Insert description if applicable</i>			
CONFIRMATION			
The declarations that I have made above, and in any additional pages, are true as of the date I have signed this form. I will notify the Corporation in writing immediately if any of the information I have provided on this form changes prior to the election.		Yes	No
Date		Signature	



15TH ANNUAL Real Estate Law Summit

Construction Lien Act Changes

Roger Gillott
Osler, Hoskin & Harcourt LLP

April 18, 2018

Construction Lien Act Changes

Roger Gillott and Jeff St. Aubin, Construction Law Group, Osler Hoskin & Harcourt LLP

Overview

Ontario's *Construction Lien Act* (the "Act") has impacts that extend far beyond the parties to a construction contract. Its influence on real property necessitates that real estate practitioners must have a working knowledge of how their client's assets and transactions can be impacted by construction liens.

The Act is currently in the process of transformation, as sweeping reforms have been introduced by Bill 142, the *Construction Lien Amendment Act, 2017* (the "Bill") which received Royal Assent on December 12, 2017. These reforms will modify and expand upon the Act, reflected by its name changing from the *Construction Lien Act* to the *Construction Act*, which is appropriate given that its scope will be significantly broader than traditional liens.

This paper explores the primary amendments to the Act, which include the introduction of regimes addressing prompt payment and mandatory interim adjudication, as well as technical amendments that include specific measures affecting condominiums.

At the time of writing, the regulations accompanying the Bill (the "Regulations") have been released for public consultation by the Ministry of the Attorney General, and this paper includes discussion of the Regulations where they assist in operationalizing the substantive amendments of the Bill. The reader should exercise caution with respect to the Regulations as described herein, as they may be modified through the public consultation process. In recognition of this risk, this paper expressly refers to the Regulations when their contents are referenced.

We begin with a discussion of the sections most relevant to Real Estate practitioners, discuss when the amendments come into force, and then provide an overview of the most important amendments to the Act.

Real Estate

a) Condominiums

The *Construction Act* will require that notice of a lien related to the common elements of a condominium must be given to the condominium corporation and each unit owner, and in the case of a common elements condominium corporation, to an owner of a parcel of land mentioned in subsection 139(1) of the *Condominium Act, 1998*, to which a common interest is attached and which is described in the declaration of the corporation¹.

In addition, it will provide that an individual unit owner may bring an *ex parte* motion to have the registration of the common elements lien vacated from title to their individual condominium unit,

¹ *Construction Act*, R.S.O. 1990, c. C-30, section 34(9). (Not yet in force).

by posting security equal to the individual unit's *pro rata* share of the lien's value, plus the lesser of \$250,000 and 25% of the unit's *pro rata* share of the lien's value, for costs.² This provision greatly simplifies the process of vacating a common elements lien from title to an individual condominium, when (for example) the owner of the unit wishes to either sell or refinance their unit.

b) *Landlords' Limited Liability for Liens and Responsibility to Respond to Information Requests from Lien Claimants*

One of the "thorny" issues involving the interaction between construction lien law and real estate law has always been the question of who (the tenant or the landlord, or both) is subject to a construction lien for work done on leasehold premises. Often, the lien claimant will register its lien against the freehold owned by the landlord – sometimes in addition to, and sometimes instead of, the leasehold premises. Sometimes, there will be no registered lease, which will lead some construction lawyers to register the construction lien only against the freehold.

Up to now, this issue has been dealt with in two ways by the *Construction Lien Act*:

1. Under section 19 of the *Construction Lien Act*, if the contractor gave the freehold owner written notice, in advance of construction, that the freehold would be subject to the lien, then the interest of the landlord would also be subject to the lien to the same extent as the interest of the leasehold owner, unless the landlord responded within 15 days of the notice, indicating in writing that it assumed no responsibility for the improvement;
2. If the owner of the freehold comes within the definition of "Owner" in section 1 of the *Construction Lien Act*, then its freehold interest is also subject to the construction lien. (Note that the caselaw has greatly narrowed the circumstances in which a landlord will be found to be an "Owner" within the meaning of the *Construction Lien Act*).

The amendments to the *Construction Lien Act* will eliminate #1 above (the ability of lien claimants to provide written notice to the landlord). In section 19(5), the amended Act will maintain #2 (though as noted above, this will be of limited utility to lien claimants, given the narrow interpretation of it in the caselaw).

However, most significantly, amendments to section 19 will provide that if a landlord is paying for all or part of an improvement on tenants' leased premises (eg. through a tenant inducement), and if the payment is included in a lease, renewal, or any connected agreement to which the landlord is a party, then the landlord's freehold interest will be subject to the lien, to the extent of 10% of the amount of such payment.³

This liability on the part of a landlord paying for a tenant's improvement, which is limited to 10% of the landlord's payment, conceptually parallels the potential liability of a mortgagee for any shortfall in the 10% holdback to be retained by the owner, under section 78 of the *Construction Lien Act*, where the mortgagee is funding the construction of the improvement.

² *Construction Act*, R.S.O. 1990, c. C-30, subsections 44(1), (2.1) and (2.2). (Not yet in force).

³ *Construction Act*, R.S.O. 1990, c. C-30, section 19(1). (Not yet in force).

The landlord will also be required to respond to information requests under Section 39 of the *Construction Act*, and must provide the following information to parties with lien or trust rights under the Act:

- the names of the parties to the lease,
- the amount of any payment referred to in section 19.1 of the *Construction Act*, being any payment for all or part of the improvement, which is “accounted for under the terms of the lease or any renewal of it, or under any agreement to which the landlord is a party that is connected to the lease”, and
- the state of accounts between the landlord and tenant, containing the following information:
 1. The price of the services or materials that have been supplied under the contract or subcontract.
 2. The amounts paid under the contract or subcontract.
 3. In the case of a state of accounts under paragraph 4 of subsection (1), which of the amounts paid under the contract or subcontract constitute any part of the payment referred to in subsection 19 (1).
 4. The amount of the applicable holdbacks.
 5. The balance owed under the contract or subcontract.
 6. Any amount retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).
 7. Any other information that may be prescribed.⁴

c) Capital Repairs

The definition of an “improvement” will be amended to clarify that an improvement includes a “capital repair”, whereas the Act previously only referred to a repair. This change provides clarity regarding whether repair work is subject to a lien, and a new subsection provides that a capital repair is one that is intended to extend the normal economic life or improve the value or productivity of the land or any structure on the land, but does not include maintenance work to prevent normal deterioration.⁵

⁴ *Construction Act*, R.S.O. 1990, c. C-30, section 39(4) and 39(4.1). (Not yet in force).

⁵ *Construction Act*, R.S.O. 1990, c. C-30, sections 1(1)(“improvement”), 1.1 and 1.2. (Not yet in force).

When Are These Changes Coming?

Certain amendments to the Act are already here, having taken effect on the day that Bill 142 received Royal Assent. However, these immediate amendments were minor in nature, and the vast majority of changes – including all of those discussed in this paper – will only take effect on a future date to be proclaimed.

An important consideration in the passage of the Bill, reaffirmed during the legislative debates, was to provide an adequate period of time for education and preparation within the construction industry. In keeping with this intention, the Ministry of the Attorney General has announced that prompt payment and adjudication will come into force on October 1, 2019, while all other amendments will come into force more than a year earlier, on July 1, 2018.

Prompt Payment

The significant length of time that contractors, subcontractors, and suppliers typically have to wait to receive payment following the submission of an invoice has been a long-standing issue in the construction industry. To address these concerns, the Ontario Legislature has previously considered the implementation of prompt payment legislation, specifically in 2011 through Bill 211, and again in 2013 through Bill 69, but both of these Bills failed to materialize as legislation and the current amendments to the Act represent the first prompt payment legislation in Ontario.

a) Time Periods for Payment

The effective starting point for the prompt payment regime is the submission of a “proper invoice” from the contractor to the owner, following which the owner must pay the contractor within 28 days. The time requirements follow the flow of funds, and the contractor must pay its subcontractors within 7 days of having received related amounts from the owner, and each subcontractor must then pay its own subcontractors within 7 days of receiving funds.

The function of a “proper invoice” as a trigger for the payment obligation translates into the opportunity or risk, depending on one’s perspective, that parties will manipulate what constitutes a proper invoice for the purpose of controlling the process. The amendments to the Act respect freedom of contract, but also impose limits to curb potential abuse. Specifically, a proper invoice must meet the requirements specified in the contract, but the Act prohibits a proper invoice from being conditional on certification by a payment certifier or the owner’s approval (although this restriction is not applicable to Alternative Financing and Procurement (“AFP”) Projects, as discussed further below). During the passage of the Bill through the legislature, a provision was added to clarify that the prohibition against certification or owner approval does not prevent a proper invoice from being made conditional on testing and commissioning.

b) Bases for Refusing Payment

The prompt payment regime recognizes that there may exist legitimate reasons for a payer to refuse payment, such as deficiencies in the work performed, notwithstanding that the requirements of a proper invoice may have been satisfied. The regime articulates a process for non-payment and it imposes stringent timelines that must be adhered to, which is in keeping with the spirit of prompt payment.

If an owner intends to refuse to make payment, then within 14 days of receipt of the proper invoice the owner must give the contractor a notice of non-payment that sets out the amount not being paid and the reasons for non-payment.

The situation for a contractor or subcontractor that intends to refuse to make a payment is slightly different than that of the owner, due to their position within the payment chain. Specifically, if a contractor or subcontractor intends to refuse to make payment, then they must elect to base their refusal on: (i) not having received funds themselves due a non-payment, or (ii) disputing the entitlement of their payee. This election has important implications. If a contractor or subcontractor refuses to pay on the basis that they were not paid themselves, then they must pay through any amounts they receive and provide an undertaking to refer the matter to adjudication within 21 days of providing notice to their payee (unless such an undertaking was already given by a party higher in the payment chain). In contrast, if they choose to dispute the entitlement of their payee (essentially taking the fight on themselves), then they do not need to pay through amounts received or refer the matter to adjudication, but they must provide a notice of non-payment specifying the amount not being paid and detailing the reasons for non-payment.

Undisputed amounts must still be paid in accordance with the time periods set out in the Act, which may require that these amounts be apportioned among several payees. In such circumstances, the prompt payment regime provides that payees not implicated in the dispute are to be paid in full, with the other payees implicated in the dispute to be paid on a rateable basis. In all other cases, all payees are to be paid on a rateable basis.

Adjudication

The amendments to the Act include the introduction of an interim adjudication regime, which is intended to promote the prompt resolution of disputes. Adjudication is viewed as a necessary adjunct to prompt payment for the purpose of ensuring that there is a rapid enforcement mechanism to support the objectives of timely payment. However, while the types of disputes referred to in the Act as the proper subject of an adjudication relate to payment, the scope of adjudication is broader and can include other matters to which the parties and the adjudicator agree.

a) The Adjudication Process

A party to a contract or subcontract can refer a matter to adjudication at any time prior to the contract or subcontract being completed, even if the matter in question is already the subject of a court action or arbitration. This right to refer a matter to adjudication is protected by the Act and the parties cannot contract out of interim adjudication.

The adjudication process is initiated when one party serves the other with a notice of adjudication, which must set out, among other things, a description of the dispute and remedy sought, as well as the proposed adjudicator – the adjudicator cannot be determined in advance by way of contract. If the parties cannot agree on an adjudicator, or the adjudicator does not agree to conduct the adjudication, within 4 days of the notice of adjudication, then the referring party must request the appointment of an adjudicator by the Authorized Nominating Authority (the “Authority”), and the Authority must make the appointment within 7 days of receiving the request.

Once an adjudicator is selected, the party that initiated the adjudication must provide the adjudicator with the notice to adjudicate, the contract or subcontract, and any documents on which

the initiating party wants to rely. The adjudicator will then conduct the adjudication in an inquisitorial manner and must make a determination within 30 days of receiving the documents from the referring party, subject to extensions that are agreed to by the parties. Any amounts payable in accordance with the adjudicator's determination must be paid within 10 days, and if such amounts are not paid then the unpaid contractor or subcontractor may suspend further work.

It is important to note that although adjudication will provide quick decisions to ensure that funds flow between the parties during the performance of the contract or subcontract, the determinations of adjudicators are interim and the parties may proceed to have the matter determined in accordance with their contractually agreed upon dispute resolution procedures or by the courts. However, the experience in the United Kingdom, which introduced adjudication almost 20 years ago, has been that parties tend to accept the decisions of adjudicators as final.

b) The Authority and Adjudicators

The adjudication regime will be overseen by an organization called the "Authority", which will be designated by the Minister. The Regulations provide that the Authority will be responsible for adjudicator training programs, issuing certificates of qualification to adjudicators, maintaining a public registry of adjudicators, establishing a code of conduct, establishing a fee schedule, and developing educational materials for the public. Each year the Authority will be required to issue an annual report, to be publicly available, providing information on the number of adjudications, amounts both claimed and paid, fees owing and paid, as well as segregating the foregoing information on an industry sector basis.

The Regulations also address the requirements for an individual to become an adjudicator. Specifically, an adjudicator will be required to have at least seven years of working experience in the construction industry, and some or all of this experience may be from outside of Ontario. Adjudicators will also be required to have completed a training program for which the Authority is responsible, but this educational requirement may be waived by the Authority within the first year of the regulations coming into force. Adjudicators will be required to comply with the code of conduct, and the Authority may suspend an adjudicator's certificate of qualification if they cease to meet the requirements for the certificate, or are found to be incompetent or unsuitable to conduct adjudications.

Construction Liens & Holdback

The amendments to the Act do not alter the core principle that each payer upon a contract or subcontract under which a lien may arise must retain a holdback of 10%. However, there are important changes to the time periods relating to liens and the release of holdback.

a) Lien Preservation and Perfection

Holdback cannot be released until all liens that may be claimed against the holdback have expired, or been satisfied, discharged, or otherwise provided for under the Act. With respect to expiration of lien rights, the amendments to the Act will result this occurring at a later point in time, as a result of the time period for the preservation (registration or delivery) of liens being increased from 45 to 60 days.

The time period for the perfection of a lien (commencing the action and registration of the Certificate of Action) will also be increasing, from 45 to 90 days, resulting in the combined preservation and perfection period lengthening from 90 days to 150 days. The purpose of these longer time periods is to allow more time for parties to resolve their disputes.

b) Early Release of Holdback

One of the issues on a large or lengthy project is that contractors or subcontractors that perform work early in the process may have to wait a long period of time, sometimes several years, after the completion of their own work before receiving their holdback. To address such issues, the Bill has introduced several mechanisms that will facilitate the early release of holdback on an annual, phased, or segmented basis.

The annual and phased release of holdback sections operate in a similar manner. In both cases, if the contract exceeds a prescribed amount (set by the Regulations at \$20 million) and the contract so provides, then holdback may be paid out annually or as phases of the work are completed, provided that as of the payment date there are no preserved or perfected liens, or all liens have been satisfied, discharged, or otherwise provided for.

Another amendment to the Act is a deeming provision pursuant to which multiple improvements under a single contract will be deemed to be separate contracts for the purposes of determining substantial performance and completion if: (i) each of the improvements is to lands that are not contiguous, and (ii) the contract so provides. An example would be a contract to construct multiple buildings in different locations throughout Ontario, and this deeming provision would allow the parties to agree to the release of holdback on a building-by-building basis, as opposed to having to wait until the completion of the last building to pay out holdback on the first.

P3/AFP Projects

The amendments to the Act take into account P3/AFP Projects, which were not contemplated when the last major amendments were implemented in 1983. These project structures involve a government entity entering into an agreement (the "Project Agreement") with a special purpose entity ("Project Co") to complete a project. It is Project Co that then enters into an agreement with the contractor.

Project Co will be deemed to be the owner for certain purposes, including the certification of substantial performance, expiration of liens, and requests for information. The agreement between Project Co and the contractor is deemed to be the contract for all of the foregoing, and holdbacks and substantial performance are to be determined based on this agreement.

After the introduction of the Bill, there was industry concern about risk being stranded at the Project Co level, and this section of the Bill underwent significant evolution before receiving Royal Assent. One of the amendments was to include a deeming provision that the Act will apply to the Project Agreement as if it were a contract, which extends the reach of prompt payment and adjudication to the upper tier of the project structure between the government entity and Project Co.

It is important to note that there are exceptions to the application of prompt payment and adjudication. In the case of the former, prompt payment does not apply to operations and

maintenance, and the submission of a proper invoice may be subject to prior payment certification. In the case of the latter, certain determinations cannot be referred to adjudication, such as substantial completion of the Project Agreement, substantial performance of an agreement between Project Co and a contractor, and achievement of a payment milestone. Parties to the Project Agreement may also be constrained in their choice of adjudicator, as they must request the independent certifier (if one is specified in the Project Agreement) to serve in this capacity, provided that the independent certifier is an adjudicator listed in the registry.

The agreement between Project Co and the contractor will also be deemed to be a public contract *between the contractor and the Government Entity* for the purposes of mandatory surety bonding, which is discussed in the next section.

Mandatory Surety Bonding

The Act will require that certain surety bonds be provided in relation to a public contract, which is defined as a contract respecting an improvement if the owner is the Crown, a municipality, or a broader public sector entity.

A contractor to a public contract must provide both a labour and material payment bond and a performance bond. The Regulations provide that these bonds will only be required if the public contract price is \$250,000 or greater. If required, the Regulations require that the minimum coverage for each bond will be 50% of the contract price up to a maximum of \$50 million in coverage (reached at a contract price of \$100 million).



15TH ANNUAL Real Estate Law Summit

Treaties, Territories and Reserve Land: Things you might not know

Kathleen Lickers, LSM
Barrister and Solicitor

April 18, 2018

- There is much variation from First Nation to First Nation as to its history of reserve creation;
- As such, it is impossible to make generalizations;
- Instead practitioners should research the specific history and terms of the relevant treaty.

s. 91(24) Reserve Lands

- “Lands reserved for Indians” are within the jurisdiction of the federal government pursuant to s. 91(24) of the *Constitution Act, 1867*.
- The federal government originally exercised its control over reserve lands through the *Indian Act, 1876*.
- Yet, while the *Indian Act* administers *reserve lands*, there are no provisions that prescribe *how* a reserve is created;
- The creation of reserves rests upon Royal Prerogative and is not subject to statutory limitation.

“Reserve” Defined

- Once created, “a reserve” defined by the *Indian Act*:

“ reserve means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.” s. 2(1)

Reserve Land Interest

- First Nations have a recognized interest in reserve land that includes the right to exclusive use and occupation, inalienability except to the Crown and is communal in nature;
- Reserve land cannot be seized, mortgaged or pledged to non-members of a First Nation; and
- The Minister must approve or grant most land transactions under the *Indian Act*.

Interest in Reserve Land

- This *Indian Act* legislative regime creates an interest in reserve land that is not fee simple;
- Other legislative solutions have evolved over time: *First Nations Land Management Act (FNLMA)* ;
- Land use development will be guided by what regime is in place and what interest is being sought (i.e., *Indian Act*, *FNLMA*, whether the lands are held collectively the Band, or by an individual Certificate of Possession, or are “designated” lands).

Non-Members Interests

- Under the *Indian Act*, non-members can only obtain rights to use or occupy reserve land by entering into valid leases or permits;
- Such Leases and permits must be approved by the Band Council and the Minister.

Leases

- Acquiring a valid leasehold interest requires compliance with the *Indian Act* or *FNLMA*;
- The ss.58(1)(b) of the *Indian Act* allows for the leasing of uncultivated or unused locatee land for agricultural and grazing purposes, or for any purpose that is for the benefit of the person in lawful possession. Designation of the lands is not required, but the consent of the Band Authority is necessary. This mechanism is rarely used today. Instead, parties will consider, where appropriate, the use of ss.58(3) leases or ss.28(2) permits.
- A lease may be subleased to another party. Subleases must follow all of the terms of the original lease (known as the head lease) as well as comply with all federal laws and First Nation by-laws.

Permits

- A s. 28 permit under the *Indian Act* is the right to use reserve lands in a limited, specific way for a defined period of time. For example, permits are issued for rights of way to run power lines, for agriculture, or to remove clay, sand, gravel or timber;
- While a lease grants temporary possession of a parcel of land, a permit does not. More than one permit may be issued over the same parcel of land provided the uses are compatible. Permits are approved by the First Nation and issued by the Minister of Aboriginal Affairs and Northern Development.

Off Reserve Issues

- First Nations assert land rights and uses not limited to reserve land, why?
- (a) issues arise where a treaty has not been honoured;
- (b) issues arise regarding access to off-reserve lands to exercise a treaty right (i.e. *R. v. Moses*, [1970] 3 O.R. 314);
- (c) issues arise regarding access to lands pursuant to “Aboriginal rights” (i.e., *R. v. Cote*, [1996] 3 S.C.R. 139; and
- (d) issues arise regarding the assertion of Aboriginal title (*Tsilhqot’in Nation v. British Columbia*, [2014] 2 S.C.R. 256)



15TH ANNUAL Real Estate Law Summit

Making Royalties Binding on Successors: When is a Right Arising out of Land Personal?

Craig Carter, C.S., LSM
Fasken Martineau DuMoulin LLP

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MAKING ROYALTIES BINDING ON SUCCESSORS: WHEN IS A RIGHT ARISING OUT OF LAND PERSONAL?

Third Eye Capital Corporation vs. Resources Dianor

Craig Carter, LSM
Fasken Martineau DuMoulin LLP

Introduction

Real estate law is incredibly complicated in part because it has its foundation in feudal society and law. Ownership of real estate resided in the King or Queen and over hundreds of years feudal law evolved to create numerous interests and rights in law with varying attributes and enforceability.

Much of that Feudal complexity continues today and the courts strive to maintain the certainty of real estate rights without hampering too much the freedom of land owners to order their affairs to achieve their goals. Much of the complexity is unnecessary in a modern industrial society but the law has been unable on its own to clean up the forms of holding real estate.

For instance there are three possible estates in land in Ontario; the fee simple estate, the leasehold estate and the life estate. In addition the law distinguishes between corporeal and incorporeal hereditaments. Corporeal hereditaments are land and incorporeal hereditaments are rights in land but are not land itself. Next there are easements, leases, licenses, restrictive covenants, profits, personal covenants, and licenses. There are several kinds of leases such as ground leases, air leases, life leases, leases at will, leases at sufferance and occupancy rights. There are express easements, at least three kinds of implied easements, easements by estoppel and prescriptive easements. There are mere licenses and license coupled with a grant. And then there are equitable interests in land such as constructive trusts, bare trusts and true trusts and proprietary estoppel. And then there are interests in land arising out of an agreement of purchase and sale based on equitable conversion, the equity of redemption in mortgage law and numerous kinds of royalty rights for mining lands.

The legal determination of when these rights bind the lands such that a subsequent buyer acquires or is bound by these rights whether they or not they have agreed to

be bound and whether or not the rights have been assigned to them is complex and sometimes counterintuitive.

For instance the law relies on privity of contract and privity of estate to help in resolving these issues. Section 53 of the *Conveyancing and Law of Property Act* allows certain choses in action to be assignable in certain circumstances.

Recently, the Ontario Court of Appeal has again slammed the door on any attempt to make positive covenants run with the land.¹

Are Royalty Agreements Land

Royalties are traditionally not interests in land. At most royalty is a right to receive a payment based on product extracted from the land and is a chose in action. While the benefit is assignable the burden is not. That is according to black letter real property law a royalty payment does not run with the lands and cannot bind a future buyer of the profit.

This legal position was fairly complex and required lawyers to try to craft onto royalty agreements rights which could be interpreted as instruments in land which would first allow lawyers to get them registered and hope to make them enforceable against future acquirers of the mining claim or profits based on some theory of actual notice. These efforts successfully allowed for registration especially if in Ontario one were relying on the wishy washy section 71 of the Land Titles notice provisions, where a royalty holder merely had to get their lawyer to make a statement that the royalty created an interest in land. Appending an easement or some other right of entry was usually sufficient to open this door.

Successfully making the royalty payment binding on subsequent owners was considerably more difficult because at the end of the day a royalty is not an interest in land it is merely a right to receive a payment and often it is not even tied to the profitability of the mine, known as a gross overriding royalty.

This was the law in 2002. Royalties were not interest in land, they were personal rights to receive money out of land or out of a profit. They did not bind the land. They did not run with the land. And anyone taking a royalty was at real risk in losing

¹ *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* 2002 CarswellOnt 850, [2002] O.J. No. 1023, 112 A.C.W.S. (3d) 789, 157 O.A.C. 135, 211 D.L.R. (4th) 1, 50 R.P.R. (3d) 1, 58 O.R. (3d) 481; *Black v. Owen* 2017 CarswellOnt 7390, 2017 ONCA 397, 137 O.R. (3d) 334, 137 O.R. (3d) 352, 278 A.C.W.S. (3d) 874, 27 E.T.R. (4th) 163, 413 D.L.R. (4th) 135, 78 R.P.R. (5th) 173; see also *The Owners, Strata Plan NWS 3457 v. The Owners, Strata Plan LMS 1425* 2017 CarswellBC 2141, 2017 BCSC 1346, [2017] B.C.W.L.D. 5382, [2017] B.C.W.L.D. 5385, 282 A.C.W.S. (3d) 211, 80 R.P.R. (5th) 1 where even the whiff of a conditional grant exemption preserved in *Amberwood* was rejected in British Columbia.

it. Attempts to contractually obfuscate this shortfall usually failed because courts would look through the crafty drafting of the parties and determine what it actually was.

This all changed in 2002. In that year the Supreme Court of Canada realized or accepted that mining in Canada was a fundamental economic driver of the economy and royalty rights were a very important part of financing risky mining stakes. Finding a way to allow royalty rights run with the land was an important but surprising judicial goal. The Supreme Court of Canada in *Bank of Montreal vs. Dynex Petroleum Ltd.*² changed real property law. In *Dynex* the court held that in the case of royalty agreements, if the parties intended the right to run with the land then it would even if on black letter principles it was not otherwise an interest in land.

The court summarized the legal issues:

“3 The appellant Bank of Montreal was a secured creditor of Dynex Petroleum Ltd. ("Dynex"), a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of Dynex. One issue was whether any such sale would be subject to overriding royalties arising out of the working interest held by Dynex. Also, there were several competing claims against the appellant, which by the time of this appeal had narrowed to the overriding royalties of the respondents Enchant and Willness, who claimed a preference by way of a caveat filed in the South Alberta Land Registration District, claiming an interest in Dynex's working interest as a result of services performed for Dynex and/or its predecessors. The respondents claimed their royalty rights comprised interests in land and claimed priority over the appellant because their interests, as protected by caveats, preceded the appellant's loans to Dynex and its predecessors. The appellant submitted that at common law an interest in land could not arise from an incorporeal hereditament and therefore the respondents' overriding royalties (which arose from a working interest, an incorporeal hereditament) did not rank higher in priority than the appellant's security interest.

4 This case pits this ancient common law rule against a common practice in the oil and gas industry. The Court is asked to resolve the apparent conflict.”

² *Bank of Montreal v. Dynex Petroleum Ltd.* 2002 CarswellAlta 54, 2002 CarswellAlta 55, 2002 SCC 7, 2002 CSC 7, [2001] S.C.J. No. 70, [2002] 1 S.C.R. 146, [2002] A.W.L.D. 52, 111 A.C.W.S. (3d) 156, 19 B.L.R. (3d) 159, 1 R.P.R. (4th) 1, 208 D.L.R. (4th) 155, 266 W.A.C. 1, 281 N.R. 113, 299 A.R. 1, 30 C.B.R. (4th) 168, J.E. 2002-230, REJB 2002-27593

Dealing with the issue of the court's ability to move past common law restrictions on property the court stated:

17 The oil and gas industry, which developed largely in the second half of the 20th century and continues to evolve, is governed by a combination of statute and common law. The application of common law concepts to a new or developing industry is useful as it provides the participants in the industry and the courts some framework for the legal structure of the industry. It should come as no surprise that some common law concepts, developed in different social, industrial and legal contexts, are inapplicable in the unique context of the industry and its practices.

18 The appellant could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles. Given the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.

21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a profit à prendre, if that is the intention of the parties.

The court summarized the test to be applied in deciding if a royalty can be an interest in land as follows:

22 Virtue J. in *Vandergrift*, supra, at p. 26 succinctly stated:

... it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:

1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

2) the interest, out of which the royalty is carved, is itself an interest in land.

It was thought that *Dynex* settled the issue. However courts after *Dynex* continued to apply common law principles in determining if the parties intended to create an

interest in land. That is rather than look at the parties actual intention the courts looked at the nature of the interest granted to determine if an interest in land was intended. This required the easement to allow some extraction rights, or access rights or other property related rights. This effectively returned the issue to common law property related principles.

In the recent Court of Appeal decision in *Third Eye Capital Corporation vs. Dianor Resources Inc.*³ (“*Third Eye*”) the court took a very aggressive approach and returned it to what *Dynex* intended which is to look at the parties intention based on the words they used without requiring the words to create property law concepts. If the words do contain property law concepts great. But if it is just a royalty i.e. the right to receive an income, *Third Eye* decides that that is ok so long as the court can determine that an interest is intended.

As we will see, the use of the magic words that the parties “intend to create and interest in land” will be sufficient based on *Third Eye*. As well, the right to register a caveat or register the royalty against title will be sufficient.

Before looking at *Third Eye*, I include the annotation of Jem Lem to the *Dynex* case. Jeff raises a concern about whether merely expressing that a personal right is intended to create an interest in land should be sufficient to do so. The courts after *Dynex* reflected the same concern. *Third Eye* clearly puts this concern to bed in the case of royalties. Jeff’s concern however is still valid with respect to other interests in land. It is my opinion, that *Third Eye* should be limited to royalties and should not be the wedge that litigation lawyers use to argue that licenses, rights of first refusal and other personal rights create interests in land merely because the parties express an intention that they want them to.

Here is what Jeff said in his annotation:

The Supreme Court of Canada's decision in *Dynex Petroleum* is a "landmark" case and a "must read" for all practitioners of oil, gas and mining law. First and foremost, it settles, probably once and for all, the seemingly long-standing debate over the juridical nature of oil and gas royalties (which, judging from the extensive jurisprudence and academic commentary leading up to the *Dynex Petroleum* litigation, seems to have enjoyed somewhat of a mixed pedigree). Although the implications of *Dynex Petroleum* may ultimately extend far beyond oil and gas royalties in scope and Alberta in jurisdiction, the whole oil and gas industry that gives rise to the *Dynex Petroleum* litigation is uniquely associated with Alberta, and it is fitting that the Supreme Court's

³ 2018 ONCA 253 (Ont. C.A.)

reasons for this appeal from the Alberta Court of Appeal is delivered by none other than Mr. Justice John Major, himself an alumnus of the Alberta judiciary.

Greatly summarized, a "working interest" is a right given by a fee owner to a miner to extract minerals and is an incorporeal hereditament in the nature of a profit à prendre. It is this working interest that gives rise to payments known as "royalties", either back to the fee owner (a "lessor's royalty") or to a third party, typically a supplier (an "overriding royalty"), in each case based on the value of the minerals extracted.

In a well written decision, Mr. Justice Major concludes that royalties can, in fact, be interests in real property if the owner of the working interest and the owner of the royalty entitlement intended that the royalties constituted a right in the unproduced minerals in situ. In so doing, Mr. Justice Major considers and then rejects the age-old common law rule that any interest issuing from an incorporeal hereditament cannot, in and of itself, become, or constitute an interest in, real property.

The principal practical consequence of such a finding is, of course, that the title to the royalties and the relative priorities of the royalties vis-à-vis other encumbrances of the land can now be governed by the race or race-notice provisions of the applicable real property title registration regimes. This was precisely the issue adjudicated in *Dynex Petroleum*. From a strictly policy perspective, this is not such a terrible result since minerals in situ are, by nature, permanently situated and well suited to a legal description or address driven search engine like a real property register. Furthermore, it seems as if the practice of protecting royalties by the registration of caveats under the real property legislation was already a well ensconced customary protocol for protecting royalties long before *Dynex Petroleum* was decided.

This annotator's endorsement of the *Dynex Petroleum* decision does not come without certain caveats of its own. First of all, this annotator is not entirely comfortable with the assertion that a property interest is either real or personal depending upon the intent of the parties creating the interest. The whole concept that the intent of the immediate parties to the conveyance (and yes, "conveyance" would be a technically appropriate term for a transfer of an interest in land) governs the juridical nature of the interest is somewhat troubling, especially given that it is precisely third parties (i.e. parties not involved in the creation of the interest) that most desperately need the protection of objective rules by which to determine whether a given interest

is real or personal (in order to search and register appropriately). The immediate parties to the conveyance are bound to each other in contract, if nothing else, and do not typically need, as against each other, to distinguish between real and personal property being conveyed.

This annotator also admits to being somewhat confused with the Supreme Court's assertion that "[r]oyalties, as used in the oil and gas industry, make sense only if they are property interests in unproduced minerals [in situ]." Although this annotator has no familiarity whatsoever with the business practices surrounding the granting of royalties, this annotator intuitively comes to the opposite conclusion: royalties make no sense if they are property interests in unproduced minerals in situ. If a royalty truly was an undivided percentage right in the minerals, that would make it something like a defacto assignment of an undivided fractional interest in the working interest itself. Instead, royalties seem somewhat more akin to promises given by the owner of the working interest to pay certain unspecified amounts for certain period(s), the exact quantum of each such payment being a direct function of the total amount extracted during such period(s). It might be illustrative to consider what might be the case if the owner of the working interest fails to extract any minerals, oil or gas notwithstanding its working interest, or extracts same inefficiently or incompetently. Is there then some remedy by royalty holders to seize the working interest and extract the riches themselves? If royalties are truly "property rights in unproduced minerals" one would expect that type of remedy. If, however, there is no such right on the part of royalty holders to seize and work the working interest themselves, then the royalty would look much like any other unsecured promise to pay.

Although probably considered a "win" for royalty owners generally (certainly the holding in *Dynex Petroleum* favoured the royalty owners who had registered their respective caveats on title long before competing real property lenders), the finding may ultimately prove to be a "double-edged sword" for royalty owners. So, while *Dynex Petroleum* validates the process of registering caveats at land registry offices to perfect and preserve priorities in royalties, by confirming that a royalty can be an interest in land if the language manifests such an intent, the law after *Dynex Petroleum* pretty well mandates that such royalties must always now be registered on title lest priority or title be lost. Furthermore, query whether all of the implications of such a finding have percolated through the oil and gas industry. For instance, but without limitation: what are the potential tax consequences?; does the Statute of Frauds now apply to royalty deals?; and what are the appropriate limitation periods for enforcing royalties?

This annotator also notes that it may be possible to export the ratio in *Dynex Petroleum* beyond the confines of oil and gas royalties, as there is nothing in the reasons that limits the finding to just royalties. According to *Dynex Petroleum*, interests issuing from any incorporeal hereditaments can be interests in land, depending upon manifested intent. Although it is not immediately clear to this annotator what the long term implications of a widespread application of the ratio in *Dynex Petroleum* might be, it is interesting to note that, aside from a profit à pendre, the largest body of recognized incorporeal hereditaments is actually easements. Could it be that rights issuing out of or in respect of easements can now also be interests in land capable of binding the fee owner?

The facts of *Third Eye* were nicely summarized by Mr Justice Lauwers:

1 Dianor Resources Inc. was insolvent. At the request of the respondent, Third Eye Capital Corporation as a lender, the court appointed a receiver under s. 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), and s. 101 of the Courts of Justice Act, R.S.O. 1990 c. C.43 ("CJA"), over the assets, undertakings, and property of the debtor, Dianor1.

2 Dianor's main asset was a group of mining claims. The claims with which this appeal is concerned were subject to, among other things, a "Gross Overriding Royalty" ("GOR") in favour of a company from which the appellant, 2350614 Ontario Inc. ("235Co"), had acquired the royalty rights. Notices of the agreements granting the GORs were registered on title to the surface rights and the mining rights.

3 The supervising judge made an order approving a bid process for the sale of Dianor's mining claims. It generated two bids, both containing a condition that the GORs be terminated or significantly reduced. Third Eye was the successful bidder.

4 At the request of the receiver, the motion judge approved the sale of the mining claims to Third Eye and granted a vesting order that purported to extinguish the GORs. 235 did not oppose the sale but asked that the property vested in Third Eye be subject to the GORs.

5 The motion judge rejected the appellant's argument that the claims would continue to be subject to the GORs after their transfer to Third Eye. He held, at para. 30: "that the GORs do not run with the land or grant the holder of the GORs an interest in the lands over which Dianor holds the mineral rights." The motion judge also held, at para. 38, that ss. 11(2), 100, and 101 of the CJA, gave him "the

jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just" including the authority to dispense with the royalty rights. He found the expert's valuation of the royalty rights to be fair and added, at para. 39:

In my view, it is appropriate and just that a vesting order in the usual terms be granted to Third Eye on the condition that \$250,000 be paid to 235Co. or whatever entity Mr. Leadbetter directs the payment to be made. That is higher than the mid-point of the range of values determined by Dr. Roscoe.

6 The receiver paid this amount to 235Co. The funds are being held in trust pending the outcome of this appeal.

The lower court judge decided that the royalty was a personal right and was not an interest in land notwithstanding it was expressed to be an interest in land and notwithstanding it was registered against title to the mining claims. The lower court judge applied common law property type principles and ignored the actual intention of the parties. The court held:

26 In my view, the situation with 235Co. is exactly described by Roberts J. 235Co. has no right to enter the property to explore and extract diamonds or other minerals. That right belongs to Dianor. The only right 235Co. (or 381Co., Paulette A. Mousseau-Leadbetter and 1584903 Ontario Ltd.) obtained under the agreements was to share in revenues produced from diamonds or other minerals extracted from the lands. It is clear from the agreements that the royalties were to be a percentage of the value of the diamonds or other metals and minerals. The interest, out of which the royalty is carved, is not interest in land.

30 I conclude and find that the GORs do not run with the land or grant the holder of the GORs an interest in the lands over which Dianor holds the mineral rights.

Dynex decided that the royalty need not be carved out of a corporeal hereditament, a profit would suffice.

The royalty agreement contained a provision that the parties intended the royalty to run with the lands. The lower court judge ignored this using the following analysis:

22 The Crown Land Agreement and the Patented Land Agreement state that the parties intend the GORs to run with the land:

4.1 It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all

successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest. If any right, power or interest of any party under the Leadbetter Crown Land Property Option Agreement would violate the rule against perpetuities, then such right, power or interest shall terminate at the expiration of 20 years after the death of the last survivor of all the lineal descendants of Her Majesty, Queen Elizabeth II of England, living on the date of this Agreement..

23 However, this clause does not convey any interest in land but only states the intent of the parties. The issue is whether that intent was carried out in the agreements.

This approach was in line with court decisions since *Dynex*, but according to Mr. Justice Lauwers was not in line with the actual decision in *Dynex* which required parties to determine the actual intention of the parties. Lauwers was prepared to find that the intention of the parties could be found in their including in the royalty of the section 4.1 that clearly provided that the royalty was to be an interest in land. The parties clear and unequivocally evidenced their intention in Section 4.1.

The Court of Appeal provided:

61 In my view, the first element is also met. The Crown Land Agreement and the Patented Land Agreement expressly state that the parties intend the GOR to create an interest in and to run with the land. To repeat for convenience, s. 4.1 of each of the Agreements states:

4.1. It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest.

62 Apart from the plain language of the Agreements, in considering the surrounding context, the original GOR-holder took steps to register its royalty rights: notices of the GORs were registered on title to the patented lands under s. 71 of the LTA and on the unpatented mining claims under the Mining Act.

63 I agree with the Court of Appeal of Alberta in *Dynex*, at para. 73, that the court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances". Doing so in this instance makes plain their mutual intention to constitute the GORs as interests in land. It is express in the

Agreements (based on the general principles of contractual interpretation), and the royalty rights-holder took care to register the interests on title.

While the court acknowledged that the court had to look at the agreement as a whole to determine what the parties intended and the existence of the magic words was a factor in that analysis, and probably a most important factor, it wasn't presumptively determinative. If other terms of the agreement made it clear that the parties did not intend to create an interest in land notwithstanding the existence of magic words, then it would not be an interest in land. However, the absence of property type rights was not a contrary intention. In fact Lauwers is satisfied that the existence of the magic words and registration is good enough to make a royalty an interest in land.

This decision effectively settles the law in this area. The parties will now negotiate for the magic words to be inserted in the royalty agreement. If they then register the royalty agreement they will create an interest in the land that binds future purchasers. It is unlikely that future will royalty agreements will not follow exactly the rules in *Third Eye*. I would be prepared to say that there would have to be some pretty wonky language in a royalty agreement to get around the express magic language. The parties could avoid this by adding to the magic language some kind of "notwithstanding" language providing that notwithstanding any other language in the royalty agreement to the contrary, the parties intend the royalty to be an interest in land.

The Vesting Order

Turning to the second issue in *Third Eye*, remember that the lower court judge issued a vesting order, the vesting order was registered and the vesting order was not stayed pending the appeal. Remember also that the vesting order vested title free of the royalty interest. There is no doubt that the court had no authority to vest title in Third Eye Capital free of the royalty interest if the royalty interest were an interest in land. Since the Court of Appeal concluded the royalty was an interest in land, there is no doubt that the lower court judge had no legal authority to vest title free of the royalty interest. But the lower court judge did so, the vesting order was registered under the *Land Titles Act*, and under the *Land Titles Act* Third Eye Capital received indefeasible title to the mining claims free of the royalty interest.

Unfortunately, because the vesting order wasn't stayed, the Court of Appeal was in a quandary about what to do about the vesting order. On the one hand it is absolutely unfair that 2350614 should lose its interest because of an overturned decision of the lower court judge. That is why we have a Court of Appeal to make good errors in the lower court. On the other hand vesting orders are sacrosanct. Parties are entitled

to rely on the vesting order without concern as to whether some procedural or substantive error occurred. To set aside the vesting order could lead to litigants trying to set aside vesting orders in many circumstances leading to uncertainty and buyers possibly having to start doing due diligence to ensure the vesting order is properly given

In the real world, there occur situations where litigants obtain vesting orders to resolve problems and in some cases the basis for doing so is weak. Most judges are very careful to ensure they have heard all the arguments and have the requisite authority because the vesting order is considered a final and not overturnable event.

In this case the Court of Appeal has to tread carefully to ensure it does not weaken the power and authority of the vesting order but still try to do justice in this circumstance.

Unfortunately, the Court of Appeal felt it was not in a position without further argument to resolve this conundrum.

The Court confirmed that the lower court judge did not have authority through the vesting order process to take away the property rights of 2350614. The court stated:

108 The Superior Court of Justice has all of the jurisdiction, power, and authority historically exercised by courts of common law and equity in England and Ontario, as provided in s. 11(2) of the CJA. This power includes making vesting orders: CJA, at s. 100. However, this Court has interpreted these provisions as conferring no greater authority on the Superior Court than was previously recognized at equity.

109 The leading text — Houlden, Bankruptcy and Insolvency Law of Canada, at Part XI, LÂ§21 — notes:

A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

110 The leading judicial authority in Ontario is *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.). In that case, Lang J.A. stated, at para. 19, that s. 100 of the CJA:

[P]rovides a court with jurisdiction to vest property in a person but only if the court also possesses the "authority to order [that the property] be disposed of, encumbered or conveyed". Thus, s. 100 only provides a mechanism to give the applicant the ownership or possession of property to which he or she is otherwise entitled; it does not provide a free standing right to property simply because the court considers that result equitable. [Footnote omitted. Emphasis added.]

111 At equity and common law, a party must have a valid and independent entitlement to possession or ownership in order for a court to issue a vesting order that extinguishes a third party's real property interest. Several cases have held that the inherent jurisdiction of the Superior Courts does not confer the power to take real property from third parties simply because the court considers it equitable to other stakeholders. Rather, it gives courts authority to bring about a transfer of title to a party who is otherwise or independently entitled to it. See also *2022177 Ontario Inc. v. Toronto Hanna Properties Ltd.* (2005), 203 O.A.C. 220 (Ont. C.A.), at para 49. See also *Clarkson Co. v. Credit foncier franco canadien* (1985), 57 C.B.R. (N.S.) 283 (Sask. C.A.), at p. 284.

112 Although this court has referred obliquely to this issue in several cases, we have never faced it squarely.

(c) The Policy Context

113 The policy context is well set out by Wilton-Siegel J. in *1565397 Ontario Inc., Re*, [2009] O.J. No. 2596, 54 C.B.R. (5th) 262 (Ont. S.C.J.). In that case, a numbered company delivered an undertaking at closing to later transfer part of the real property to two parties. The company became insolvent, and a receiver was appointed. Although the undertakings were not registered on title until after the appointment of the receiver, the relevant parties had actual notice of them. The receiver attempted to sell the property free of the undertakings. The Court refused to permit the sale. Justice Wilton-Siegel stated, at para. 60:

I know of no law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment . . . amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors.

114 He added, at para. 67: "I do not think the Court has the authority to order a sale" of the third party's proprietary interests "on the basis proposed" by the receiver. Among the reasons he gave for refusing a vesting order, at para 68, was that the third party's interest was not subject to the receivership:

Such interests in the Property reside in the respondents whose property is not subject to the receivership. . . . [The receiver] cannot have taken possession of, or otherwise have any interest in, the respondents' interests in the Property, regardless of the terms of the Receivership Order because the Order extends only to the assets of [the debtor]. As such, the [receiver] has no authority under the Receivership Order to sell the interests of the respondents. Nor does the Court have the authority to grant such an order in the absence of the appointment of a receiver over the respondents' property and assets.

In the referral back for further argument the court advised counsel what issues the court wants assistance on in deciding on what circumstances if any the lower court judge could have vested title free of the royalty interest :

116 There are several situations in which courts have considered vesting orders that vest out a third party's proprietary interest. I address several, and there may be others.

(a) The "narrow circumstances" exception

117 Several cases have held that in some narrow circumstances, courts may issue a vesting order that extinguishes third party interests. Such circumstances appear to include situations where doing so would provide added certainty, and there is no evidence of competing proprietary interests: *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2012 ONSC 1868 (Ont. S.C.J. [Commercial List]), at paras. 5, 18, 20-21.

118 What are the narrow circumstances in which a Superior Court judge may issue a vesting order under s. 100 of the CJA that vests out a third party's proprietary interest, when s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply?

(b) The equities

119 Courts have also considered the "equities" in determining whether to issue a vesting order. Although the term, "equities", is an ambiguous word, the vesting order cases have tended to use it to describe their work in establishing priorities among interests. See, for example, *Meridian Credit Union v. 984 Bay Street Inc.*,

[2005] O.J. No. 3707, rev'd [2006] O.J. No. 1726 (Ont. C.A.), and [2006] O.J. No. 3169 (Ont. S.C.J.). See also *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), rev'd 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.); and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120.

(c) Have commercial practices expanded the court's jurisdiction?

120 Finally, under the rubric of "equitable considerations", s.100 of the CJA, and the Superior Court's inherent jurisdiction, has the permissible reach of the vesting order grown to permit a court to vest out virtually any interests in an asset? See, for example, David Bish and Lee Cassey, "Vesting Orders Part 1: The Origin and Development" (2015) 32(4) *Nat. Insol. Rev.* 41; and "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32(5) *Nat. Insol. Rev.* 53.

If one of these circumstances existed, presumably the court would not have to set aside the vesting order and the court would not have to resolve the further issue as to when it ought to set aside a vesting order.

The court also wanted argument on whether it had authority under the *Land Titles Act* once the vesting order is registered. That is notwithstanding that the court must decide if a vesting order can be set aside from a judicial sanctity point of view, it must also decide if it can, given the indefeasibility rules in the *Land Titles Act*. Can the court rectify the register in these circumstances. This will be decided by the rectification rules in section 159 and 160 of the *Land Titles Act*. Section 159 and 160 provide:

159. Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.

160. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

As well, the court will have to consider the concept of actual notice. In this case the buyer Third Eye Capital had actual notice of the issue of whether the royalty was an interest in land and cannot argue they were a bona fide purchaser for value without notice who relied on the title record. As well, the lower court allowed the vesting order to be registered in the face of the appeal which called into question the vesting order's efficacy and this also may support setting aside the vesting order. On these points the court provided:

17 Third Eye submits that the appeal is moot because the vesting order was "spent" when it was registered, relying in part on *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.). In that case, a hotel was placed into receivership. The receiver found a purchaser. The court approved the sale and granted a vesting order in favour of the purchaser. A few days later, the sole shareholder of the company that operated the hotel discovered information about the identity of the group behind the purchaser. This was relevant because the group had previously entered into agreements to purchase the hotel for more money, but the transactions had failed to close. The sole shareholder sought to set aside the vesting order on the basis that the receiver had failed to disclose the identity of the group behind the purchaser.

18 This court quashed the appeal in *Regal Constellation* as moot. The conditions attached to the vesting order had been met and the vesting order (and the bank's mortgage) had been registered on title. Justice Blair stated, at para. 39:

Once a vesting order that has not been stayed is registered on title . . . , it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

19 Where no stay is obtained and the order has been registered, "innocent third parties are entitled to rely upon that change [in title]," as Blair J.A. noted, at para. 45 of *Regal Constellation*. Accordingly, the respondent argues that this appeal is moot.

20 It cannot be said that the appeal is moot in the particular circumstances of this case. The order is spent, but the remedy for rectification under the LTA, left open by Blair J.A. in *Regal Constellation*, may be available to the appellant, provided that several conditions are met: (1) the motion judge had no jurisdiction to vest out the GORs; (2) no innocent third party has relied on the title to its detriment; and (3) the appellant is otherwise entitled to the remedy.

21 Additional submissions are required. In particular, because I conclude the GORs are interests in land, does the fact that Third Eye had notice of 235Co's claim affect the application of *Regal Constellation*? Third Eye was aware that 235Co was considering an appeal on the day of (but prior to) the closing of the transaction.

22 Blair J.A.'s observation in *Regal Constellation*, at para. 49 was: "These matters ought not to be determined on the basis that 'the race is to the swiftest'." Was it appropriate for the court-appointed receiver to close the transaction before the expiry of the appeal period, having been advised that an appeal could be launched, and how does this affect the availability of a remedy?

23 As Blair J.A. recognized, vesting orders have a dual character as both a court order and a conveyance. Once an order is registered on title, it is effective as a registered instrument and has lost its character as an order. However, in my view, this does not mean that 235Co is necessarily without a remedy, if the GORs constitute interests in land. As Blair J.A. noted in *Regal Constellation*, the vesting order "cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system": at para. 39. If the GORs are interests in land, then the appellant's remedy is to be found under the LTA. In these circumstances, it would be premature to quash the appeal.

This will raise the same kinds of issues that the Court of Appeal dealt with in *MacIssac vs Salo*⁴ where the court rectified a registered reference plan relying on the fact that the *Land Titles Act* does not guarantee the quantity of title. In the Third Eye case the issue goes to the quality of title and therefore it will be harder for the court to find an easy mechanism to rectify the title.

Conclusion

In conclusion, the court has settled the test for determining if royalties should be interests in land that run with the land and bind future buyers of mining claims. If

⁴ *Spencer v. Salo* 2013 CarswellOnt 1606, 2013 ONCA 98, 114 O.R. (3d) 226, 223 A.C.W.S. (3d) 891, 29 R.P.R. (5th) 1, 303 O.A.C. 374 [note this case is reported as *Spencer vs. Salo* but it should have been reported as *MacIsaac vs. Salo*. *Spencer* was *MacIssacs* middle name.]

the royalty agreement contains the magic language they are intended to be interests in land and are registered, they are interests in land. Drafting royalty agreements will be easier and result in simpler less tortured royalty agreements. Lenders to the mining industry will have more certainty.

The concern that this case will be used to make other agreements that traditionally are not interest in land, interests in land because the magic language is included and the agreement get registered is unlikely to be the case. The *Dynex* case was a special case dealing with royalty agreements and the mining industry and *Third Eye* will be treated the same way.

Finally, *Third Eye* will resolve important issues regarding the sanctity of vesting orders and the indefeasibility of title which will ultimately affect how we all practise. Stay tuned.



15TH ANNUAL Real Estate Law Summit

Camps, Mining Claims, and Summer Resort Locations: What Makes Practice North of North Bay Different?

Christine McLeod
McLeod Ducharme LLP

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As real estate prices in the GTA continue to rise, so do the values of property in those regions north of Toronto that were previously considered to be affordable alternatives for retirees and others seeking a lower cost of living. The population is now migrating farther northward in the hunt for reasonably priced property, space, privacy, and the rural experience, while so do the geographic boundaries of “cottage country”. Meanwhile, the agricultural communities from Southern and Eastern Ontario have also discovered the richly productive clay belt areas north of Lake Temiskaming through to Cochrane. Farmers are moving northward in droves to establish farms on prime agricultural land priced approximately 1/6th of the cost per acre paid in southwestern Ontario. As a result, more and more lawyers find themselves working on transactions involving properties located hundreds of kilometres north of their typical practice area.

With a few exceptions, the same laws apply to practice in Northern Ontario as elsewhere in the province. Most cottage transactions (colloquially referred to as “camps” by many north of North Bay) will involve the same types of issues encountered in rural and cottage country transactions throughout the province. Road access, septic systems, wells, docks and boat houses are matters that have been given comprehensive coverage by presenters at previous Real Estate Summits, and therefore will not be covered extensively here. However, there are a number of uniquely northern issues that may arise on the “typical” real estate transaction north of North Bay (- if it can even be said that there is such a thing!) and may only be encountered once or twice in a solicitor’s career. Examples include:

- Property in unorganized townships;
- Houses sitting on freehold lands described as “Mining Claims” or “Resort Areas”;

- Reservations of trees, colonization roads, shorelines, and mining rights;
- “Floating” roads parcels; and,
- Landlocked parcels.

The purpose of this paper is not to give an in-depth or exhaustive examination of the laws on any particular topic, but rather, to provide a practical resource designed to highlight the common issues that arise in transactions in the northern parts of the province. Essential searches and other due diligence matters are covered first, followed by an overview of some of the typical or unique issues that may be encountered over the course of the engagement, with recommendations or insights into how they may be handled.

TITLE AND OFF-TITLE SEARCHING

1) Temiskaming and Cochrane are straight Land Titles jurisdictions

The districts of Temiskaming (LRO 54) and Cochrane (LRO 6) have always been Land Titles jurisdictions. Except for one or two exceptional Registry parcels in each region, lands in these districts were never part of the Registry system, and therefore did not go through the same conversion processes from Registry to Land Titles as elsewhere in the province.

While this may be relevant in a number of ways, the most significant distinctions are as follows:

- i. **Abutting land searches must be conducted to ensure there hasn't been any contravention of the *Planning Act*¹.**

Unless there is an exemption from part-lot control, such as the property being a whole lot on a registered plan of subdivision, searches should go back to the last transaction prior June 15, 1967, if in an area that was designated by the Minister as being within an area of subdivision control, or to June 27, 1970 otherwise. (Under Minister's order dated June 19, 1962, designated areas within the District of Temiskaming are the Townships/Towns

¹ R.S.O. 1990, c. P.13.

of: Gauthier, Boston, Chamberlain, Dack, Evanturel, Lebel, Marquis, Marter, McElroy, Otto, Pacaud, and Charlton).

Written or verbal directions have been obtained from the underwriters at three of the four major title insurers indicating that in Land Titles absolute jurisdictions the lawyer is required to complete the same abutting title search that would be completed if title insurance were not being purchased. This would suggest that you should always conduct a full abutting search in these districts, notwithstanding title insurance coverage.

It is the writer's opinion that full abutting searches should always be undertaken when acting for a purchaser absent a clear exception to part-lot control rules. *Planning Act* breaches are very common in this part of the province, and curative remedies are very difficult if not impossible to obtain, whether or not the property is title insured.

If in doubt, contact your title insurer to confirm search requirements, and always ensure that your client has provided instructions in writing acknowledging the limitations on what remedies title insurance can provide for contraventions of the *Planning Act* if proceeding without a search.

A further note about *Planning Act* searches. The writer's searches have uncovered several occasions where *Planning Act* breaches have been apparently "cured" by transfer to the municipality, and then back to the land owner or to a third party. In theory, these transactions would fall within the scope of the exception under the Act which applies where land is acquired or disposed of by government.² Unfortunately, no acquisition or disposition by a government will come within the exception to the general prohibition if it is designed to allow a third party, not otherwise exempt, to avoid the subdivision control provisions of the Act.³ Accordingly, such circumstances should be treated with great suspicion. Absent evidence that there was a proper governmental purpose to the

² R.S.O. 1990, c. P.13, s. 50(3)(c)

³ *Jackson and Freer (Re)* 1980, 6 A.C.W.S. (2d) 134 (Ont. Co. Ct.).

transactions, such circumstances should not be relied on as a cure for a *Planning Act* breach.

- ii. **Adverse possession and prescriptive rights don't exist under Land Titles.** Section 51 of the *Land Titles Act*⁴ reads as follows:

51 (1) Despite any provision of this Act, the Real Property Limitations Act or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired thereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.

According there is no need to make requisitions or otherwise concern oneself with possible possessory or prescriptive claims in these Land Titles districts the way one would in Land Titles Conversion Qualified (LTCQ) jurisdictions where adverse possessory and prescriptive rights were preserved during the conversion.

- iii. **Title is subject to any reservations in the Crown patent.**

Every PIN in a Land Titles district includes the notation "SUBJECT TO RESERVATIONS IN CROWN GRANT". Accordingly, you must always examine the Crown patent to identify any reservations, restrictions or other qualifiers on title. There will almost always be reservations on property in Northern Ontario, as discussed in greater detail later in this paper.

2) **Other Searches**

In addition to the above, there are several other searches that should be considered in every case.

- i. **Subject PIN and abutting lands.**

⁴ *Land Titles Act*, R.S.O. 1990, c. L.5

Many properties in Northern Ontario simply have not been assigned municipal addresses, and the legal descriptions in Agreements of Purchase and Sale are often inaccurate or incomplete. It is therefore good practice to review the PIN early in the engagement to confirm that the legal description and ownership is consistent with the Agreement, and to promptly seek amendment to the Agreement to remedy any inaccuracies.

In most parts of Northern Ontario, simply reviewing the subject PIN may be insufficient for the purposes of confirming the legal description of the subject property. Many properties in this part of the world are comprised of multiple PINs - a fact sometimes unbeknownst even to the vendor, and particularly when they are all found on a single tax roll. It is easy for parcels to be omitted from the transaction entirely if an abutting search isn't otherwise required for *Planning Act* purposes – a problem that may come back to haunt both lawyer and client when it is later discovered that half of the home is located on a lot that is still registered in the name of the Vendor. A quick search of the vendor's name in Teraview will reveal if there are any other adjacent properties that should have been included in the transaction, without putting your client to the additional expense of pulling the abutting PINs if otherwise unnecessary.

ii. **Road access.**

Land in Northern Ontario is plentiful, but roads are not. Many properties have no road access at all, being completely land-locked or accessible only by water, while others may be accessed only by roads on private property.

The road on private property may be a public highway by virtue of the provisions of the *Municipal Act*^{5,6}, failing which, your client may be entitled only to rely on the provisions of the *Road Access Act*⁷ to protect their right of access. The *Road Access Act* acts as a shield, rather than a sword, in that it provides land owners who cannot otherwise access their

⁵ *Municipal Act, 2001*, S.O. 2001, c. 25, s. 26.

⁶ An excellent and highly in-depth explanation of the various ways by which a privately-owned road may be deemed to a public highway can be found in W.D. (Rusty) Russel, Q.C., *Russell on Roads*, 3rd Ed. (Toronto: Carswell, 2015).

⁷ *Road Access Act*, R.S.O. 1990, C. R. 34, s. 2(1).

property with the right not to be treated as a trespasser for the purposes of accessing their lands. It is an imperfect solution however, as it does not put any obligation on the road owner to maintain the road, nor give others reliant on the road the right to perform any form of maintenance - even at their own cost. It also fails to provide protection to the land owner whose property abuts a public road at any point, regardless of how inaccessible the remainder of the property may be from that particular location.

Remarkably, a lack of road access may not be an issue for your purchaser client. Many people buy remote properties for hunting or agricultural purposes, with the intention of accessing them by water, or from adjacent lands owned by friends, family, or the purchaser themselves. Whatever the case may be, if the access is not by public road then ensure you have complied with your obligations to your client, title insurer, and mortgage lender by confirming the state of access in writing and obtaining their instructions accordingly.

iii. **Tax searches.**

Obtaining tax information in Northern Ontario is not as straightforward as it may be elsewhere. Land owners may find themselves receiving a property tax bill from the municipality, a water bill from a neighbouring community, and an additional tax bill from the Local Roads Board or Local Services Board.

Start by contacting the municipal office in the community where the property is located to obtain a realty tax bill, and ask specifically about water and sewer charges, as well as about local roads or services boards. And give yourself plenty of time! Many smaller municipalities are run by volunteer or part time employees who may only work 1 or 2 days per week.

If the property is located in an unincorporated township or territory, then it will be subject to Provincial Land Tax instead of municipal taxes. In that case, you must contact the Minister of Finance Provincial Land Tax Administration office for the tax certificate, as follows:

Address: Ministry of Finance, Provincial Land Tax
500 Donald St. E.
Thunder Bay, ON P7C 0A5

Tel: (807) 625-2122 or (866) 400-2122

Fax: (807) 623-3378

Email: plt@thunderbay.ca

Many local roads boards and local services boards have now opted in to the central Provincial Land Tax billing system, wherein a single tax bill is issued by the PLT office. Lawyers acting for purchasers in unorganized townships should be aware that the PLT office only has tax information as of the date that they took responsibility for billing and collections. As a result, there may be roads tax arrears attaching to the property from previous years that don't appear on the PLT certificate. The lawyer should always write directly to the local road or services board, where applicable, to ensure that all taxes have been accounted for.

iv. **Work orders, zoning, septic permits, and Building Code compliance.**

Standard search letters should be sent to the municipality or other local authorities, as required. But what about properties in the unorganized townships?

Unorganized townships are not the lawless no-mans-lands that many purchasers believe them to be. Although there may not be by-laws, enforcement officers, or a building permit requirement in unorganized areas, provincial and federal laws do apply throughout the province, and appropriate searches and inquiries should be conducted as required with the proper authorities.

- **Existing structures and improvements.** The *Building Code*⁸ applies to all lands, including in unincorporated and unorganized territories, whether or not a permit is required or was issued. You can contact the Ministry of Municipal Affairs and

⁸ *Building Code Act, 1992*, S.O. 1992, c. 23.

Housing (MMAH) Municipal Services Office to determine if any work orders have been issued.

- **Septic tanks.** The local health unit or conservation authority has jurisdiction over and issues permits for all septic system approvals.
- **Zoning.** Although there may not be a local zoning by-law, certain unorganized townships are located in District or Territorial Planning Boards, as is the case with approximately 25 townships in the area north of Sault Ste. Marie. Other properties or townships may be subject to Minister’s Zoning Orders or Zoning by-laws, in which cases a Letter of Conformity or Zoning Conformity Permit from the MMAH is required prior to any development or construction. 19 Geographic districts in the Sudbury area are included in one such area.

Unfortunately the Ministry does not have a general list or website indicating what townships and properties are affected by such orders and by-laws; however, you can contact the MMAH for information on a case-by-case basis. As of the date of this paper, the contact person with the MMAH’s Northern Ontario offices is:

Name:	Caitlin Carmichael
Position:	Assistant Planner for Northeast District
Tel:	705-564-6845
Email:	Caitlin.carmichael@ontario.ca

- **Docks and shoreline structures.** The regional office of the Ministry of Natural Resources and Forestry should be contacted with inquiries regarding the legality of docks and other shoreline structures. Be advised however that an inquiry into an unpermitted structure could lead to an investigation and order for its removal, so you should discuss this risk with your client before making any inquiries.
- **Highway access.** The Ministry of Transportation should always be contacted to inquire into highway entry points/permits for properties located on provincial highways.

TYPICAL “NORTHERN” LEGAL DESCRIPTIONS AND OTHER TITLE ISSUES

On review of the PIN it is discovered that the purchaser is buying a property described in the thumbnail as “Summer Resort Location X###”. What does this mean? Can they occupy the property year-round? Or perhaps their new cottage is on a parcel described as “Mining claim XY###”. What is a mining claim in this context? And does that mean that the purchaser is also receiving the mineral rights? An examination of the PIN, Crown patent, and other searches of the Northern Ontario property is likely to reveal something that you haven’t encountered before in your standard residential practice. The following is a non-exhaustive summary of some of the more common types of legal descriptions and other title matters that might cause your head to spin, and recommendations on how to deal with them.

1) Summer Resort Locations

Like many other forms of land tenure, summer resort locations were granted under the authority of the *Public Lands Act*⁹ in its various forms. The Act gives the Minister the broad authority to grant lands to individuals for a variety of purposes by issuance of letters patent, subject to such conditions, reservations and restrictions as the Minister may deem appropriate, as well as certain mandatory conditions or restrictions as described in the Act – many of which are then voided in later versions of the Act.

The term “summer resort location” first appears in the Act in 1960¹⁰; however, there is no description of what a summer resort location is. Accordingly, one must look to the letters patent (and of course any other instruments or laws affecting title) to determine the nature of the land tenure and any conditions, restrictions or reservations attached thereto.

Newer patents will contain a mandatory reservation of all mines and minerals¹¹, and may also include conditions that the land must be used or must not be used in a particular manner¹². Year-round residences are not prohibited simply by virtue of the description as a “summer”

⁹ Currently R.S.O. c. P.43.

¹⁰ S.O. 1966, c. 324.

¹¹ R.S.O. c. P.43, s. 15(6).

¹² R.S.O. c. P.43, s. 18(1).

resort, and are permitted unless there is an indication that the lands may only be used seasonally.

Older patents will inevitably contain certain conditions or reservations that have since been deemed void by later versions of the Act. They include:

- Reservations of all timber and trees generally, or of any particular class¹³; prohibition of the cutting of pine timber except for necessary building or clearing with permission of the Minister¹⁴; or providing for the manner of disposal of cut timber¹⁵; and,
- Requirements that the patentee shall expend not less than \$300 on the construction of buildings within 18 months of the date of the patent¹⁶.

There may also be other reservations, such as navigable waters, shoreline road allowances or rights-of-way, and other road reservations, a general discussion of which is found later in this paper.

The summer resort location's letters patent will typically include a metes and bounds description, as well as reference to a particular designated location on an attached sketch or plan of survey. There may be many designated summer resort locations on one plan, resembling lots on a plan of subdivision. Beware, however, that the language of the Act in its various forms over the years makes it clear that these plans are not considered registered plans of subdivision unless specifically designated and registered as such¹⁷, and therefore are subject to the application of subdivision control provisions of the *Planning Act*¹⁸.

2) Patented Mining Claims

Patented mining claims are another form of land tenure that had previously been granted under the *Public Lands Act* or the *Mining Act*¹⁹, in the form of either a leasehold or freehold

¹³ R.S.O. c. P.43, s 58(2).

¹⁴ R.S.O. c. P.43, s. 58(4)(a).

¹⁵ R.S.O. c. P.43, s. 58(4)(b).

¹⁶ R.S.O. c. P.43, s. 68.

¹⁷ See i.e. *Public Lands Act*, S.O. 1966, c. 324, s. 15(2).

¹⁸ R.S.O. 1990, c. P.13.

¹⁹ Currently R.S.O. 1990, c. M.14.

interest, for the purposes of permitting mineral extraction and other mining activities on and under a parcel of land.

Although initially granted for mining purposes, there are now many homes, camps (cottages) and businesses sitting on these properties, including on leasehold claims. Review the PIN carefully to ensure that your client is receiving the estate that they bargained for. Leases typically have a 21 year term with right to renew for a second 21 year term at the discretion of the Minister. There is no right of renewal beyond that without a new lease or amending agreement. Consent of the Ministry of Northern Development and Mines (“MNDM”) is also required to transfer or encumber any mining lease, even if not being used for mining purposes.

Although described as a “mining claims”, these properties may no longer include mineral rights. The *Planning Act* does not apply to mineral or sub-surface rights so mining patent holders, concerned primarily with the sub-surface interests, often sell the surface rights to third parties for other purposes. Review the legal description carefully for the notations “MRO” or “SRO”, which indicate that the land includes or excludes surface or mineral rights only. To add to the confusion, a single PIN may include both mineral and surface rights over one portion of the parcel, but only MRO or SRO on the remainder.

The purchaser of surface rights only must be aware that their interest is always subject to the right of the mineral rights owner to enter on to the lands to engage in exploration activities. Actual mining and mineral processing activities, however, must be approved by the MNDM, and the surface rights holder is entitled to be fully compensated for their damages.²⁰

Mineral rights are often subject to mining taxes imposed by the MNDM on their own tax roll. Not all mineral rights are subject to mining taxes however, as the Minister has the discretion to exempt a property from the imposition of the tax if the lands aren’t being used for mining purposes and there are no existing mining interests in the lands.

²⁰ *Mining Act*, R.S.O. 1990, c. M.14, s. 175(2); 2017, c. 8, Sched. 17, s.7(1).

If mining taxes are assessed but unpaid, the mining rights may be forfeited to the Crown. The buyer's lawyer should examine the PIN for notices of forfeiture, seek proof of the mining tax status of the property, and adjust for mining taxes on closing if applicable.

Where a purchaser has no interest in mining the property, it may be prudent to add a condition to the Agreement of Purchase and Sale requiring the vendor to make the application for exemption from mining land tax before closing. There is no cost to making the application.

Although there is no requirement to notify the MNDM of a change of ownership in freehold patented mining lands, it may be prudent to do so where there is a change in use of the lands or where your client sees value in the mineral rights. There have been cases where the MNDM's records incorrectly show the mining rights as being owned by the Crown, and therefore available for claim-staking, when in fact they are owned by the surface-rights holder as established through a title search.

Like other types of properties, the mining lands patents or leases will contain a number of reservations or conditions and therefore must always be reviewed carefully. The PIN should also be examined carefully for notices of "net smelter agreements" or other mining-related instruments affecting the lands, and a mining lawyer should be consulted to review those documents where appropriate.

3) Surface rights only – who owns the mineral rights?

Most real estate transactions in the province will include surface rights only – the mineral rights having been reserved to the Crown in the Crown patent or conveyed away from the surface rights at some point in the past. While most purchasers are only concerned with what happens on the surface of the lands, those who are purchasing in Northern Ontario or other active mining and exploration regions should at least be aware that they may be affected by the rights of the mineral rights owner.

As described in the mining claim section above, the interest of the surface rights holder is subject to the right of the mineral rights owner to enter on to the lands to engage in exploration activities. If the mining rights are owned by the Crown, then the property may still

be subject to claim staking activities by licensed prospectors. The land owner cannot prevent or seek compensation for these activities.

Where minerals are located, the mineral rights owner must obtain consent of the Ministry for any proposed mining activities. Surface rights owners are entitled to receive notice and provide input. Affected surface rights owners are entitled under the *Mining Act* to compensation for their losses arising from mining activities on their lands, unless there is an express easement in favour of the mineral rights holder, in which case the parties' respective rights will be set out in that instrument.

Purchasers of surface rights often inquire as to who owns the mineral rights, and if they may purchase them. Where the lands are part of a patented mining claim, there will be a separate mineral rights only parcel, assigned its own PIN, that can be searched through Teraview. Failing that, your client will need to contact the MNDM or a licenced prospector to obtain ownership information. The Province will only issue new mining claims to licenced prospectors.

4) Railway Easements and Reservations

There are two similar, but legally very different issues that frequently arise as related to railway lines.

In the early 20th century there was significant mining activity happening in places like Cobalt, Kirkland Lake, Sudbury, and other parts of the region. Public lands were devised to early settlers for the establishment of townsites and homesteads. Concerned with preserving space to develop the necessary mining-related infrastructure, the Province mapped out a number of proposed locations for rail lines. The letters patent for any lands granted in those locations included a reservation for 99-foot-wide right-of-way in favour of the Temiskaming and Northern Ontario Railway Commission.

While those railway lines have long since been built, the reservations remain. Although there are no known proposals for the development of new railway lines in these areas at this time, and as limited as that future risk may be, affected land owners do bear some at least

theoretical risk of loss to their use or marketability of their property because of these reservations. These losses would not be covered by standard residential title insurance policies.

Unbeknownst to many lawyers, there is actually a seldom used provision of the *Public Lands Act* that permits a land owner to make application to the Ministry for the release of certain types of reservations prescribed by regulation, including railway rights-of-way.²¹ The lawyer should always draw the purchaser client's attention to both the right-of-way, and their right to make application for its release.

The reservations described above should not be confused with another common form of easement in favour of the railway commission. After the railways were mapped out and developed, the commissions disposed of large swaths of surplus lands. The mineral rights were typically reserved from those transactions, and the commission reserved easements giving them the right to use the surface of the lands for a wide variety of mining-related activities and practices.

These lands were not granted under the *Public Lands Act* and accordingly, the easements cannot be released on Application to the Minister. If the mineral rights holder were to exercise their easement, the surface rights holder would not be entitled to *Mining Act* compensation, nor coverage under a standard title insurance policy. Accordingly, upon discovery of such an easement, counsel would be well advised to immediately requisition removal of the easement, and if it cannot be removed, to inquire as to whether the title insurer would insure over this issue.

5) Reservations of Trees

Most letters patent for property located in Northern Ontario contain reservations of all standing timber, just pine trees, or in some cases just the white pine – trees which, by virtue of their height, width and straightness, were favoured by the Crown for building the masts on Her Majesty's ships.

²¹ 1998, c. 18, Sched. I, s. 58; O.Reg. 110/01, s. 1.

The *Public Lands Act* now contains provision voiding any reservation of timber or trees contained in letters patent granted under that Act for agricultural purposes, summer resort locations, or for any lands disposed of in letters patent dated on or before the 1st day of April, 1869²²

6) Reservations for shoreline access, sand and gravel, and roads

There are several other common reservations found in Crown patents in Northern Ontario.

They include:

- **Shoreline access.** Many waterfront properties are subject to a general reservation of the right of the public to access and free passage along the shores of rivers, streams and lakes. Others contain a similar reservation but limited to access for the purposes of fisheries. These reservations typically cover a strip of land 1 chain (66 feet) in width from the high-water mark.
- **Sand and Gravel.** Aggregate is a valuable and often scarce resource; accordingly, it was often reserved by the Crown for the purposes of building and maintaining provincial roads and highways.
- **Roads.** Most property in Northern Ontario is subject to a reservation of any public or colonization roads crossing the land. These reservations prevent land owners from restricting access to, or building on those roads, even where the road is no longer in use. Similarly, almost all Crown Patents contain a reservation of a certain percentage (typically 5%) of the lands to for the building of future roads and highways.

The risks or damages arising out of these reservations may seem trivial at the time of purchase. Most people stop feeling that way however when they find themselves with people camped out with fishing rods in the front yard of their quiet lakefront retreat or, worse yet, waking up in the early hours of the morning to the sound and vibration caused by backhoes and large dump

²² *Public Lands Act*, R.S.O. c. P.43, s. 58.

trucks running in and out of their backyard every half-hour carrying gravel. These things can and do happen.

Land owners have no recourse if any of these reserved rights are exercised, and they are not entitled to any compensation from the Province or title insurance for their losses. But all is not lost! All of these are classes of reservations which may be released upon application to the Minister under the *Public Lands Act*.²³ The remedy does come at a cost - any release is made at such price and on such conditions that the Minister considers proper, which typically amounts to an amount approximating fair market value. But it is the writer's experience that some clients are prepared to pay almost any cost to have the peace of mind that comes with quiet use and enjoyment of their cottage-country dream property.

7) **"Floating" road parcels**

This issue is an unusual one that may be relatively unique to certain parts of Northern Ontario. It come up enough in this writer's practice, however, that it is worth touching on.

The issue is one that typically arises in transactions involving the purchase and sale or refinancing of agricultural lands. At some point the lawyer for the purchaser or lender discovers a parcel of land that appears to be, or includes, a section of road that is not adjacent to the remainder of the owner's lands. How is this possible? And should the owners be concerned with liability in the event of an accident?

To understand how these parcels exist we must consider the history of the lands. Imagine a settler receives a large acreage of land under a Crown grant. Over time, a colonization road or concession road allowance across the land is used by the public, improved and maintained through the expenditure of public money, and thus becomes a full-blown public road. It is deemed to be a public highway by the *Municipal Act*²⁴ despite being legally owned by the land owner.²⁵

²³ O.Reg. 110/01, s. 1.

²⁴ 2001, c. 25, s. 26.

²⁵ See W.D. (Rusty) Russel, Q.C., *Russell on Roads*, 3rd Ed. (Toronto: Carswell, 2015) for a comprehensive discussion of roads principles, including the definition of "public highway".

At some point, the land owner decides to transfer the portion of land on one side of the road to a third party. Consent is not required because the lands are divided by a public road²⁶ but a survey and reference plan are required to legally identify the new parcel for the purposes of the conveyance. Instead of surveying the severed parcel to the centre of the dividing road, most surveyors in Northern Ontario would create three separate parts, being the severed lands, the highway, and the retained lands. Keep in mind, legal ownership of the highway lot remains in the name of the land owner.

Later on, the land owner sells the retained portion of the original parcel. The lawyer for the purchaser either determines that it is not in the purchaser's interest to purchase the highway, or by oversight entirely misses fact that it is owned by the vendor. Now your land owner is left owning a floating piece of road which, for reasons described below, may prove to be a potential liability.

8) Privately owned roads- responsibility for maintenance and construction

Any person who purchases or owns a road should consider whether or not someone else is liable to maintain it, what their own liabilities may be in the event that someone is injured using the road.

Under the *Municipal Act*, the local municipality is responsible for the maintenance of "highways" within their jurisdiction, and liable for negligence for failure to comply with that obligation.²⁷ Their jurisdiction includes:

1. All highways over which it had jurisdiction or joint jurisdiction on December 31, 2002²⁸, which includes, except in so far as they have been stopped up according to law:
 - all allowances for roads made by the Crown surveyors,

²⁶ Public roads and highways are within the public domain and therefore the owner of the lands separated by a road can deal with the parcels separately. See Sidney H. Troister, *The Law of Subdivision Control in Ontario*, 3rd Ed. (Aurora: Canada Law Book, 2010).

²⁷ 2001, c. 25, s. 44.

²⁸ 2001, c. 25, s. 44, s. 28(1).

- all highways laid out or established under the authority of any statute;
- all roads on which public money has been spent for opening them or on which statute labour has been usually performed;
- all roads passing through Indian lands;
- all roads dedicated by the owner of the land to public use; and,
- and all alterations and deviations of and all bridges over any such allowance for road, highway or road, are common and public highways.²⁹

However, roads and bridges owned by companies or individuals are explicitly *excluded* from the above.³⁰

2. All highways established by by-law of the municipality on or after January 1, 2003.
3. All highways transferred to the municipality under the *Municipal Act*, the *Public Transportation and Highway Improvement Act* or any other Act.
4. All road allowances located in the municipality that were made by the Crown surveyors.
5. All road allowances, highways, streets and lanes shown on a registered plan of subdivision.

The definition of “Highway” under the *Municipal Act* is broad, and includes the following unless they have been closed:³¹

1. All highways that existed on December 31, 2002 (the somewhat circular definition of which, under the terms of the previous version of the Act, was “a common and public highway, and includes a street and a bridge forming part of a highway or on, over or across which a highway passes”³² and arguably includes: original road

²⁹ *Municipal Act*, R.S.O. 1990, c. M.45, s. 261.

³⁰ R.S.O. 1990, c. M.45, s. 264.

³¹ 2001, c. 25, s. 26.

³² 1990, c. M.45, s. 264, s. 1.

allowances; shore road allowances; roads reserved in the Crown Patent; roads created by Magistrates in Quarter Sessions; Colonization Roads in the Ottawa-Huron Tract; boundary roads, roads created by explicit or implied dedication and acceptance, trespass/forced roads across private lands, roads surveyed under “improved roads” surveys, and others.³³)

2. All highways established by by-law of a municipality on or after January 1, 2003.
3. All highways transferred to a municipality under the *Public Transportation and Highway Improvement Act*.
4. All road allowances made by the Crown surveyors that are located in municipalities.
5. All road allowances, highways, streets and lanes shown on a registered plan of subdivision. 2001,

If your land owner’s road fits within the definition of a “highway”, and is within the jurisdiction of a municipality, then it is the municipality who is liable for its maintenance, and presumably for any damages arising from a failure to properly maintain.

Where the road is a public highway, but not within the municipality’s jurisdiction, then your land owner would be well advised to try to transfer responsibility to the municipality. This is typically carried out via dedication by the owner, and acceptance by the municipality by way of by-law. Unfortunately, most municipalities are now hesitant to assume the liability and expense of additional roads, so your land owner may find the municipality is a less than willing recipient.

Privately owned roads located in the many unorganized townships in Northern Ontario present a different issue, as, by definition, there is no municipality to have jurisdiction over the road. Instead, the roads may be maintained by a local roads board, which strictly has the authority to construct and maintain, but not own, roads.³⁴ Unfortunately, the *Local Roads Board Act* is

³³ See W.D. (Rusty) Russel, Q.C., *Russell on Roads*, 3rd Ed. (Toronto: Carswell, 2015) page 58 for an overview of types of roads grandfathered under this definition.

³⁴ *Local Rods Boards Act*, R.S.O.. 1990, c. L.27.

clear that, while the roads board is obligated to maintain roads to certain minimum standards, there is no liability for default in maintenance or construction. No action may be brought against the Crown, the board, or any trustee for damages.³⁵ That said, does that a duty of care and consequent liability on the legal owner?

To determine a property owner's duty of care to third parties, we must examine the *Occupier's Liability Act*.

9) **Land owners' duty of care under the *Occupiers' Liability Act***

To determine one's liability for a private road that is not in the jurisdiction of a municipality, we must look at the *Occupiers' Liability Act*³⁶. The Act puts a duty of care on the "occupier" of a property, defined as a person who is in physical possession of the premises, or who has responsibility for and control over the condition of premises or the activities there carried on, or control over who may enter the premises.³⁷

i. The general rule.

The standard of care set out in the Act is "such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises."³⁸ The duty of care applies equally whether the danger is caused by the condition of the premises or by an activity carried on on the premises.³⁹

ii. The exceptions to the rule – a lowered standard of care for rural lands and private roads.

The Act sets out a lower standard of care for risks willingly assumed by the person who enters on certain types of premises under certain circumstances. The types of premises included in the exception are:

³⁵ R.S.O.. 1990, c. L.27, s. 18.

³⁶ R.S.O. 1990, c. O.2.

³⁷ R.S.O. 1990, c. O.2, s.1.

³⁸ R.S.O. 1990, c. O.2, s.3(1)

³⁹ R.S.O. 1990, c. O.2, s.3.

- Rural premises that are used for agricultural purposes (including cultivated lands, orchards, pastures, wood lots and farm ponds);
- Vacant or undeveloped premises;
- Forested or wilderness premises;
- Unopened road allowances;
- Private roads reasonably marked by notice as such;
- Recreational trails reasonably marked by notice as such;

as well as to other types of properties as listed in section 4(4) of the Act.

A person who enters premises described above shall be deemed to have willingly assumed all risks under certain circumstances. In such cases the occupier's duty is not to create dangers with the deliberate intent of doing harm or damage to the person, and not act with reckless disregard of the presence of the person or his or her property.⁴⁰ This reduced standard of care applies to trespassers under the under the *Trespass to Property Act*⁴¹; where notice in respect of entry, or permission to entry, haven't been given; or where the entry is for the purpose of recreational activity where the participant hasn't paid an entry fee.⁴²

The owners or purchasers of private roads that don't fall within municipal jurisdiction should be aware of their potential liability and exercise caution.

A local roads board having jurisdiction over a road would presumably be treated as the occupier, owing to their responsibility for and control over the condition of premises. However, the Act is clear that two or more persons may be an occupier of the same premises.⁴³ Since a local roads board is immune from liability, one might contemplate a situation where an injured party names the legal owner of the road as defendant to an action, as a co-occupier of the

⁴⁰ R.S.O. 1990, c. O.2, s.4(1) and (3).

⁴¹ R.S.O. 1990, c. T.21.

⁴² R.S.O. 1990, s. 4(3).

⁴³ R.S.O. 1990, c. O.2, s.1.

premises. The terms of the *Occupiers' Liability Act* should be examined on a case-by-case basis to determine if a land owner might possibly face risk of liability within their individual circumstances.

The owner of a private road that is not under the jurisdiction of a municipality or local roads board will certainly want to exercise caution to ensure that the road falls within the reduced standard of care set out in the Act. At a minimum, appropriate signage should be posted indicating that the road is private and not maintained and that users do so at their own risk. They would also be well-advised to ensure that they have appropriate liability insurance coverage to defend and protect themselves if they are named in an action for damages.

The same principles that apply to private roads also apply to other lands that may qualify for the exemption to the usual standard of care. While owners of rural, agricultural, forested or otherwise vacant lands are automatically afforded certain protections under the Act, care should be taken to ensure that no express or implied permission to entry is given, or entry fee accepted, if they wish to rely on the lowered standard of care as set out in the Act. Simply having the knowledge that someone has been using a property for hunting or recreational purposes, for instance, may be treated as deemed notice of entry, such that the exemption can no longer be relied on. In those cases, the land owner should consider giving notice, either verbally, in writing, or by posted signs in accordance with the *Trespass to Property Act*.⁴⁴

CONCLUSION

Although many people are drawn to Northern Ontario for a simpler way of life, the real estate transactions north of North Bay are anything but simple. Fortunately, when armed with the understanding of what searches to conduct, and the knowledge of how to deal with issues that may arise, the inexperienced practitioner can avoid a potential minefield and ensure that their client gets the maximum use and enjoyment of their northern property ownership.

⁴⁴ R.S.O. 1990, c. T.21, s. 5(1).

Occupiers' Liability Act

R.S.O. 1990, CHAPTER O.2

Definitions

1 In this Act,

“occupier” includes,

- (a) a person who is in physical possession of premises, or
 - (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,
- despite the fact that there is more than one occupier of the same premises; (“occupant”)

“premises” means lands and structures, or either of them, and includes,

- (a) water,
- (b) ships and vessels,
- (c) trailers and portable structures designed or used for residence, business or shelter,
- (d) trains, railway cars, vehicles and aircraft, except while in operation. (“lieux”) R.S.O. 1990, c. O.2, s. 1.

Common law duty of care superseded

2 Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons. R.S.O. 1990, c. O.2, s. 2.

Occupier's duty

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Idem

(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty. R.S.O. 1990, c. O.2, s. 3.

Risks willingly assumed

4 (1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not

create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property. R.S.O. 1990, c. O.2, s. 4 (1).

Criminal activity

(2) A person who is on premises with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1). R.S.O. 1990, c. O.2, s. 4 (2).

Trespass and permitted recreational activity

(3) A person who enters premises described in subsection (4) shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1),

- (a) where the entry is prohibited under the *Trespass to Property Act*;
- (b) where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry; or
- (c) where the entry is for the purpose of a recreational activity and,
 - (i) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association, and
 - (ii) the person is not being provided with living accommodation by the occupier. R.S.O. 1990, c. O.2, s. 4 (3).

Same

(3.1) For greater certainty, the following do not constitute a fee for entry or activity of the person for the purposes of subclause (3) (c) (i):

1. A fee charged for a purpose incidental to the entry or activity, such as for parking.
2. The receipt by a non-profit recreation club or association of a benefit or payment from or under the authority of a government or government agency. 2016, c. 8, Sched. 3, s. 1 (1).

Premises referred to in subs. (3)

(4) The premises referred to in subsection (3) are,

- (a) a rural premises that is,
 - (i) used for agricultural purposes, including land under cultivation, orchards, pastures, woodlots and farm ponds,
 - (ii) vacant or undeveloped premises,
 - (iii) forested or wilderness premises;
- (b) golf courses when not open for playing;
- (c) utility rights-of-way and corridors, excluding structures located thereon;
- (d) unopened road allowances;

- (e) private roads reasonably marked by notice as such;
- (f) recreational trails reasonably marked by notice as such; and
- (g) portage routes. R.S.O. 1990, c. O.2, s. 4 (4); 2016, c. 8, Sched. 3, s. 1 (2).

Section Amendments with date in force (d/m/y)

Restriction of duty or liability

5 (1) The duty of an occupier under this Act, or the occupier's liability for breach thereof, shall not be restricted or excluded by any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit such person to enter or use the premises.

Extension of liability by contract

(2) A contract shall not by virtue of this Act have the effect, unless it expressly so provides, of making an occupier who has taken reasonable care, liable to any person not a party to the contract, for dangers due to the faulty execution of any work of construction, maintenance or repair, or other like operation by persons other than the occupier, employees of the occupier and persons acting under the occupier's direction and control.

Reasonable steps to inform

(3) Where an occupier is free to restrict, modify or exclude the occupier's duty of care or the occupier's liability for breach thereof, the occupier shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed. R.S.O. 1990, c. O.2, s. 5.

Liability where independent contractor

6 (1) Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

Idem

(2) Where there is more than one occupier of premises, any benefit accruing by reason of subsection (1) to the occupier who employed the independent contractor shall accrue to all occupiers of the premises.

Idem

(3) Nothing in this section affects any duty of the occupier that is non-delegable at common law or affects any provision in any other Act that provides that an occupier is liable for the negligence of an independent contractor. R.S.O. 1990, c. O.2, s. 6.

Application of ss. 5 (1, 2), 6

7 In so far as subsections 5 (1) and (2) prevent the duty of care owed by an occupier, or liability for breach thereof, from being restricted or excluded, they apply to contracts entered into both before and

after the commencement of this Act, and in so far as section 6 enlarges the duty of care owed by an occupier, or liability for breach thereof, it applies only in respect of contracts entered into after the 8th day of September, 1980. R.S.O. 1990, c. O.2, s. 7.

Obligations of landlord as occupier

8 (1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.

Idem

(2) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to a person unless the landlord's default is such as to be actionable at the suit of the person entitled to possession of the premises.

Definitions

(3) For the purposes of this section, obligations imposed by any enactment by virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

Application of section

(4) This section applies to all tenancies whether created before or after the commencement of this Act. R.S.O. 1990, c. O.2, s. 8.

Preservation of higher obligations

9 (1) Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on the occupier by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of,

- (a) innkeepers, subject to the *Innkeepers Act*,
- (b) common carriers;
- (c) bailees.

Employer and employee relationships

(2) Nothing in this Act shall be construed to affect the rights, duties and liabilities resulting from an employer and employee relationship where it exists.

Application of *Negligence Act*

(3) The *Negligence Act* applies with respect to causes of action to which this Act applies. R.S.O. 1990, c. O.2, s. 9.

Act binds Crown

10 (1) This Act binds the Crown, subject to the *Proceedings Against the Crown Act*.

Exception

(2) This Act does not apply to the Crown or to any municipal corporation, where the Crown or the municipal corporation is an occupier of a public highway or a public road. R.S.O. 1990, c. O.2, s. 10.

Application of Act

11 This Act does not affect rights and liabilities of persons in respect of causes of action arising before the 8th day of September, 1980. R.S.O. 1990, c. O.2, s. 11.

Trespass to Property Act

R.S.O. 1990, CHAPTER T.21

Definitions

1 (1) In this Act,

“occupier” includes,

- (a) a person who is in physical possession of premises, or
 - (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,
- even if there is more than one occupier of the same premises; (“occupant”)

“premises” means lands and structures, or either of them, and includes,

- (a) water,
- (b) ships and vessels,
- (c) trailers and portable structures designed or used for residence, business or shelter,
- (d) trains, railway cars, vehicles and aircraft, except while in operation. (“lieux”) R.S.O. 1990, c. T.21, s. 1 (1).

School boards

(2) A school board has all the rights and duties of an occupier in respect of its school sites as defined in the *Education Act*. R.S.O. 1990, c. T.21, s. 1 (2).

Trespass an offence

2 (1) Every person who is not acting under a right or authority conferred by law and who,

- (a) without the express permission of the occupier, the proof of which rests on the defendant,
 - (i) enters on premises when entry is prohibited under this Act, or
 - (ii) engages in an activity on premises when the activity is prohibited under this Act; or
- (b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than \$10,000. R.S.O. 1990, c. T.21, s. 2 (1); 2016, c. 8, Sched. 6, s. 1.

Colour of right as a defence

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he or she had title to or an interest in the land that entitled him or her to do the act complained of. R.S.O. 1990, c. T.21, s. 2 (2).

Section Amendments with date in force (d/m/y)

Prohibition of entry

3 (1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

- (a) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or
- (b) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises. R.S.O. 1990, c. T.21, s. 3 (1).

Implied permission to use approach to door

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited. R.S.O. 1990, c. T.21, s. 3 (2).

Limited permission

4 (1) Where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises shall be construed to be for greater certainty only. R.S.O. 1990, c. T.21, s. 4 (1).

Limited prohibition

(2) Where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection (1), and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited. R.S.O. 1990, c. T.21, s. 4 (2).

Method of giving notice

5 (1) A notice under this Act may be given,

- (a) orally or in writing;
- (b) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies; or
- (c) by means of the marking system set out in section 7. R.S.O. 1990, c. T.21, s. 5 (1).

Substantial compliance

(2) Substantial compliance with clause (1) (b) or (c) is sufficient notice. R.S.O. 1990, c. T.21, s. 5 (2).

Form of sign

6 (1) A sign naming an activity or showing a graphic representation of an activity is sufficient for the purpose of giving notice that the activity is permitted. R.S.O. 1990, c. T.21, s. 6 (1).

Idem

(2) A sign naming an activity with an oblique line drawn through the name or showing a graphic representation of an activity with an oblique line drawn through the representation is sufficient for the purpose of giving notice that the activity is prohibited. R.S.O. 1990, c. T.21, s. 6 (2).

Red markings

7 (1) Red markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry on the premises is prohibited. R.S.O. 1990, c. T.21, s. 7 (1).

Yellow markings

(2) Yellow markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry is prohibited except for the purpose of certain activities and shall be deemed to be notice of the activities permitted. R.S.O. 1990, c. T.21, s. 7 (2).

Size

(3) A marking under this section shall be of such a size that a circle ten centimetres in diameter can be contained wholly within it. R.S.O. 1990, c. T.21, s. 7 (3).

Posting

(4) Markings under this section shall be so placed that a marking is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies. R.S.O. 1990, c. T.21, s. 7 (4).

Notice applicable to part of premises

8 A notice or permission under this Act may be given in respect of any part of the premises of an occupier. R.S.O. 1990, c. T.21, s. 8.

Arrest without warrant on premises

9 (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2. R.S.O. 1990, c. T.21, s. 9 (1).

Delivery to police officer

(2) Where the person who makes an arrest under subsection (1) is not a police officer, he or she shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer. R.S.O. 1990, c. T.21, s. 9 (2).

Deemed arrest

(3) A police officer to whom the custody of a person is given under subsection (2) shall be deemed to have arrested the person for the purposes of the provisions of the *Provincial Offences Act* applying to his or her release or continued detention and bail. R.S.O. 1990, c. T.21, s. 9 (3).

Arrest without warrant off premises

10 Where a police officer believes on reasonable and probable grounds that a person has been in contravention of section 2 and has made fresh departure from the premises, and the person refuses to give his or her name and address, or there are reasonable and probable grounds to believe that the name or address given is false, the police officer may arrest the person without warrant. R.S.O. 1990, c. T.21, s. 10.

Motor vehicles and motorized snow vehicles

11 Where an offence under this Act is committed by means of a motor vehicle, as defined in the *Highway Traffic Act*, or by means of a motorized snow vehicle, as defined in the *Motorized Snow Vehicles Act*, the driver of the motor vehicle or motorized snow vehicle is liable to the fine provided under this Act and, where the driver is not the owner, the owner of the motor vehicle or motorized snow vehicle is liable to the fine provided under this Act unless the driver is convicted of the offence or, at the time the offence was committed, the motor vehicle or motorized snow vehicle was in the possession of a person other than the owner without the owner's consent. 2000, c. 30, s. 11.

Section Amendments with date in force (d/m/y)

Damage award

12 (1) Where a person is convicted of an offence under section 2, and a person has suffered damage caused by the person convicted during the commission of the offence, the court shall, on the request of the prosecutor and with the consent of the person who suffered the damage, determine the damages and shall make a judgment for damages against the person convicted in favour of the person who suffered the damage. R.S.O. 1990, c. T.21, s. 12 (1); 2016, c. 8, Sched. 6, s. 2.

Costs of prosecution

(2) Where a prosecution under section 2 is conducted by a private prosecutor, and the defendant is convicted, unless the court is of the opinion that the prosecution was not necessary for the protection of the occupier or the occupier's interests, the court shall determine the actual costs reasonably incurred in conducting the prosecution and, despite section 60 of the *Provincial Offences Act*, shall order those costs to be paid by the defendant to the prosecutor. R.S.O. 1990, c. T.21, s. 12 (2).

Damages and costs in addition to fine

(3) A judgment for damages under subsection (1), or an award of costs under subsection (2), shall be in addition to any fine that is imposed under this Act. R.S.O. 1990, c. T.21, s. 12 (3).

Civil action

(4) A judgment for damages under subsection (1) extinguishes the right of the person in whose favour the judgment is made to bring a civil action for damages against the person convicted arising out of the same facts. R.S.O. 1990, c. T.21, s. 12 (4).

Idem

(5) The failure to request or refusal to grant a judgment for damages under subsection (1) does not affect a right to bring a civil action for damages arising out of the same facts. R.S.O. 1990, c. T.21, s. 12 (5).

Enforcement

(6) The judgment for damages under subsection (1), and the award for costs under subsection (2), may be filed in the Small Claims Court and shall be deemed to be a judgment or order of that court for the purposes of enforcement. R.S.O. 1990, c. T.21, s. 12 (6).

Section Amendments with date in force (d/m/y)



15TH ANNUAL Real Estate Law Summit

Hold me Harmless: Indemnidoos and Indemnidon'ts (Indemnity Agreements in a Commercial Sale)

Simon Crawford
Andréa Armorst
Bennett Jones LLP

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15th Annual Real Estate Law Summit, Law Society of Ontario

“Hold Me Harmless: Indemnidoos and Indemnidon’ts (Indemnity Agreements in a Commercial Sale)”

By Simon Crawford and Andréa Armbrorst, Bennett Jones LLP

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I. Introduction

In this paper, we discuss in what context inclusion of indemnity language is important, and will also look at examples where use of a representation or warranty may be better suited than an indemnity, given the available remedies. We will also consider best practices for the drafting of indemnities in the governing agreement and for avoiding conflict in the closing documents. Our approach to this paper, from the perspective of a commercial practitioner, is one of practicality, and given that the Ontario Real Estate Association’s Form 100 Agreement of Purchase and Sale (the “**OREA Form**”) does not contain standard indemnity language, we have attempted to provide general guidance for the drafting and negotiation of an indemnity provision in the context of a commercial sale.

II. What is an Indemnity?

Black’s Law Dictionary defines “indemnify” as “...to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. Also to make good; to compensate; to make reimbursement to one of a loss already incurred by him...”¹ To simplify, an indemnity means that if the indemnified party suffers a loss, the indemnitor is responsible to reimburse them. Depending on the extent of the indemnity provision in a contract, an indemnity may serve to not only expand damages beyond losses for breach of contract, but also to clarify the types and limitations of damages available, as well as how a claim is to be handled (including the time by which a claim for indemnity must be made).

III. Why Include Indemnification in an Agreement?

There are many benefits to including indemnification provisions in an agreement of purchase and sale (an “**agreement**”) when acting for a vendor. One advantage in particular is that

¹ Black’s Law Dictionary, <https://thelawdictionary.org/>
<https://thelawdictionary.org/indemnify/> (accessed February 2, 2018).

indemnification provisions in an agreement can explicitly cover claims made directly between the parties, as opposed to the conventional use of indemnities to protect against third party claims. For instance, if the purchaser is a nominee titleholder, an indemnification provision can ensure that a company or person with financial substance is responsible for the liabilities of the purchaser. Additionally, the completion of the transaction may be subject to a third party deliverable that is not under the vendor's control or the vendor has no obligation to provide (i.e. a change of zoning designation), in which case the vendor may want the purchaser to indemnify it against this third party risk. Finally, indemnification can provide the vendor with certain limits to its liability exposure as it provides the parties with a mechanism to agree: (i) to cap the indemnification liability; (ii) to shorten the time limit under the *Limitations Act* (Ontario) for bringing a claim; and (iii) on a minimum threshold of materiality or cost required in order to bring a claim against the other party.

Note that if the parties intend to have the indemnification cover claims made directly between the parties, it is essential that this intent is clearly stated in the agreement, as case law authorities may lead a court to hold that the provision covers only third party claims.²

IV. Breach of Representation or Warranty vs. Claim for Indemnity

Understanding the difference between representations and warranties in contrast to an indemnification provision is helpful when drafting the agreement (or, in the case of the OREA Form, the amendments and/or schedules to the agreement). No matter how the agreement describes such terms, representations and warranties are statements of fact; and a warranty on its own, absent a representation, is “a term which is collateral to the main purpose of the agreement”³. As discussed in *Jorian Properties Ltd. v. Zellenrath*⁴ and highlighted in Geoff Hall's seminal contract interpretation text, “[T]he issue depends not on the label chosen by the parties, but on the effect of the contractual term...”⁵.

The remedies available for breach of representation or warranty are those remedies for inaccurate statements of fact in a contract and may be brought by way of claim for misrepresentation or breach of warranty (a claim for damages).⁶ Remember that a claim for misrepresentation could give rise to the remedy of rescission, with the parties returned to the situation they were in before they entered into the agreement, which may not ultimately be the desired outcome for the client.

In consideration of both the result of rescission for misrepresentation and the principle of an “as is, where is” sale, vendors should be reluctant to make any representations or warranties on its own behalf or with respect to the asset which could otherwise be independently “due diligenced” by the purchaser. Where appropriate, the representations and warranties should be qualified to the vendor's knowledge. Note that Section 17 (residency), and Section 23 (UFFI) of the OREA Form contain representations of the vendor, and Section 23 in particular should be negotiated out of the agreement where the purchaser has the opportunity to perform its own tests and inspections.

² See: *Mobil Oil Canada Ltd. v. Beta Well Service Ltd.* (1974), 43 DLR (3d) 745 (ABCA.), aff'd 50 DLR (3d) 158 (SCC) and Ken Adams. *A Manual of Style for Contract Drafting*, 4th ed. (Chicago: ABA Publishing, 2017), 365. (“Adams”)

³ Geoff Hall. *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: LexisNexis Canada, 2016), 157. (“Hall”)

⁴ [1984] OJ No. 3258, 46 OR (2d) 775 at 780-81 (ON CA).

⁵ Hall, 158.

⁶ Adams, 107.

It is also important to tailor the agreement's survival provisions with respect to representations and warranties to the mandate and deal at hand. It is in the vendor's interest to shorten this period of liability exposure, especially in the context of an "as is, where is" sale, and either eliminate the survival period or limit the survival period to as short a period as possible after closing. The vendor should give careful thought to the timing of the representations and warranties it gives in the agreement, as they will be "brought down" as true and correct as if made on the closing date, which may be a much later date than the agreement date. If the vendor is obligated to deliver a bring-down certificate on closing, ensure that the survival period stated in the certificate is accurately reflected and not in conflict with the provisions of the agreement. And, keep in mind that the survival period remains subject to exceptions based on fraudulent, wilful, intentional, and negligent misrepresentation, each of which may result in the inapplicability of the cap on the survival period.

V. Indemnity and Limitation of Liability Drafting "Dos" and "Don'ts"

A. Exclude "save harmless"

When it comes to drafting, we agree with the authorities on the matter and recommend excluding "save harmless" from the indemnity provision.⁷ Support for this recommendation is derived from a holding of the Ontario Superior Court in 2009 that "the contractual obligation to save harmless, in my view, is broader than that of indemnification," in that someone having the benefit of a hold harmless provision "should never have to put his hand in his pocket in respect of a claim" covered by that provision.⁸ Because the meaning of "to save" or "to hold" harmless is uncertain and potentially broader than indemnification, the term is ambiguous and unnecessary. On that point and more generally, all indemnity language should be as clear as possible with respect to the list of claim(s) indemnified; the list of the of damage(s) indemnified (i.e. diminution in value of the asset); the extent to which legal costs are recoverable by either party; and liability limitation(s), if any.

B. Use unambiguous limitation of liability language

If future damages are to be limited by way of a limitation of liability clause, be aware that excluding certain kinds of damages – for example, "special", "indirect" or "consequential" can cause ambiguity, since these terms are vague.⁹ Simply stating that these damages are excluded increases the difficulty of valuation and enforcement in litigation. Guidance from the case law provides that current test for enforcement is found in the Supreme Court of Canada's decision in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, that limitation clauses are enforceable according to their terms, unless they are unconscionable or such enforcement would be contrary to public policy.¹⁰ Given that the use of indemnity provisions in contract is motivated by risk allocation, if liability is allocated to a party as a result of unequal negotiating power, the result may be subject to limitation of the indemnity out of concern for public policy. Therefore, we recommend that if the agreement necessitates inclusion of limitation of liability, that the provision be drafted in clear, unambiguous, and comprehensible language, that it

⁷ Adams, 367.

⁸ *Stewart Title Guarantee Company v. Zeppieri*, [2009] OJ No. 322 (SCJ) at para. 17.

⁹ Ken Adams, "Excluding Consequential Damages is a Bad Idea." [www.adamsdrafting.com](http://www.adamsdrafting.com/excluding-consequential-damages-is-a-bad-idea/)
<http://www.adamsdrafting.com/excluding-consequential-damages-is-a-bad-idea/>

¹⁰ *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, at para. 108.

identify specific types of damages limited and to what extent they are limited or entirely excluded, and that it be brought to the attention of the other party prior to signing of the agreement.¹¹

C. Clearly describe applicable dispute resolution procedure (if applicable)

As mentioned earlier, indemnity provisions are of particular use where the parties wish to set out the handling of a third party claim. If the parties have agreed to a specific procedure (whether it be for dealing with direct claims (which, strictly speaking, are claims for breach of contract and not claim for indemnity), third party claims, or both), ensure that clear language is included describing the mechanics, as to otherwise rely on the word “defend” is uncertain and may lead to dispute.¹² From the perspective of the indemnifying party, it is advantageous to include only a right (as opposed to an obligation) to defend claims, as the duty to defend is otherwise open-ended and could be quite costly.

D. Consider including an anti-sandbagging provision

When acting for a vendor, consider the importance of an anti-sandbagging provision. The concept arises where a purchaser has conducted its due diligence of the vendor and the asset, and as a result, learns (prior to closing) that the vendor has breached one of its representations, warranties, covenants and indemnities in the agreement. Whether or not the agreement has an anti-sandbagging clause will determine whether the purchaser can close the transaction, without the obligation to disclose its knowledge of the breach, and then turn around and demand indemnification from the vendor. One way to prevent this outcome is to include a covenant of the purchaser to disclose knowledge of the breach upon becoming aware of same in order to allow the vendor to cure the breach (or take steps to mitigate the damages) prior to closing.

For example, “The Purchaser acknowledges that it has had the opportunity to conduct its due diligence investigation and review adequate information and materials as it believes are necessary to evaluate the Subject Assets and the Transaction contemplated herein. To the extent the Purchaser, or any of the Purchaser's advisors, agents, consultants or representatives, knew that any representation and warranty made in this Agreement by the Vendor is or might be inaccurate or untrue, the Purchaser shall not be entitled to rely upon such representation and warranty and hereby releases and waives any and all actions, claims, suits, damages or rights to indemnity, at law, in equity or pursuant to the terms of this Agreement, against the Vendor by the Purchaser arising out of the breach of that representation and warranty. This Section shall survive the termination of this Agreement and Closing.”

E. Ensure consistency between the agreement and the closing documents

Avoid inclusion of indemnity provisions in closing documents where the closing document indemnity is inconsistent or in conflict with the governing agreement. For example, often times in an assignment and assumption of leases, certain paragraphs are included that state the following:

¹¹ Cynthia L. Elderkin and Julia S. Shin Doi. “Behind and Beyond Boilerplate: Drafting Commercial Agreements, 3rd ed. (Toronto: Thompson Reuters Canada Limited, 2011), 135.

¹² Ken Adams, “Revisiting Indemnity.” www.adamsdrafting.com
<http://www.adamsdrafting.com/revisiting-indemnify/> (accessed February 2, 2018).

“The Assignee hereby agrees to indemnify and save harmless the Assignor from and against any and all Claims arising from or in connection with, or resulting from, any breach by the Assignee of its obligations under the Assigned Leases and/or any act or omission of the Assignee with respect to the Assigned Leases at any time from and after the Closing.

The Assignor hereby agrees to indemnify and save harmless the Assignee from and against any and all Claims arising from or in connection with, or resulting from, any breach by the Assignor of its obligations under the Assigned Leases at any time prior to Closing and/or any act or omission of the Assignor with respect to the Assigned Leases at any time prior to the Closing.”

However, typically the parties have previously agreed to this indemnity via the general indemnity provision in the governing agreement. By including additional indemnities in the closing documents, the parties are at best unnecessarily reiterating a provision already agreed to, and at worst are importing conflict and/or uncertainty with respect to the scope of the indemnification provisions.

VI. Conclusion

While there is much to consider when drafting an indemnity provision, including the concept in an agreement may be of value to the parties involved. From risk allocation to certainty with respect to damages liability, an effective indemnity can offer a practical solution to claims exposure. To ensure the provision is enforceable and meaningful, use language that is straightforward and clear in its intent. Be careful to avoid ambiguity and make a point of highlighting the effect of the indemnity to both parties. The framework for a definitive indemnity begins by keeping these principles in mind.

TAB 6



15TH ANNUAL Real Estate Law Summit

PART 2

“Murder, She Omitted: The British Columbia Supreme Court Reviews How Not to Sell a Property in *Wang v Shao*”

Simon Crawford
Mike O’Grady
Bennett Jones LLP

April 18, 2018

15th Annual Real Estate Law Summit, Law Society of Ontario

“Murder, She Omitted: The British Columbia Supreme Court Reviews How Not to Sell a Property in *Wang v Shao*”

By Simon Crawford and Mike O’Grady, Bennett Jones LLP

I. Introduction

The British Columbia Supreme Court recently decided that a buyer could rescind a purchase agreement for a residential property when the vendor failed to disclose that a previous occupant was murdered just outside of the property.

In *Wang v Shao*, the plaintiff vendor, Mei Zhen Wang (“**Wang**”), failed to disclose the unsolved murder of her son-in-law, Raymond Huang (“**Huang**”), which occurred just outside 3883 Cartier Street, Vancouver, British Columbia (the “**Property**”). The defendant buyer, Feng Yun Shao (“**Shao**”), claimed that Wang’s failure to do so entitled Shao to refuse to complete the purchase and to recover her deposit. Shao claimed that she was entitled to do so for two reasons:

1. The murder of Huang just outside the front gate of the Property constituted a latent defect that Wang failed to disclose despite her obligation to do so; and
2. Wang, through her agents, made a fraudulent misrepresentation in failing to disclose Huang’s death when Shao asked why the Property was being sold.

Justice Pearlman rejected the first of Shao’s arguments, but accepted the second. Therefore, Shao was entitled to vitiate the purchase agreement and Justice Pearlman granted her an order for the return of her deposit, together with accrued interest and legal costs.¹

II. Facts

On November 3, 2007, an unknown assailant shot Huang to death just outside the front gate of the Property.² Shortly after Huang’s death, it was alleged that he was a high-ranking member of the Big Circle Boys gang and that his death was gang related.³

In the aftermath of Huang’s murder, Wang and Gui Ying Yuan (“**Yuan**”), Wang’s daughter and her power of attorney, took steps to sell the Property for a variety of reasons, including Huang’s murder.⁴

In June 2009, after a failed attempt to sell the Property with another realtor, Yuan met with Julia Lau and Matthew Yee (each a “**Realtor**”, and collectively the “**Realtors**”) to discuss listing the

¹ *Wang v Shao*, 2018 BCSC 377 at paras. 221-225 “*Wang*”.

² *Ibid*, at para. 3.

³ *Ibid*, at para. 5.

⁴ *Ibid*, at para. 58.

Property. Yuan informed the Realtors that Huang was killed on the street in front of the Property.⁵ Yuan further informed the Realtors that the reason for selling the Property was that her daughter – Wang’s granddaughter – would be attending a school in West Vancouver to improve her English.⁶ The Realtors were not instructed, by either Wang or Yuan, to refrain from disclosing the circumstances of Huang’s death.⁷ However, the Realtors’ manager advised them that they need not disclose Huang’s death unless a potential purchaser made a specific inquiry to that effect.⁸

Prior to entering into a purchase agreement for the Property for \$6,138,000, Shao asked the Realtor why the Property was being sold.⁹ The Realtor responded that the reason for selling the Property was that Yuan’s daughter had moved schools in order to improve her English.¹⁰ The Realtor did not mention any other reason; the subject of Huang’s death never came up.¹¹

On September 25, 2009, Shao paid the \$300,000 deposit required under the purchase agreement.¹² A few days later, Shao learned of the circumstances surrounding Huang’s death. Shao sought legal advice and, on November 2, 2009, informed Wang’s lawyer that she would not be completing the purchase of the Property.¹³

After Shao failed to purchase the Property, Wang sold the property to another buyer for \$5,500,000 on December 17, 2009.¹⁴ Shortly thereafter Wang sued for the deposit and \$338,000 in additional damages.¹⁵

III. Issues

This case presented the following issues:

- Was the death of Huang a material latent defect in the Property that Wang had an obligation to disclose?
- Did Wang make a fraudulent misrepresentation by failing to disclose the death of Huang as a reason for selling the Property?

These issues will be discussed in greater detail below.

⁵ *Ibid*, at para. 100.

⁶ *Ibid*, at para. 104.

⁷ *Ibid*, at para. 110.

⁸ *Ibid*, at para. 106.

⁹ *Ibid*, at para. 122.

¹⁰ *Ibid*, at para. 123.

¹¹ *Ibid*.

¹² *Ibid*, at para. 126.

¹³ *Ibid*, at para. 129.

¹⁴ *Ibid*, at para. 63.

¹⁵ *Ibid*, at para. 4.

IV. Was the death of Huang a material latent defect in the Property that Wang had an obligation to disclose?

Before analyzing this issue, Justice Pearlman stated that the doctrine of *caveat emptor* applies to real estate transactions in British Columbia, subject to certain exceptions, including the duty to disclose a latent defect.¹⁶

A latent defect is one that is not discoverable by a purchaser through reasonable inspection or inquiries.¹⁷ As such, a latent defect stands in contrast to a patent defect, which is a defect discoverable by a purchaser who conducts reasonable inspections and makes reasonable inquiries about the property.¹⁸ Whether the defect is a patent or latent one is a question of fact requiring: (a) consideration of the nature of the defect; (b) the importance to the purchaser; and (c) the extent of inspection and inquiry reasonable in the circumstances and necessary to reveal the defect.¹⁹ Justice Pearlman further noted that Canadian courts have generally held that a latent defect that renders a property dangerous or unfit to live in is an objective physical defect of the property.²⁰ The few Canadian authorities that have considered subjective non-physical factors in this context have rejected categorizing them as a latent defect.²¹

In discussing when Canadian courts will consider a latent defect to be material, Justice Pearlman acknowledged the recent approach of Ontario courts to this issue. More specifically, Ontario courts determine “whether the latent defect has caused any loss of use, occupation and enjoyment of any meaningful or material portion of the premises or residence that results in the loss of enjoyment of the premises or residence as a whole.”²² Justice Pearlman rejected the application of the Ontario standard in British Columbia, stating that it stretches the definition of a material latent defect too far.²³ Rather, if the defect does not render a property dangerous or uninhabitable in British Columbia, *caveat emptor* applies regardless of whether the defect in question is a patent or a latent one.²⁴

In applying the British Columbia standard to the facts of this case, Justice Pearlman concluded that the death of Huang was not a material latent defect. For Justice Pearlman, the defect was unrelated to the physical qualities of the Property and as such did not render the Property dangerous or uninhabitable.²⁵ Rather, it was a subjective concern of Shao’s²⁶ and she had therefore failed to establish that Wang had an obligation to disclose Huang’s murder as a latent defect in the

¹⁶ *Ibid*, at para. 141, citing *Nixon v MacIver*, 2016 BCCA 8, at paras 32-34.

¹⁷ *Ibid*.

¹⁸ *Ibid*, at para. 143, citing *Cardwell v Perthen*, 2006 BCSC 333, at para. 122.

¹⁹ *Ibid*, at para. 144, citing *Cresswell Investments Ltd. v Pavone*, 2011 BCSC 1069.

²⁰ *Ibid*, at para. 146.

²¹ See *Summach v Allen*, 2002 BCSC 119, affirmed at 2003 SCCA 176 for a courts rejection of the close proximity of a nudist beach as a latent defect requiring disclosure. See also *1784773 Ontario Inc. v. K-W Labour Assn. Inc.*, 2013 ONSC 5401, affirmed at 2014 ONCA 1764 for another court rejecting the fact that a property was allegedly haunted as a latent defect requiring disclosure.

²² *Ibid*, at paras. 165-170, citing *Swayze v Robertson*, [2001] OJ No. 968 (Ont SCJ); *Dennis v Gray*, 2011 ONSC 1567; and *Empire Communities Ltd. v Ontario*, 2015 ONSC 4355.

²³ *Ibid*, at para. 171.

²⁴ *Ibid*, at para. 171, citing *Nixon v. MacIver*, 2016 BCCA 8 at para 47.

²⁵ *Ibid*, at para. 191.

²⁶ *Ibid*.

Property.²⁷ As further justification for this conclusion, Justice Pearlman noted that, from a public policy perspective, if subjective concerns such as Shao's are considered a material latent defect, it would impose an impossible standard of disclosure on future vendors.²⁸

Finally, in obiter, Justice Pearlman noted that even if his analysis on material latent defects was incorrect, the death of Huang is more properly characterized as a patent defect. The murder of Huang was discoverable by Shao making reasonable inquiries about the Property.²⁹

V. Did Wang make a fraudulent misrepresentation by failing to disclose the death of Huang as a reason for selling the Property?

To succeed in a claim for fraudulent misrepresentation, the following must be established:

1. The vendor made a representation of fact to the purchaser;
2. The representation was false in fact;
3. The vendor knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
4. The vendor intended the purchaser to act on the representation; and
5. The purchaser was induced to enter into contract in reliance upon the false representation and thereby suffered a detriment.³⁰

In applying the test outlined above, Justice Pearlman concluded that Shao established the first element: Wang, via Yuan and her Realtor, made a representation of fact that the reason for the sale of the Property was Yuan's daughter moving schools.³¹

For the second element, Shao established, on the balance of probabilities that Wang's stated reason for selling the Property was false by way of omission.³² More specifically, this representation omitted the fact that Huang's murder was a factor in both Wang and Yuan's decision to sell the Property.³³

Next, Yuan acknowledged at trial that her daughter would not have changed schools if Huang had not been killed. By way of this acknowledgment, Justice Pearlman concluded that Yuan also tacitly acknowledged that the underlying reason for selling the Property was in fact Huang's murder. Therefore, Justice Pearlman found that Yuan knew that she was providing the Realtors with a false

²⁷ *Ibid*, at para. 195.

²⁸ *Ibid*, at para. 193.

²⁹ *Ibid*, at para. 194.

³⁰ *Ibid*, at para 196, citing *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25.

³¹ *Ibid*, at paras. 202-203.

³² *Ibid*, at para. 204.

³³ *Ibid*, at paras 202-203.

representation, by way of omission, when she informed the Realtors that her daughter changing schools was the reason for selling the Property.³⁴

In evaluating the fourth element, Justice Pearlman highlighted that Yuan informed the Realtors that the reason for selling the Property was her daughter changing schools. In Justice Pearlman's opinion, by doing so Yuan intended any prospective purchaser to accept as fact that there was no other reason for selling the Property.³⁵

Finally, Justice Pearlman held that the false representation made by Yuan was a material consideration for Shao, which she relied on as an inducement to purchase the Property.³⁶

After finding the elements of the test had been satisfied, Justice Pearlman concluded that Wang's representation, communicated orally via Yuan and her Realtors, was a fraudulent misrepresentation. Since a fraudulent misrepresentation vitiates a "no representations" or "entire agreement" clause in an agreement,³⁷ Shao was entitled to vitiate the contract of purchase and sale for the Property.³⁸

VI. The Credibility of Wang and Yuan

Reviewed in isolation, Justice Pearlman's conclusion appears to be a somewhat lax application of the established test for fraudulent misrepresentation in the sale of real property. As noted by Justice Pearlman, Shao's question as to why the Property was being sold was very general.³⁹ Indeed, while the answer Shao received was ultimately incomplete, it was at least partially true.⁴⁰

However, an important distinguishing factor in this case is the credibility issues of both Wang and Yuan. For example, in her examination for discovery, Wang acknowledged that after the violent death of Huang, she was concerned about the safety of Yuan and her grandchildren if they continued to reside at the Property.⁴¹ However, at trial, Wang asserted that her concern for her family was unrelated to the Property.⁴² Justice Pearlman rejected Wang's evidence at trial and held that the murder of Huang was one of the reasons Wang wanted to sell the Property.⁴³ Similar credibility issues arose with respect to Yuan and her evidence on both the sale of the Property and the death of Huang.⁴⁴

These credibility issues, especially as they relate to the reasons the Property was sold, help to explain why Justice Pearlman concluded that offering "Yuan's daughter changing schools" as the reason for selling the Property amounted to fraudulent misrepresentation. Indeed, some of the

³⁴ *Ibid*, at para. 208.

³⁵ *Ibid*, at para. 213.

³⁶ *Ibid*, at para. 217.

³⁷ *Ibid*, at para. 218, citing *Van Beek v. Dodd*, 2010 BCSC 1639 at para. 78.

³⁸ *Ibid*, at para. 220.

³⁹ *Ibid*, at para. 217.

⁴⁰ *Ibid*, at para. 203.

⁴¹ *Ibid*, at para. 53.

⁴² *Ibid*, at para. 56.

⁴³ *Ibid*, at para. 58.

⁴⁴ *Ibid*, at paras. 209-211.

language used by Justice Pearlman, such as the representation made being “calculated to conceal,”⁴⁵ also points to this conclusion.

VII. Conclusion

While Justice Pearlman speaks at length about latent defects in *Wang v Shao*, in obiter he acknowledges that the death of Huang is more properly characterized as a patent defect rather than a latent defect.⁴⁶ Huang’s death, and where it occurred, was public information readily available to Shao. However, as noted by Justice Pearlman, courts in Ontario and British Columbia take a different approach to determining the materiality of latent defects. Therefore, if the circumstances were less public, it is unclear whether the difference in approach found in Ontario and British Columbia would amount to a difference in practice.

Finally, at face value, the seemingly lax application of the established test for fraudulent misrepresentation found in *Wang v Shao* is of potential concern to future vendors of real property. Nevertheless, the serious credibility issues that arose with Wang and Yuan serve as a notable distinguishing factor in this decision.

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⁴⁵ *Ibid*, at para. 217.

⁴⁶ *Ibid*, at para. 194.



15TH ANNUAL Real Estate Law Summit

Syndicated Mortgages: How to Avoid the Risks

Gary Goldfarb, *Meyer, Wassenaar & Banach LLP*
Stephen McClyment, Senior Investigation Counsel,
Law Society of Ontario
Ronald Melvin, *Rose, Persiko, Rakowsky, Melvin LLP*

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Syndicated Mortgages: How To Avoid The Risks

presented for the

**15th Annual Real Estate Summit
Law Society of Ontario
April 18, 2018**

by:

**Gary Goldfarb
Meyer, Wassenaar &
Banach LLP**

**Stephen McClyment
Senior Investigation Counsel
Law Society of Ontario**

**Ronald B. Melvin
Rose, Persiko, Rakowsky,
Melvin LLP**

Hypothetical Fact Situation

Peter is an investor in real estate and, over the past 10 years, has acquired a portfolio of five small apartment buildings, a few retail strip plazas and an industrial building. These properties are leased out to residential and commercial tenants as the case may be. Through this process, Peter has gained a certain level of experience as a businessman in dealing with real estate acquisitions, financing and leasing. Due to the general increase in recent real estate values over the past years, Peter has recently refinanced his portfolio so as to withdraw some of its equity and now has available to himself \$1,000,000 which he wishes to invest in mortgage loans.

In order to spread his risk, Peter wishes to only invest about \$100,000 of his own funds in up to 10 mortgage loans, but because many of the prospective borrowers will require greater amounts, Peter is interested in seeking other like investors to participate in these mortgage loan investments.

Peter has developed a good working relationship with Paul, a licensed mortgage broker who has assisted Peter in the past financings of his portfolio. Paul is likewise interested in arranging mortgage loans for his clients.

Peter and Paul have agreed on a handshake to join forces in order as to find and close on mortgage loan investments. Paul will be principally responsible for sourcing potential borrowers and properties, and arranging for due diligence such as appraisals, building condition reports, etc. Paul will be paid commissions and other fees for these services, but will not otherwise be participating in any of the mortgage loans as an investor.

Peter will provide a loan commitment to the borrower and arrange for the mortgage transaction to be completed and funded through his legal counsel. Peter will also be seeking co-investors amongst his family and friends. The idea is that any given mortgage loan could be in the range of \$400,000-\$500,000 or higher, of which Peter would contribute approximately \$100,000 and the remainder would be contributed by his co-investors.

Mary is an Ontario solicitor who has been practicing for the past 15 years as a partner in an eight person law firm. The firm provides a range of legal services; however, Mary's practice is principally residential and commercial real estate, with a reasonable amount of corporate and commercial work that would be associated with such practice, and to a lesser extent she also does wills and estates. Peter approaches Mary to represent him in the foregoing endeavors and she accepts the retainer.

Variants/Alternates on Hypothetical Fact Situation

Alternative could be that the broker Paul, issues the commitment and sends the deal to Mary. Does that change anything? Does Mary have to ask if it is syndicated, or who the real lenders are?

What if Peter is not sophisticated. He inherited money from his mother, and has never been involved in real estate, but a friend told him he could get good returns in second mortgage, sometimes up to 12%. He is eager to have his money work better for him. He gets a deal from Paul and brings it to Mary. Mary thinks it may be a risky business deal at 12%. There is no appraisal of the property, but Paul told Peter that is it 75% LTV. What does Mary tell Peter? Is her advice any different if Paul sends her the deal?

How much business advise is Mary supposed to give. What if Peter only has \$1,000,000 but decided to invest it all in one deal? Does she advise him to spread the risk? Is Mary required to ask and try to determine Peter's expertise? Or his worth? Does she ask Peter. And is she has to ask Peter, what is her duty to any of the other investors. Maybe they are not all as sophisticated as Peter.

Mary is acting for all the investors, but she inadvertently find out the Paul is sharing part of his brokerage fee with Peter. Does she tell the other investors. Peter has send her 5 deals already this month, and if she tells the others, Peter may not send her any more work. The other investors and not worse off, because Paul would be getting the same fee in any event.

Discussion

Does Mary know that Peter is syndicating the mortgage? Did Peter tell her, does she have a duty to ask further.

Does Mary know if Paul's role, as broker, and does that matter?

Is Peter on an equal footing with other investors or is he receiving fees or any additional compensation. How does lawyer ensure that all lenders are on the same footing.

Are all lenders lending on the same basis. Do you discuss front and back end arrangements? Does the lawyer have to advise Peter to prepare a syndication agreement for the lenders? When is a syndication agreement required? Is it always required.

Who take title to the mortgage? Discuss the difficulties of having more than one person on title, especially when having to deal with postponement/discharges.

Who gives the lawyer instructions. If he knows it is syndicated, does lawyer need a joint retainer, instructions from all other lenders to take instructions from Peter. Often times, Peter (or Paul) may issue commitment before having other investors and instruct lawyer on his own. Does that make a difference to Mary.

If Mary takes instructions from Peter, what does Mary do if she gets calls from "other investors" asking questions. Can she answer them without Peter, does she refer them to Peter. Again, who is her client?

Syndicated Mortgages: How To Avoid The Risks

presented for the

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Presentations:

1. Legislative Requirements (presented by Gary Goldfarb)
2. Rules of Professional Conduct (presented by Stephen McClyment)
3. Loan Participation and Servicing Agreements (presented by Ronald B. Melvin)
4. Panel Discussion and Attendee Questions

Selected Reference Materials:

1. Mortgage Brokers, Lenders and Administrators Act, 2006 (S.O. 2006, c 29)
 - (a) Sections 1 to 6 - Definitions and Regulated Activities
 - (b) Ontario Regulation 406/07 - Regulated Activities: Additional Prescribed Activities
 - (c) Ontario Regulation 407/07 - Exemptions From The Requirements To Be Licensed
 - (d) Ontario Regulation 407/07 - Mortgage Brokerages: Standards of Practice
 - (e) Ontario Regulation 191/08 - Cost Of Borrowing And Disclosure To Borrowers
2. Notice to Lawyers Concerning Syndicated Mortgages, published by the Law Society of Ontario
3. Sample form of Loan Participation and Servicing Agreement
4. Recent changes to Ontario Regulation 407/07 - Mortgage Brokerages: Standards of Practice, coming into effect on July 1, 2018 and dealing with expanded requirements for “non-qualified” syndicated mortgages
5. Press Release dated March 8, 2018 regarding proposals for a regulatory framework for syndicated mortgages under Canadian securities legislation and amendment of prospectus exemptions

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Mortgage Brokers, Lenders and Administrators Act, 2006 (S.O. 2006, c 29)

Sections 1 to 6 - Definitions and Regulated Activities

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Mortgage Brokerages, Lenders and Administrators Act, 2006

S.O. 2006, CHAPTER 29

Consolidation Period: From January 29, 2018 to the [e-Laws currency date](#).Last amendment: [2017, c. 34, Sched. 27](#).

Legislative History: [+]

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INTERPRETATION

Definitions

1 In this Act,

"cost of borrowing", for a mortgage, means,

- (a) the interest or discount applicable to the mortgage,
- (b) any amount charged in connection with the mortgage that is payable by the borrower to the brokerage or lender,
- (c) any amount charged in connection with the mortgage that is payable by the borrower to a person other than the brokerage or lender, where the amount is chargeable, directly or indirectly, by the person to the brokerage or lender, and
- (d) any charge prescribed as included in the cost of borrowing,

but does not include any charge prescribed as excluded from the cost of borrowing; ("coût d'emprunt")

"financial institution" means a bank or authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada), a credit union or caisse populaire to which the *Credit Unions and Caisses Populaires Act, 1994* applies including a league within the meaning of that Act, an insurer licensed under the *Insurance Act*, a corporation registered under the *Loan and Trust Corporations Act* or a retail association as defined under the *Cooperative Credit Associations Act* (Canada); ("institution financière")

"lawyer" means a person who is authorized to practise law in Ontario; ("avocat")

"licence" means a licence issued under this Act; ("permis")

"licensed" means licensed under this Act; ("titulaire de permis")

"mortgage" has the same meaning as in section 1 of the *Mortgages Act*; ("hypothèque")

"mortgage administrator" means a corporation, partnership, sole proprietorship or other entity that has a mortgage administrator's licence; ("administrateur d'hypothèques")

"mortgage agent" or "agent" means an individual who has a mortgage agent's licence; ("agent en hypothèques", "agent")

"mortgage broker" or "broker" means an individual who has a mortgage broker's licence; ("courtier en hypothèques", "courtier")

"mortgage brokerage" or "brokerage" means a corporation, partnership, sole proprietorship or other entity that has a brokerage licence; ("maison de courtage d'hypothèques", "maison de courtage")

"prescribed" means prescribed by a regulation; ("prescrit")

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "prescribed" in section 1 of the Act is repealed and the following substituted: (See: 2017, c. 34, Sched. 27, s. 1 (2))

"prescribed" means,

(a) prescribed by the regulations; or

(b) subject to subsection 55 (9), in respect of matters listed in subsection 55 (1), prescribed by the Authority rules; ("prescrit")

"regulation" means a regulation made under this Act; ("règlement")

"requirement established under this Act" means a requirement imposed by this Act or by a regulation, a condition of a licence, a requirement imposed by order or an obligation assumed by way of an undertaking; ("exigence établie en application de la présente loi")

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "requirement established under this Act" in section 1 of the Act is amended by adding "or an Authority rule" after "regulation". (See: 2017, c. 34, Sched. 27, s. 1 (3))

"Superintendent" means the Superintendent of Financial Services appointed under the *Financial Services Commission of Ontario Act, 1997*; ("surintendant")

"Tribunal" means the Financial Services Tribunal established under the *Financial Services Commission of Ontario Act, 1997*. ("Tribunal") 2006, c. 29, s. 1.

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "Tribunal" in section 1 of the Act is repealed and the following substituted: (See: 2017, c. 34, Sched. 17, s. 24)

"Tribunal" means the Financial Services Tribunal continued under the *Financial Services Tribunal Act, 2017*. ("Tribunal")

Note: On a day to be named by proclamation of the Lieutenant Governor, section 1 of the Act is amended by adding the following definitions: (See: 2017, c. 34, Sched. 27, s. 1 (1))

"Authority" means the Financial Services Regulatory Authority of Ontario established under subsection 2 (1) of the *Financial Services Regulatory Authority of Ontario Act, 2016*; ("Office")

"Authority rule" means a rule made under subsection 55 (1); ("règle de l'Office")

"Chief Executive Officer" means the Chief Executive Officer appointed under subsection 10 (2) of the *Financial Services Regulatory Authority of Ontario Act, 2016*; ("directeur général")

Section Amendments with date in force (d/m/y) [+]

REGULATED ACTIVITIES

Dealing in mortgages

2 (1) For the purposes of this Act, a person or entity is dealing in mortgages in Ontario when he, she or it engages in any of the following activities in Ontario, or holds himself out as doing so:

1. Soliciting another person or entity to borrow or lend money on the security of real property.
2. Providing information about a prospective borrower to a prospective mortgage lender, whether or not this Act governs the lender.
3. Assessing a prospective borrower on behalf of a prospective mortgage lender, whether or not this Act governs the lender.
4. Negotiating or arranging a mortgage on behalf of another person or entity, or attempting to do so.
5. Engaging in such other activities as may be prescribed. 2006, c. 29, s. 2 (1).

Prohibition re carrying on business

(2) No person or entity shall carry on the business of dealing in mortgages in Ontario unless he, she or it has a brokerage licence or is exempted from the requirement to have such a licence. 2006, c. 29, s. 2 (2).

Prohibition re dealing

(3) No individual shall deal in mortgages in Ontario for remuneration, whether direct or indirect, as an employee or otherwise, unless he or she has a mortgage broker's or agent's licence and is acting on behalf of a mortgage brokerage or is exempted from the requirement to have such a licence. 2006, c. 29, s. 2 (3).

Trading in mortgages

3 (1) For the purposes of this Act, a person or entity is trading in mortgages in Ontario when he, she or it engages in any of the following activities in Ontario, or holds himself out as doing so:

1. Soliciting another person or entity to buy, sell or exchange mortgages.
2. Buying, selling or exchanging mortgages on behalf of another person or entity.
3. Buying, selling or exchanging mortgages on the person's or entity's own behalf.

4. Engaging in such other activities as may be prescribed. 2006, c. 29, s. 3 (1).

Prohibition re carrying on business

(2) No person or entity shall carry on the business of trading in mortgages in Ontario unless he, she or it has a brokerage licence or is exempted from the requirement to have such a licence. 2006, c. 29, s. 3 (2).

Prohibition re trading

(3) No individual shall trade in mortgages for remuneration, whether direct or indirect, as an employee or otherwise, by engaging in an activity described in paragraph 1, 2 or 4 of subsection (1) unless he or she has a mortgage broker's or agent's licence and is acting on behalf of a mortgage brokerage or is exempted from the requirement to have such a licence. 2006, c. 29, s. 3 (3).

Mortgage lending

4 (1) For the purposes of this Act, a person or entity is a mortgage lender in Ontario when he, she or it lends money in Ontario on the security of real property, or holds himself out as doing so. 2006, c. 29, s. 4 (1).

Prohibition re carrying on business

(2) No person or entity shall carry on business as a mortgage lender in Ontario unless he, she or it has a brokerage licence or is exempted from the requirement to have such a licence. 2006, c. 29, s. 4 (2).

Administering mortgages

5 (1) For the purposes of this Act, a person or entity is administering mortgages in Ontario when he, she or it engages in any of the following activities in Ontario, or holds himself out as doing so:

1. Receiving payments from a borrower under a mortgage on behalf of another person or entity, and remitting the payments to or on behalf of that person or entity.
2. Engaging in such other activities as may be prescribed. 2006, c. 29, s. 5 (1).

Prohibition re carrying on business

(2) No person or entity shall carry on the business of administering mortgages in Ontario unless he, she or it has a mortgage administrator's licence or is exempted from the requirement to have such a licence. 2006, c. 29, s. 5 (2).

Exemptions

Financial institutions

6 (1) Every financial institution is exempted from the requirement in sections 2, 3 and 4 to have a brokerage licence. 2006, c. 29, s. 6 (1).

Same

(2) Every financial institution is exempted from the requirement in section 5 to have a mortgage administrator's licence. 2006, c. 29, s. 6 (2).

Directors, officers, employees of financial institutions

(3) A director, officer or employee of a financial institution is exempted from the requirement in sections 2 and 3 to have a mortgage broker's or agent's licence when, in the ordinary course of his or her duties, the individual deals in or trades in mortgages on behalf of the financial institution. 2006, c. 29, s. 6 (3).

Simple referrals

(4) A person or entity is exempted from the requirement in section 2 to have a brokerage licence or a mortgage broker's or agent's licence when he, she or it refers a prospective borrower to a prospective mortgage lender if,

- (a) the person or entity provides the prospective borrower with only such information about the prospective lender that is prescribed;
- (b) the person or entity provides the prospective borrower with prescribed information in accordance with the regulations respecting the fee or other remuneration the person or entity receives, is entitled to receive, has received or may receive, directly or indirectly, for the referral; and
- (c) the person or entity complies with such other requirements as may be prescribed. 2006, c. 29, s. 6 (4).

Same

(5) A person or entity is exempted from the requirement in section 2 to have a brokerage licence or a mortgage broker's or agent's licence when he, she or it refers a prospective mortgage lender to a prospective borrower if,

- (a) the person or entity provides the prospective lender with only such information about the prospective borrower that is prescribed;
- (b) the person or entity provides the prospective borrower with prescribed information in accordance with the regulations respecting the fee or other remuneration the person or entity receives, is entitled to receive, has received or may receive, directly or indirectly, for the referral; and
- (c) the person or entity complies with such other requirements as may be prescribed. 2006, c. 29, s. 6 (5).

Lawyers

(6) Lawyers are exempted from the requirement in sections 2, 3 and 5 to have a licence in such circumstances as may be prescribed. 2006, c. 29, s. 6 (6).

Other persons and entities

(7) Such other persons and entities, or classes of persons or entities, as may be prescribed are exempted from the requirement in sections 2, 3 and 4 to have a brokerage licence in such circumstances as may be prescribed. 2006, c. 29, s. 6 (7).

Same

(8) Such individuals, or classes of individuals, as may be prescribed are exempted from the requirement in sections 2 and 3 to have a mortgage broker's or agent's licence in such circumstances as may be prescribed. 2006, c. 29, s. 6 (8).

Same

(9) Such other persons and entities, or classes of persons or entities, as may be prescribed are exempted from the requirement in section 5 to have a mortgage administrator's licence in such circumstances as may be prescribed. 2006, c. 29, s. 6 (9).

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Mortgage Brokers, Lenders and Administrators Act, 2006 (S.O. 2006, c 29)

Ontario Regulation 406/07 - Regulated Activities: Additional Prescribed Activities



[Français](#)

Mortgage Brokerages, Lenders and Administrators Act, 2006

ONTARIO REGULATION 406/07

REGULATED ACTIVITIES: ADDITIONAL PRESCRIBED ACTIVITIES

Consolidation Period: From March 6, 2009 to the [e-Laws currency date](#).

Last amendment: [87/09](#).

Legislative History: [+]

This is the English version of a bilingual regulation.

Administering mortgages

1. The following activities are prescribed for the purposes of paragraph 2 of subsection 5 (1) of the Act as activities that constitute administering mortgages:

1. Taking steps, on behalf of another person or entity, to enforce payment by a borrower under a mortgage. O. Reg. 406/07, s. 1.

2. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 406/07, s. 2.

[Français](#)

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Ontario Regulation 407/07 - Exemptions From The Requirements To Be Licensed



[Français](#)

Mortgage Brokerages, Lenders and Administrators Act, 2006

ONTARIO REGULATION 407/07

EXEMPTIONS FROM THE REQUIREMENTS TO BE LICENSED

Consolidation Period: From January 1, 2015 to the [e-Laws currency date](#).

Last amendment: [237/14](#).

Legislative History: [+]

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EXEMPTIONS FOR SIMPLE REFERRALS

When providing information to a prospective borrower

1. (1) A person or entity who refers a prospective borrower to a prospective mortgage lender is exempted under subsection 6 (4) of the Act from the requirement in section 2 of the Act to have a brokerage licence or a mortgage broker's or agent's licence if the person or entity complies with both of the following requirements and criteria:

- 1. Before or at the time of making the referral, the person or entity informs the prospective borrower in writing,
 - i. that the person or entity has received or will or may receive a fee or other remuneration, whether directly or indirectly, for making the referral, and
 - ii. of the nature of the relationship between the person or entity and the prospective lender.

- 2. The only other information that the person or entity is permitted to give to the prospective borrower is the name, address, telephone number, fax number, email address or website address of the prospective lender or of an individual who acts on behalf of the prospective lender. O. Reg. 407/07, s. 1 (1).

(2) Nothing in subsection (1) affects the right of a person or entity who does not have a brokerage licence or a mortgage broker's or agent's licence to refer a prospective borrower to a prospective lender for no fee or other remuneration. O. Reg. 407/07, s. 1 (2).

When providing information to a prospective lender

2. (1) A person or entity who refers a prospective mortgage lender to a prospective borrower is exempted under subsection 6 (5) of the Act from the requirement in section 2 of the Act to have a brokerage licence or a mortgage broker's or agent's licence if the person or entity complies with all of the following requirements and criteria:

- 1. Before making the referral, the person or entity informs the prospective borrower in writing,
 - i. that the person or entity has received or will or may receive a fee or other remuneration, whether directly or indirectly, for making the referral, and
 - ii. of the nature of the relationship between the person or entity and the prospective lender.

- 2. The person or entity then obtains the prospective borrower's written consent to give specified information to the prospective

lender.

3. The only information that the person or entity is permitted to give to the prospective lender is the name, address, telephone number, fax number, email address or website address of the prospective borrower or of an individual who acts on behalf of the prospective borrower.
4. The person or entity does not give the prospective lender any information about the prospective borrower other than the information that is authorized by both paragraph 3 and the written consent of the prospective borrower. O. Reg. 407/07, s. 2 (1).

(2) Nothing in subsection (1) affects the right of a person or entity who does not have a brokerage licence or a mortgage broker's or agent's licence to refer a prospective lender to a prospective borrower for no fee or other remuneration. O. Reg. 407/07, s. 2 (2).

EXEMPTIONS FOR LAWYERS

When dealing in mortgages

3. A lawyer is exempted under subsection 6 (6) of the Act from the requirement under section 2 of the Act to have a brokerage licence or a mortgage broker's or agent's licence if both of the following circumstances exist:

1. The lawyer, acting in his or her professional capacity as a lawyer on behalf of a client,
 - i. solicits a person or entity to lend money on the security of real property, or
 - ii. engages in an activity described in paragraph 2, 3 or 4 of subsection 2 (1) of the Act.
2. The lawyer does not hold himself or herself out as engaging in any activity described in subsection 2 (1) of the Act, except as described in paragraph 1 of this section, or otherwise as dealing in mortgages. O. Reg. 407/07, s. 3.

When trading in mortgages

4. A lawyer is exempted under subsection 6 (6) of the Act from the requirement in section 3 of the Act to have a brokerage licence or a mortgage broker's or agent's licence if both of the following circumstances exist:

1. The lawyer, acting in his or her professional capacity as a lawyer on behalf of a client, engages in an activity described in paragraph 1 or 2 of subsection 3 (1) of the Act.
2. The lawyer does not hold himself or herself out as engaging in any activity described in subsection 3 (1) of the Act, except as described in paragraph 1 of this section, or otherwise as trading in mortgages. O. Reg. 407/07, s. 4.

When administering mortgages

5. A lawyer is exempted under subsection 6 (6) of the Act from the requirement in section 5 of the Act to have a mortgage administrator's licence if both of the following circumstances exist:

1. The lawyer administers mortgages, acting in his or her professional capacity as a lawyer on behalf of a client.
2. The lawyer does not hold himself or herself out as administering mortgages, except as described in paragraph 1 of this section. O. Reg. 407/07, s. 5.

EXEMPTIONS FOR OTHER PERSONS AND ENTITIES

GENERAL EXEMPTIONS

For trustees in bankruptcy

6. A person or entity who is acting as a trustee in bankruptcy is exempted under subsections 6 (7) and (9) of the Act from any requirement to have a brokerage licence or a mortgage administrator's licence. O. Reg. 407/07, s. 6.

When acting under court order

7. A person or entity who is acting under an order of the Superior Court of Justice is exempted under subsections 6 (7) and (9) of the Act from any requirement to have a brokerage licence or a mortgage administrator's licence. O. Reg. 407/07, s. 7.

For certain statutory corporations

8. The following corporations are exempted under subsections 6 (7) and (9) of the Act from any requirement to have a brokerage licence or a mortgage administrator's licence:

1. Eastern Ontario Development Corporation.
2. Northern Ontario Development Corporation.
3. Ontario Development Corporation.
4. Ontario Infrastructure and Lands Corporation.
5. Ontario Mortgage and Housing Corporation.
6. REVOKED: O. Reg. 211/11, s. 1 (2).

O. Reg. 407/07, s. 8; O. Reg. 211/11, s. 1.

For personal corporation of broker, agent

8.1 (1) In this section,

"member brokers and agents" means, in respect of a corporation, every broker or agent who is an employee or shareholder of the corporation. O. Reg. 186/08, s. 1 (1).

(2) Expressions used in this section have the same meaning as in the standards of practice prescribed for brokerage licences. O. Reg. 186/08, s. 1 (1).

(3) A corporation is exempted under subsection 6 (7) of the Act from any requirement to have a brokerage licence if all of the following circumstances exist:

1. Every member broker and agent of the corporation is authorized to deal or trade in mortgages on behalf of a particular brokerage.
2. The corporation does not carry on the business of dealing or trading in mortgages otherwise than by providing the services of its member brokers and agents to the particular brokerage.
3. The corporation does not carry on business as a mortgage lender unless it does so solely through the particular brokerage.
4. The corporation and its member brokers and agents do not represent to the public in any manner, directly or indirectly, that the corporation carries on the business of dealing or trading in mortgages or carries on business as a mortgage lender.
5. The corporation does not receive, directly or indirectly, revenue for dealing or trading in mortgages from any person or entity other than the particular brokerage.
6. The member brokers and agents do not receive, directly or indirectly, fees or other remuneration for dealing or trading in mortgages from any person or entity other than the corporation or the particular brokerage.
7. The corporation does not, on behalf of the particular brokerage, directly or indirectly hold funds or other assets received from borrowers, lenders or investors in connection with dealing or trading in mortgages.
8. A majority of the corporation's directors are member brokers and agents.
9. A majority of the equity of the corporation is legally and beneficially owned, directly or indirectly, by one or more of its member brokers or agents.
10. There is a written agreement between the particular brokerage and each member broker or agent governing the relationship between the brokerage and the broker or agent.

11. There is a written agreement between the corporation and the particular brokerage governing the relationship between the brokerage and the corporation and its member brokers and agents.
12. Under the agreement between the corporation and the particular brokerage, the corporation agrees not to hinder or obstruct the brokerage or its principal broker in the performance of their duties under the Act and not to obstruct or hinder the member brokers and agents in the performance of their duties under the Act.
13. Under the agreement between the corporation and the particular brokerage, the corporation agrees to provide whatever assistance may be reasonably necessary to enable the brokerage and its principal broker to comply with their duties under the Act and to enable the brokerage and its principal broker to ensure that the member brokers and agents are complying with their duties under the Act.
14. Under the agreement between the corporation and the particular brokerage, the corporation agrees to provide whatever assistance may be reasonably necessary to enable the brokerage to determine whether the circumstances entitling the corporation to the exemption established by this section exist. O. Reg. 186/08, s. 1 (1).

For certain corporations (motor vehicle dealership financing)

8.2 (1) In this section,

"eligible mortgage" means a mortgage described in subsection (5); ("hypothèque admissible")

"registered motor vehicle dealer" means a person who is registered under the *Motor Vehicle Dealers Act, 2002* as a motor vehicle dealer. ("commerçant de véhicules automobiles inscrit") O. Reg. 186/08, s. 1; O. Reg. 78/09, s. 2; O. Reg. 174/09, s. 1.

(2) This section applies to the following corporations:

1. BMW Canada Inc.
2. Ford Credit Canada Limited.
3. General Motors Financial of Canada, Ltd.
4. Honda Canada Finance Inc.
5. Mercedes-Benz Financial Services Canada Corporation.
6. Nissan Canada Financial Services Inc.
7. Toyota Credit Canada Inc.
8. VFS Canada Inc.
9. VW Credit Canada, Inc.
10. Hyundai Capital Canada Inc. O. Reg. 314/13, s. 1; O. Reg. 237/14, s. 1.

(3) A corporation listed in subsection (2) is exempted under subsection 6 (7) of the Act from the requirement in section 2, 3 or 4 of the Act to have a brokerage licence if the corporation deals or trades in, or lends money on the security of, eligible mortgages only and if it does not engage in other activities requiring a brokerage licence. O. Reg. 186/08, s. 1 (1).

(4) A corporation listed in subsection (2) is exempted under subsection 6 (9) of the Act from the requirement in section 5 of the Act to have a mortgage administrator's licence if the corporation administers eligible mortgages only and does not engage in other activities requiring a mortgage administrator's licence. O. Reg. 186/08, s. 1 (1).

(5) A mortgage is an eligible mortgage for the purposes of this section if all of the following conditions are satisfied:

1. One or more of the following persons or entities is either the borrower under the mortgage or guarantees payment of the mortgage:

- i. a registered motor vehicle dealer,
- ii. a person or entity with an ownership interest in a registered motor vehicle dealer,
- iii. a person or entity in which a registered motor vehicle dealer has an ownership interest.

2. The mortgage loan is made for the purposes of the business for which the registered motor vehicle dealer requires the registration or for the purposes of another business that is ancillary to that business.
3. The real property that secures the mortgage loan is not a residential premises in whole or in part. O. Reg. 186/08, s. 1 (1).

For directors, employees, etc., of Crown agencies

9. (1) In this section,

"Crown agency" means an agency of the Crown in right of Ontario, Canada or another province or territory of Canada. O. Reg. 407/07, s. 9 (1).

(2) Every individual who is an officer or employee of a Crown agency or is a director, partner or member of the governing body of a Crown agency is exempted under subsection 6 (8) of the Act from the requirement in section 2 or 3 of the Act to have a mortgage broker's or agent's licence if he or she deals or trades in mortgages solely on behalf of the Crown agency in the ordinary course of his or her duties. O. Reg. 407/07, s. 9 (2).

For directors, employees, etc., of certain exempted persons and entities

10. (1) In this section,

"exempted person or entity" means a person or entity who is exempted under subsection 6 (4), (5), (6) or (7) of the Act from the requirement in section 2 or 3 of the Act to have a brokerage licence. O. Reg. 407/07, s. 10 (1).

(2) Every individual who is an officer or employee of an exempted person or entity or is a director, partner or member of the governing body of such a person or entity is exempted under subsection 6 (8) of the Act from the requirement in section 2 or 3 of the Act to have a mortgage broker's or agent's licence if he or she deals or trades in mortgages solely on behalf of the person or entity in the ordinary course of his or her duties. O. Reg. 407/07, s. 10 (2).

(3) Despite subsection (2), if there are conditions or restrictions that apply with respect to the exempted person's or entity's exemption, the individual's exemption is subject to corresponding restrictions. O. Reg. 407/07, s. 10 (3).

(4) This section does not apply to an individual who is an officer or employee of a corporation that is exempted under section 8.1 or to an individual who is a director, partner or member of the governing body of such a corporation. O. Reg. 186/08, s. 2.

EXEMPTIONS FOR DEALING IN MORTGAGES

For consumer reporting agencies

11. A consumer reporting agency registered under the *Consumer Reporting Act* is exempted under subsection 6 (7) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* from the requirement in section 2 of the Act to have a brokerage licence if both of the following circumstances exist:

1. In the course of acting as a consumer reporting agency, the agency provides information about prospective borrowers to prospective mortgage lenders, whether or not the Act governs the lenders.
2. The agency does not hold itself out as otherwise dealing in mortgages. O. Reg. 407/07, s. 11.

Limited exemption, registered real estate brokerages, etc.

11.1 (1) In this section,

"registered real estate broker or salesperson" means an individual who is registered under the *Real Estate and Business Brokers Act, 2002* as a broker or salesperson, as the case may be; ("courtier ou agent immobilier inscrit")

"registered real estate brokerage" means a person or entity who is registered under the *Real Estate and Business Brokers Act, 2002* as a brokerage; ("maison de courtage immobilier inscrite")

"trade in real estate" has the same meaning as in the *Real Estate and Business Brokers Act, 2002*. ("opération immobilière", "mener des opérations immobilières") O. Reg. 186/08, s. 3.

(2) If both of the following circumstances exist, a registered real estate brokerage is exempted under subsection 6 (7) of the Act from the requirement in section 2 of the Act to have a mortgage brokerage licence when arranging a vendor take-back mortgage, or attempting to do so, in the course of a trade in real estate:

1. The registered real estate brokerage does not hold itself out as otherwise dealing in mortgages.
2. The registered real estate brokerage does not engage in any other activity that requires a licence under the Act. O. Reg. 186/08, s. 3.

(3) If all of the following circumstances exist, a registered real estate broker or salesperson is exempted under subsection 6 (8) of the Act from the requirement in section 2 of the Act to have a mortgage broker's or agent's licence when arranging a vendor take-back mortgage, or attempting to do so, in the course of a trade in real estate:

1. The registered real estate brokerage for whom he or she is a real estate broker or salesperson is exempted by subsection (2) from the requirement to have a mortgage brokerage licence.
2. The registered real estate broker or salesperson does not hold himself or herself out as otherwise dealing in mortgages.
3. He or she does not engage in any other activity that requires a licence under the Act. O. Reg. 186/08, s. 3; O. Reg. 314/13, s. 2.

EXEMPTIONS FOR TRADING IN MORTGAGES

For registered dealers

12. A person or entity who is registered as a dealer under the *Securities Act* is exempted under subsection 6 (7) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* from the requirement under section 3 of the Act to have a brokerage licence if the following circumstances exist:

1. The person or entity, acting on its own behalf, buys, sells or exchanges mortgages with one or more of the following persons or entities or, acting on its own behalf, solicits one or more of the following persons or entities to buy, sell or exchange mortgages:
 - i. The Crown in right of Ontario, Canada or any province or territory of Canada.
 - ii. A brokerage acting on its own behalf.
 - iii. A financial institution.
 - iv. A corporation that is a subsidiary of a person or entity described in paragraph 1, 2 or 3.
 - v. A corporation that is an approved lender under the *National Housing Act* (Canada).
 - vi. An administrator or trustee of a registered pension plan within the meaning of subsection 248 (1) of the *Income Tax Act* (Canada).
 - vii. A person or entity who is registered as an adviser or dealer under the *Securities Act* when the person or entity is

acting as a principal or as an agent or trustee for accounts that are fully managed by the person or entity.

viii. A person or entity who is registered under securities legislation in another province or territory of Canada with a status comparable to that described in subparagraph vii when the person or entity is acting as a principal or as an agent or trustee for accounts that are fully managed by the person or entity.

ix. A person or entity in respect of which all of the owners of interests, except the voting securities required by law to be owned by directors, are persons or entities described in subparagraphs i to viii.

2. The person or entity does not hold themselves out as otherwise trading in mortgages.

3. The person or entity is not otherwise required to be licensed. O. Reg. 407/07, s. 12.

In connection with mortgage securitization

13. (1) A person or entity is exempted under subsection 6 (7) of the Act from the requirement in section 3 of the Act to have a brokerage licence if both of the following circumstances exist:

1. The person or entity carries on the business of trading in mortgages in connection with mortgage securitization.

2. The person or entity is not otherwise required to be licensed. O. Reg. 407/07, s. 13 (1).

(2) In this section,

"mortgage securitization" means the creation of securities, as defined in the *Securities Act*, that represent an interest in, or obligations backed by, a mortgage or a discrete pool of mortgages. O. Reg. 407/07, s. 13 (2).

When acting through an intermediary

14. A person or entity is exempted under subsection 6 (7) of the Act from the requirement in section 3 of the Act to have a brokerage licence if the person or entity buys, sells or exchanges mortgages on its own behalf through a mortgage brokerage or a person or entity that is exempted from the requirement to have a brokerage licence. O. Reg. 407/07, s. 14.

EXEMPTIONS FOR MORTGAGE LENDING

When acting through an intermediary

15. A person or entity is exempted under subsection 6 (7) of the Act from the requirement in section 4 of the Act to have a brokerage licence if the person or entity carries on business as a mortgage lender solely through a mortgage brokerage or a person or entity that is exempted from the requirement to have a brokerage licence. O. Reg. 407/07, s. 15.

EXEMPTIONS FOR ADMINISTERING MORTGAGES

When acting for the Crown

16. A person or entity is exempted under subsection 6 (9) of the Act from the requirement in section 5 of the Act to have a mortgage administrator's licence if the person or entity carries on the business of administering mortgages on behalf of the Crown in right of Ontario, Canada or another province or territory of Canada and if the person or entity is not otherwise required to be licensed. O. Reg. 407/07, s. 16.

When acting for a financial institution, etc.

17. (1) A person or entity is exempted under subsection 6 (9) of the Act from the requirement in section 5 of the Act to have a mortgage administrator's licence if the person or entity carries on the business of administering mortgages on behalf of a financial institution or finance company and if the person or entity is not otherwise required to be licensed. O. Reg. 407/07, s. 17 (1).

(2) For the purposes of this section,

"affiliate", with respect to a corporation, has the same meaning as in the *Business Corporations Act*; ("membre du même groupe")

"finance company" means a corporation or partnership, other than a financial institution, that satisfies both of the following criteria:

1. A material business activity of the corporation or partnership involves making or refinancing loans, or entering into other similar arrangements for advancing funds or credit.
2. The shares or ownership interests of the corporation or partnership, or of another person or entity with which it is affiliated, are listed on a stock exchange in Canada or outside Canada that is a prescribed stock exchange for the purposes of the *Income Tax Act* (Canada). ("société de financement") O. Reg. 407/07, s. 17 (2).

(3) For the purposes of the definition of "finance company" in subsection (2), a partnership is affiliated with another person or entity if one of them is controlled by the other or if both are controlled by the same person or entity. O. Reg. 407/07, s. 17 (3).

For collection agencies

18. A collection agency that is registered under the *Collection Agencies Act* is exempted under subsection 6 (9) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* from the requirement in section 5 of the Act to have a mortgage administrator's licence if both of the following circumstances exist:

1. In the course of acting as a collection agency, the agency takes steps, on behalf of another person or entity, to enforce payment by borrowers under mortgages.
2. The agency does not hold itself out as engaging in any other activity described in subsection 5 (1) of the Act or otherwise as administering mortgages. O. Reg. 407/07, s. 18.

In connection with mortgage-backed securities

19. (1) A person or entity is exempted under subsection 6 (9) of the Act from the requirement in section 5 of the Act to have a mortgage administrator's licence when the person or entity carries on the business of administering only those mortgages that constitute the assets backing mortgage-backed securities. O. Reg. 407/07, s. 19 (1).

(2) In this section,

"mortgage-backed securities" means securities, as defined in the *Securities Act*, that represent an interest in, or obligations backed by, a mortgage or a discrete pool of mortgages. O. Reg. 407/07, s. 19 (2).

20. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 407/07, s. 20.

Français

Syndicated Mortgages: How To Avoid The Risks

15th Annual Real Estate Summit

Law Society of Ontario

April 18, 2018

Mortgage Brokers, Lenders and Administrators Act, 2006 (S.O. 2006, c 29)

Ontario Regulation 407/07 - Mortgage Brokerages: Standards of Practice

Mortgage Brokerages, Lenders and Administrators Act, 2006ONTARIO REGULATION 188/08**MORTGAGE BROKERAGES: STANDARDS OF PRACTICE****Consolidation Period:** From March 8, 2018 to the e-Laws currency date.Last amendment: 96/18.

Legislative History: [+]

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INTERPRETATION

Definitions

1. In this Regulation,

"authorized name" means, in relation to a brokerage, any name in which the brokerage is licensed; ("nom autorisé")

"authorized trust account" means, in relation to a brokerage, its mortgage brokerage trust account established in accordance with section 50; ("compte en fiducie autorisé")

"business day" means a day that is not a Saturday or holiday within the meaning of section 87 of the *Legislation Act, 2006*; ("jour ouvrable")

"deemed trust funds" means, in relation to a brokerage, money that is deemed by section 49 to be held in trust by the brokerage; ("fonds réputés détenus en fiducie")

"investor" means a person or entity who makes an investment in a mortgage through the purchase or exchange of a loan or an interest in a loan on the security of real estate; ("investisseur")

"public relations materials" means, in relation to a brokerage,

(a) any advertisement by the brokerage in connection with its business as a brokerage that is published, circulated or broadcast by any means, or

(b) any material that a brokerage makes available to the public in connection with its business as a brokerage; ("document de relations publiques")

Note: On July 1, 2018, section 1 of the Regulation is amended by adding the following definitions: (See: O. Reg. 96/18, s. 1 (1))

"qualified syndicated mortgage" has the meaning set out in subsection (2); ("hypothèque consortiale admissible")

"syndicated mortgage" means a mortgage that secures a debt obligation in respect of which two or more persons are direct or indirect lenders or investors; ("hypothèque consortiale")

"trade completion date" means, in relation to a mortgage, the earlier of,

(a) the date on which an investor, or a brokerage on behalf of an investor, enters into an agreement to trade in the mortgage, or

(b) the date on which the trade in the mortgage is completed. ("date de conclusion de l'opération") O. Reg. 188/08, s. 1.

Note: On July 1, 2018, section 1 of the Regulation is amended by adding the following subsections: (See: O. Reg. 96/18, s. 1 (2))

(2) Subject to subsection (3), a qualified syndicated mortgage is a syndicated mortgage that meets all of the following criteria:

1. It is negotiated or arranged through a mortgage brokerage.
2. It secures a debt obligation on property that,
 - i. is used primarily for residential purposes,
 - ii. includes no more than a total of four units, and
 - iii. if used for both commercial and residential purposes, includes no more than one unit that is used for commercial purposes.
3. At the time the syndicated mortgage is arranged, the amount of the debt it secures, together with all other debt secured by mortgages on the property that have priority over, or the same priority as, the syndicated mortgage, does not exceed 90 per cent of the fair market value of the property relating to the mortgage, excluding any value that may be attributed to proposed or pending development of the property.
4. It is limited to one debt obligation whose term is the same as the term of the syndicated mortgage.
5. The rate of interest payable under it is equal to the rate of interest payable under the debt obligation. O. Reg. 96/18, s. 1 (2).

(3) A syndicated mortgage that secures a debt obligation incurred for the construction or development of property is not a qualified syndicated mortgage. O. Reg. 96/18, s. 1 (2).

Designated classes of lenders and investors

2. (1) For the purposes of this Regulation, a person or entity is a member of a designated class of lenders and investors if the person or entity is a member of any of the following classes:

1. The Crown in right of Ontario, Canada or any province or territory of Canada.
2. A brokerage acting on its own behalf.
3. A financial institution.
4. A corporation that is a subsidiary of a person or entity described in paragraph 1, 2 or 3.
5. A corporation that is an approved lender under the *National Housing Act* (Canada).
6. An administrator or trustee of a registered pension plan within the meaning of subsection 248 (1) of the *Income Tax Act* (Canada).
7. A person or entity who is registered as an adviser or dealer under the *Securities Act* when the person or entity is acting as a principal or as an agent or trustee for accounts that are fully managed by the person or entity.
8. A person or entity who is registered under securities legislation in another province or territory of Canada with a status comparable to that described in paragraph 7 when the person or entity is acting as a principal or as an agent or trustee for accounts that are fully managed by the person or entity.
9. A person or entity, other than an individual, who has net assets of at least \$5 million as reflected in its most recently-prepared financial statements and who provides written confirmation of this to the brokerage.
10. An individual who, alone or together with his or her spouse, has net assets of at least \$5 million and who provides written confirmation of this to the brokerage.
11. An individual who, alone or together with his or her spouse, beneficially owns financial assets (being cash, securities within the meaning of the *Securities Act*, the cash surrender value of a life insurance contract, a deposit or evidence of a deposit) that have an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$1 million and who provides written confirmation of this to the brokerage.
12. An individual whose net income before taxes in each of the two most recent years exceeded \$200,000 or whose net

income before taxes in each of those years combined with that of his or her spouse in each of those years exceeded \$300,000, who has a reasonable expectation of exceeding the same net income or combined net income, as the case may be, in the current year and who provides written confirmation of this to the brokerage.

13. A person or entity in respect of which all of the owners of interests, other than the owners of voting securities required by law to be owned by directors, are persons or entities described in paragraphs 1 to 12. O. Reg. 188/08, s. 2 (1).

(2) In this section,

"spouse" means spouse as defined in section 29 of the *Family Law Act*. O. Reg. 188/08, s. 2 (2).

Duties re syndicated mortgages

3. If there is more than one lender under a mortgage or if there is more than one investor who makes an investment in a mortgage, a brokerage owes to each of the lenders or investors the duties imposed by this Regulation in respect of the mortgage or investment. O. Reg. 188/08, s. 3.

Note: On July 1, 2018, section 3 of the Regulation is revoked and the following substituted: (See: O. Reg. 96/18, s. 2)

Duties re syndicated mortgages

3. A brokerage owes to each of the lenders and investors in a syndicated mortgage the duties imposed by this Regulation in respect of the investment or loan. O. Reg. 96/18, s. 2.

STANDARDS OF PRACTICE

Standards of practice

4. The requirements set out in this Regulation are prescribed as standards of practice for every brokerage licence that is issued under the Act. O. Reg. 188/08, s. 4.

PUBLIC RELATIONS

Use of authorized name

5. A brokerage shall not carry on business in a name other than its authorized name. O. Reg. 188/08, s. 5.

Use of name, etc., in public relations materials

6. (1) A brokerage shall disclose its authorized name and its licence number in all of its public relations materials and the name and number must be clearly and prominently disclosed. O. Reg. 188/08, s. 6 (1).

(2) If the authorized name of a brokerage is, or includes, a franchise name that the brokerage is permitted to use under a franchise agreement, the public relations materials must clearly indicate that the brokerage is independently owned and operated. O. Reg. 188/08, s. 6 (2).

(3) If, in its public relations materials, a brokerage identifies a broker or agent by name, the brokerage shall use the name in which the broker or agent is licensed. O. Reg. 188/08, s. 6 (3).

(4) If, in its public relations materials, a brokerage refers to a broker or agent, the materials must include at least one reference to the broker or agent that includes one of the following titles, and the materials may also include an equivalent title in another language:

1. When referring to a broker, the title "mortgage broker", "broker", "courtier en hypothèques" or "courtier" or an abbreviation of any of those titles.

2. When referring to an agent, the title "mortgage agent", "agent" or "agent en hypothèques" or an abbreviation of any of those titles. O. Reg. 188/08, s. 6 (4).

Prohibition re public relations materials

7. A brokerage shall not include false, misleading or deceptive information in its public relations materials. O. Reg. 188/08, s. 7.

Duty to provide licence information

8. (1) Upon request, a brokerage shall give to a person the licence number of the brokerage and the name and licence number of any broker or agent who is authorized to deal or trade in mortgages on behalf of the brokerage. O. Reg. 188/08, s. 8 (1).

(2) Subsection (1) does not require the brokerage to give a person the names and licence numbers of all or substantially all of its brokers or agents. O. Reg. 188/08, s. 8 (2).

Complaints by the public

9. (1) If a person makes a complaint to the brokerage in writing about the mortgage business activities of the brokerage or of any broker or agent authorized to deal or trade in mortgages on its behalf, the brokerage shall give the person a written response to the complaint setting out the brokerage's proposed resolution of the complaint. O. Reg. 188/08, s. 9 (1).

(2) The written response must also tell the person who made the complaint that, if the person is not satisfied with the proposed resolution and if the person believes that the complaint relates to a contravention of the Act or a regulation, the person may refer the complaint to the Superintendent. O. Reg. 188/08, s. 9 (2).

Note: On July 1, 2018, section 9 of the Regulation is amended by adding the following subsections: (See: O. Reg. 96/18, s. 3)

(3) If the complaint relates to a syndicated mortgage other than a qualified syndicated mortgage, the brokerage shall, within 10 business days after receiving the complaint, give the Superintendent a copy of the complaint and the brokerage's response to it. O. Reg. 96/18, s. 3.

(4) The Superintendent may extend the deadline referred to in subsection (3) if,

(a) the brokerage requests the extension before the deadline has passed; and

(b) the Superintendent is satisfied that there are reasonable grounds for the extension. O. Reg. 96/18, s. 3.

CUSTOMER RELATIONS

Duty to verify customer's identity

10. (1) A brokerage shall take reasonable steps to verify the identity of each borrower and lender to whom it intends to present a mortgage or renewal for consideration. O. Reg. 188/08, s. 10 (1).

(2) A brokerage shall take reasonable steps to verify the identity of each investor to whom it intends to present an investment in a mortgage for consideration. O. Reg. 188/08, s. 10 (2).

Duty to verify other party's identity

11. (1) If a brokerage wishes to present a mortgage or renewal to a borrower for consideration, the brokerage shall take reasonable steps to verify the identity of each lender. O. Reg. 188/08, s. 11 (1).

(2) If a brokerage wishes to present a mortgage or renewal to a lender for consideration, the brokerage shall take reasonable steps to verify the identity of each borrower. O. Reg. 188/08, s. 11 (2).

(3) Subsection (2) does not apply if the lender is otherwise required by law to verify the borrower's identity. O. Reg. 188/08, s. 11 (3).

(4) If a brokerage wishes to present an investment in a mortgage to an investor for consideration, the brokerage shall take

reasonable steps to verify the identity of every other investor involved in the trade. O. Reg. 188/08, s. 11 (4).

(5) Subsection (4) does not apply if another brokerage is acting as the representative of the other investor in the trade. O. Reg. 188/08, s. 11 (5).

(6) The brokerage shall advise the borrower, lender or investor, as the case may be, if the brokerage is unable to verify the identity of another party to the transaction,

(a) before the borrower enters into the mortgage agreement or signs a mortgage instrument or a mortgage renewal agreement, as the case may be, with the lender;

(b) before submitting the borrower's mortgage application to the lender or arranging for a mortgage renewal agreement with the lender; or

(c) before the trade completion date for the investment in a mortgage. O. Reg. 188/08, s. 11 (6).

Duty re unlawful transactions

12. A brokerage shall not act as a representative of a borrower, lender or investor in respect of a mortgage if the brokerage has reason to doubt that the mortgage, its renewal or the investment in it is lawful. O. Reg. 153/15, s. 1.

Duty re borrower's legal authority

13. A brokerage shall take reasonable steps to verify a borrower's legal authority to mortgage a property, and if the brokerage has reason to doubt the borrower's legal authority, the brokerage shall so advise each prospective lender at the earliest opportunity. O. Reg. 153/15, s. 1.

Duty re accuracy of mortgage application

14. If a brokerage has reason to doubt the accuracy of information contained in a borrower's mortgage application or in a document submitted in support of an application, the brokerage shall so advise each prospective lender at the earliest opportunity. O. Reg. 188/08, s. 14.

Continuation of duty

14.1 The duty to advise a lender under sections 13 and 14 continues with respect to the lender after the borrower enters into the mortgage agreement or signs the mortgage instrument or a mortgage renewal agreement, as the case may be, with the lender. O. Reg. 153/15, s. 2.

Dishonesty, fraud, etc.

14.2 A brokerage shall not act, or do anything or omit to do anything, in circumstances where the brokerage ought to know that by acting, doing the thing or omitting to do the thing, the brokerage is being used by a borrower, lender, investor or any other person to facilitate dishonesty, fraud, crime or illegal conduct. O. Reg. 153/15, s. 2.

Restriction re tied selling

15. (1) A brokerage shall not coerce a borrower, lender or investor to obtain a product or service from a particular person or entity, including the brokerage, as a condition for obtaining another service from the brokerage. O. Reg. 188/08, s. 15 (1).

(2) For the purposes of subsection (1), a brokerage does not coerce a borrower, lender or investor, as the case may be, by virtue of offering a service to the borrower, lender or investor on more favourable terms than it would otherwise offer, if the more favourable terms are offered on the condition that the borrower, lender or investor obtains another product or service from a particular person or entity, including the brokerage. O. Reg. 188/08, s. 15 (2).

Restriction re guarantees

16. A brokerage shall not, directly or indirectly, offer or make any guarantee to a lender in respect of a mortgage or to an investor

in respect of an investment in a mortgage. O. Reg. 188/08, s. 16.

Duty to return certain documents

17. (1) A brokerage shall not unreasonably withhold any deed, instruments or other documents from their owner. O. Reg. 188/08, s. 17 (1).

(2) A brokerage shall promptly, without charge, return deeds, instruments or other documents to their owner when requested in writing to do so by the Superintendent, the owner or the owner's agent. O. Reg. 188/08, s. 17 (2).

INFORMATION ABOUT THE BROKERAGE

Disclosure re role of brokerage

18. (1) A brokerage shall disclose in writing to a prospective borrower or lender the following information about the nature of its relationship with borrowers and lenders:

1. Information about whether, and when, the brokerage is acting as a representative of the lender but not the borrower in a transaction.
2. Information about whether, and when, the brokerage is acting as a representative of the borrower but not the lender in a transaction.
3. Information about whether, and when, the brokerage is acting as a representative of both the borrower and the lender in a transaction and is not giving preference to the interests of either. O. Reg. 188/08, s. 18 (1).

(2) Subsection (1) does not apply when the brokerage is the mortgage lender. O. Reg. 188/08, s. 18 (2).

Disclosure of brokerage's relationship with lenders

19. (1) A brokerage shall disclose in writing to a borrower the number of lenders on whose behalf the brokerage acted as a representative during the previous fiscal year and shall indicate whether the brokerage itself was a lender. O. Reg. 188/08, s. 19 (1).

(2) When there are two or more lenders under one mortgage, they are deemed to be one lender for the purposes of subsection (1). O. Reg. 188/08, s. 19 (2).

(3) Upon request, a brokerage shall disclose the following information in writing to a borrower:

1. Whether the brokerage itself was the lender for more than 50 per cent of the total number of mortgages and mortgage renewals completed by the brokerage during the previous fiscal year.
2. The name of the lender, if any, with whom the brokerage arranged mortgages during the previous fiscal year if the mortgages constituted more than 50 per cent of the total number of mortgages and mortgage renewals completed by the brokerage during the previous fiscal year. O. Reg. 188/08, s. 19 (3).

INFORMATION ABOUT FEES AND OTHER PAYMENTS

Representations re status of payments

20. (1) A brokerage shall not, directly or indirectly, represent to any person or entity that any amounts payable to the brokerage in connection with carrying on the business of dealing or trading in mortgages or carrying on business as a mortgage lender are set or approved by any government authority. O. Reg. 188/08, s. 20 (1).

(2) Subsection (1) does not apply with respect to disbursements that may be made by a brokerage for fees payable to register or deposit instruments under the *Land Titles Act* or the *Registry Act*. O. Reg. 188/08, s. 20 (2).

Fees, etc., payable by others

21. (1) A brokerage shall give the following information, in writing, to a borrower in connection with a mortgage or renewal that it presents for the borrower's consideration:

1. Whether the brokerage has received, may receive or will receive a fee or other remuneration, directly or indirectly, from another person or entity in connection with the negotiation or arrangement of the mortgage or renewal.
2. If a fee or other remuneration is or may be payable to the brokerage, the identity of the other person or entity, the basis for calculating the amount of the fee or other remuneration and, in case of a benefit other than money, the nature of the benefit.
3. Whether a broker or agent who is authorized to deal or trade in mortgages on the brokerage's behalf has received, may receive or will receive payment of an incentive from another person or entity in connection with the negotiation or arrangement of the mortgage or renewal.
4. If an incentive is or may be payable to a broker or agent, the nature of the incentive and the identity of the other person or entity. O. Reg. 188/08, s. 21 (1).

(2) The brokerage shall obtain the borrower's written acknowledgement that the brokerage made the disclosure required by this section. O. Reg. 188/08, s. 21 (2).

Fees, etc., payable by the brokerage to others

22. (1) A brokerage shall give the following information, in writing, to a borrower in connection with a mortgage or renewal that it presents for the borrower's consideration:

1. Whether the brokerage has paid, may pay or will pay a fee or other remuneration, directly or indirectly, to another person or entity in connection with the negotiation or arrangement of the mortgage or renewal.
2. If a fee or other remuneration is or may be payable, the identity of the other person or entity, the basis for calculating the amount of the fee or other remuneration and, in case of a benefit other than money, the nature of the benefit. O. Reg. 188/08, s. 22 (1).

(2) The brokerage shall obtain the borrower's written acknowledgement that the brokerage made the disclosure required by this section. O. Reg. 188/08, s. 22 (2).

Fees, etc., receivable by brokerage for referral

23. If a brokerage refers a borrower, lender or investor or a prospective borrower, lender or investor to another person or entity for a fee or other remuneration, the brokerage shall give the following information, in writing, to the borrower, lender or investor or prospective borrower, lender or investor either before or when making the referral:

1. A description of the nature of the relationship between the brokerage and the other person or entity.
2. A statement concerning whether the brokerage has received, may receive or will receive a fee or other remuneration, directly or indirectly, for making the referral. O. Reg. 188/08, s. 23.

DUTIES IN PARTICULAR TRANSACTIONS**Duty re suitability of mortgage for customer**

24. (1) A brokerage shall take reasonable steps to ensure that any mortgage or investment in a mortgage that it presents for the consideration of a borrower, lender or investor, as the case may be, is suitable for the borrower, lender or investor having regard to the needs and circumstances of the borrower, lender or investor. O. Reg. 188/08, s. 24 (1).

(2) Subsection (1) does not apply if the borrower, lender or investor, as the case may be, is another brokerage or a financial institution. O. Reg. 188/08, s. 24 (2).

Note: On July 1, 2018, section 24 of the Regulation is amended by adding the following subsection: (See: O. Reg. 96/18, s. 4)

(3) Without limiting the application of subsection (1), a brokerage shall consider the results of the written suitability assessment prepared under section 24.1 in determining whether an investment in, or loan in respect of, a syndicated mortgage other than a qualified syndicated mortgage is suitable for a lender or investor. O. Reg. 96/18, s. 4.

Note: On July 1, 2018, the Regulation is amended by adding the following sections: (See: O. Reg. 96/18, s. 5)

Duty re suitability of syndicated mortgage for lender or investor

24.1 (1) Before presenting an investment in, or loan in respect of, a syndicated mortgage for the consideration of a lender or investor, a brokerage shall,

(a) collect the following information from the lender or investor and take reasonable steps to verify its accuracy:

- (i) the lender or investor's name,
- (ii) the lender or investor's age, marital status and number of dependents,
- (iii) the lender or investor's financial circumstances,
- (iv) the lender or investor's investment needs and objectives,
- (v) the lender or investor's risk tolerance,
- (vi) the lender or investor's level of financial knowledge,
- (vii) the lender or investor's investment experience,
- (viii) the lender or investor's relationship with the brokerage, if any,
- (ix) any other information required to prepare the lender or investor information form approved by the Superintendent;

(b) use the collected information to prepare the lender or investor information form approved by the Superintendent and ensure that the lender or investor signs it to attest to its accuracy;

(c) provide a copy of the signed lender or investor information form to the lender or investor; and

(d) prepare a written suitability assessment using the form approved by the Superintendent and provide a copy of it to the lender or investor. O. Reg. 96/18, s. 5.

(2) Subsection (1) does not apply to a qualified syndicated mortgage. O. Reg. 96/18, s. 5.

Syndicated mortgage — limits

24.2 (1) A brokerage shall not negotiate or arrange an investment in, or loan in respect of, a syndicated mortgage for a lender or investor who is an individual if the brokerage has reason to believe that the investment or loan, alone or in combination with any other investment in, or loan in respect of, a syndicated mortgage that the individual has made in the previous 12 months, would result in the individual investing or lending more than \$60,000 in or with respect to syndicated mortgages within that 12-month period. O. Reg. 96/18, s. 5.

(2) Subsection (1) does not apply if the lender or investor is a member of a designated class of lenders and investors. O. Reg. 96/18, s. 5.

(3) Subsection (1) does not apply to a qualified syndicated mortgage. O. Reg. 96/18, s. 5.

(4) In determining whether the \$60,000 limit has been exceeded in the previous 12 months for the purposes of subsection (1), the brokerage shall not count any investments or loans the individual entered into prior to July 1, 2018. O. Reg. 96/18, s. 5.

Disclosure of material risks

25. (1) A brokerage shall disclose in writing to a borrower, lender or investor, as the case may be, the material risks of each mortgage or investment in a mortgage that the brokerage presents for the consideration of the borrower, lender or investor.

O. Reg. 188/08, s. 25 (1).

(2) Subsection (1) does not apply if the lender or investor, as the case may be, is a member of a designated class of lenders and investors. O. Reg. 188/08, s. 25 (2).

(3) The brokerage shall obtain the written acknowledgement of the borrower, lender or investor, as the case may be, that the brokerage made the disclosure required by this section. O. Reg. 188/08, s. 25 (3).

Disclosure of brokerage's relationships

26. (1) A brokerage shall disclose in writing to a borrower the nature of the relationship between the brokerage and each lender under a mortgage that it presents for the borrower's consideration, including whether the brokerage itself is a lender under the mortgage. O. Reg. 188/08, s. 26 (1).

(2) A brokerage shall disclose in writing to each lender the nature of the relationship between the brokerage and each borrower under a mortgage that it presents for the lender's consideration. O. Reg. 188/08, s. 26 (2).

(3) A brokerage shall disclose in writing to an investor the nature of the relationship between the brokerage and each party to the trade in a mortgage that it presents for the investor's consideration. O. Reg. 188/08, s. 26 (3).

(4) The brokerage shall obtain the written acknowledgement of the borrower, lender or investor, as the case may be, that the brokerage made the disclosure required by this section. O. Reg. 188/08, s. 26 (4).

Disclosure of conflicts of interest or potential conflicts of interest

27. (1) A brokerage shall disclose in writing to a borrower, lender or investor, as the case may be, any conflict of interest or potential conflict of interest that the brokerage or any broker or agent authorized to deal or trade in mortgages on its behalf may have in connection with a mortgage or a trade in a mortgage that the brokerage presents for the consideration of the borrower, lender or investor. O. Reg. 188/08, s. 27 (1); O. Reg. 153/15, s. 3.

(2) The brokerage shall obtain the written acknowledgement of the borrower, lender or investor, as the case may be, that the brokerage made the disclosure required by this section. O. Reg. 188/08, s. 27 (2).

(3) Subsection (1) does not apply if the lender is another brokerage. O. Reg. 188/08, s. 27 (3).

(4) Subsection (1) does not apply if the investor is another brokerage or a financial institution. O. Reg. 188/08, s. 27 (4).

Duty re mortgage previously in default

28. (1) A brokerage shall not sell or attempt to sell or arrange or attempt to arrange the sale of a mortgage that has been in default at any time in the preceding 12 months unless the brokerage informs the investor of the amount and duration of the default. O. Reg. 188/08, s. 28 (1).

(2) A brokerage shall obtain the investor's written acknowledgement that the brokerage has made the disclosure required by this section. O. Reg. 188/08, s. 28 (2).

Duties re reverse mortgages

29. (1) A brokerage shall not arrange or enter into a reverse mortgage with a borrower unless the brokerage receives from the borrower a written statement signed by a lawyer stating that the lawyer has given the borrower independent legal advice about the proposed reverse mortgage. O. Reg. 188/08, s. 29 (1).

(2) For the purposes of this section, a mortgage is a reverse mortgage if both of the following conditions are satisfied:

1. The money that is advanced under the mortgage does not have to be repaid until the occurrence of one or more of the following events:

- i. The borrower's death or, if there is more than one borrower, the death of the last surviving borrower.
- ii. The acquisition by the borrower or the last surviving borrower, as the case may be, of another dwelling to use as his or her principal residence.
- iii. The sale of the mortgaged property.
- iv. The borrower's or last surviving borrower's vacating the mortgaged property to live elsewhere with no reasonable prospect of returning.
- v. An event of default under the conditions of the mortgage.

2. One or more of the following conditions applies while the borrower or last surviving borrower, as the case may be, continues to occupy the mortgaged property as his or her principal residence and otherwise complies with the terms of the mortgage:

- i. No instalment repayments of the principal and no payment of interest on the principal are due or capable of becoming due.
- ii. Although interest payments may become due, no repayment of all or part of the principal is due or capable of becoming due.
- iii. Although interest payments and repayment of part of the principal may become due, repayment of all of the principal is not due or capable of becoming due. O. Reg. 188/08, s. 29 (2).

30. REVOKED: O. Reg. 188/08, s. 30 (6).

Disclosure form for lenders and investors re mortgages

31. (1) A brokerage shall give each lender or investor the following information and documents with respect to a mortgage or a trade in a mortgage that the brokerage presents for the consideration of the lender or investor:

1. A completed disclosure form, in a form approved by the Superintendent, signed by a broker.
2. If the investment is in an existing mortgage, a copy of the mortgage instrument.
3. If an appraisal of the applicable property has been done in the preceding 12 months and is available to the brokerage, a copy of the appraisal.
4. If an appraisal of the applicable property is not available as described in paragraph 3, documentary evidence of the value of the property, other than an agreement of purchase and sale.
5. If an agreement of purchase and sale in respect of the property has been entered into in the preceding 12 months and is available to the brokerage, a copy of the agreement of purchase and sale.

6. Documentary evidence of the borrower's ability to meet the mortgage payments.
 7. A copy of the application for the mortgage and of any document submitted in support of the application.
 8. If the mortgage is a new mortgage, documentary evidence of any down payment made by the borrower for the purchase of the property.
 9. A copy of any agreement that the lender or investor may be asked to enter into with the brokerage.
 10. All other information, in writing, that a lender or investor of ordinary prudence would consider to be material to a decision about whether to lend money on the security of the property or to invest in the mortgage. O. Reg. 188/08, s. 31 (1).
- (2) Subsection (1) does not apply if the lender or investor is a member of a designated class of lenders and investors. O. Reg. 188/08, s. 31 (2).

Note: On July 1, 2018, section 31 of the Regulation is amended by adding the following subsection: (See: O. Reg. 96/18, s. 6)

- (2.1) Subsection (1) does not apply to a syndicated mortgage other than a qualified syndicated mortgage. O. Reg. 96/18, s. 6.
- (3) A brokerage shall obtain the lender's or investor's written acknowledgement that the brokerage has disclosed the information and documents required by this section. O. Reg. 188/08, s. 31 (3).

Note: On July 1, 2018, the Regulation is amended by adding the following section: (See: O. Reg. 96/18, s. 7)

Same, syndicated mortgages

31.1 (1) A brokerage shall give each lender or investor the following information and documents with respect to an investment in, or loan in respect of, a syndicated mortgage other than a qualified syndicated mortgage that the brokerage presents for consideration to the lender or investor:

1. A completed syndicated mortgage disclosure form, in a form approved by the Superintendent, signed by a broker.
2. A copy of an appraisal of the property relating to the syndicated mortgage that satisfies the following criteria:
 - i. It was prepared within 12 months before the day the syndicated mortgage disclosure form was provided to the lender or investor.
 - ii. It was prepared by a member of the Appraisal Institute of Canada who is independent, as described in subsection (2), and who holds the designation of Accredited Appraiser Canadian Institute.
 - iii. It was prepared in accordance with the Canadian Uniform Standards of Professional Appraisal Practice published by the Appraisal Institute of Canada, as amended from time to time.
 - iv. It provides an estimated market value of the property relating to the syndicated mortgage that reflects its condition and stage of development as of the day of the inspection or any day within 60 days after the day of the inspection.
 - v. The estimated value of the property referred to in subparagraph iv must not depend or rely on,
 - A. assumptions about proposed or future development of the property,
 - B. assumptions about proposed or future improvements to the property, or
 - C. any other condition that is not in existence as of the date selected for the estimated market value of the property.
3. If the investment is in, or the loan is in respect of, an existing mortgage, a copy of the mortgage instrument.
4. If the investment is in, or the loan is in respect of, an existing mortgage, a statement indicating whether the mortgage is in arrears and whether any mortgage payments are delayed or owing.
5. A copy of the certificate of mortgage interest, the assignment of the mortgage or any other document that provides

evidence of the investment or loan.

6. If an agreement of purchase and sale in respect of the property relating to the syndicated mortgage has been entered into in the preceding 12 months and is available to the brokerage, a copy of the agreement of purchase and sale.
7. Documentary evidence of the borrower's ability to meet the mortgage payments.
8. A copy of the application for the mortgage and of any document submitted in support of the application.
9. If the investment is in, or if the loan is in respect of, a new mortgage, documentary evidence of any down payment made by the borrower for the purchase of the property relating to the syndicated mortgage.
10. A copy of any administration agreement that is applicable to the lender or investor.
11. A copy of any trust agreement that is applicable to the lender or investor.
12. A copy of the commitment letter or document setting out the terms of the lender's or investor's commitment to advance funds to the borrower.
13. The information required to be given under sections 21, 22 and 23.
14. A copy of any agreement that the lender or investor may be asked to enter into with the brokerage.
15. If the borrower is not an individual, one of the following:
 - i. Both,
 - A. the borrower's financial statements for its most recently completed financial year that ended more than 120 days before the day the syndicated mortgage disclosure form was provided to the lender or investor and for the financial year immediately preceding that financial year, and
 - B. the borrower's interim financial statements from the day after the end of the most recently completed financial year referred to in subparagraph A to the end of the most recent interim period that ended more than 60 days before the day the syndicated mortgage disclosure form was provided to the lender or investor.
 - ii. The borrower's financial statements for its most recently completed financial year that ended 120 days or less before the day the syndicated mortgage disclosure form was provided to the lender or investor and for the financial year immediately preceding that financial year.
 - iii. If the borrower's first financial year ended more than 120 days before the day the syndicated mortgage disclosure form was provided to the lender or investor and the borrower's second financial year did not end before that day,
 - A. the borrower's audited financial statements for the first financial year, and
 - B. the borrower's interim financial statements from the day after the end of the borrower's first financial year to the end of the most recent interim period that ended more than 60 days before the day the syndicated mortgage disclosure form was provided to the lender or investor.
 - iv. If the borrower's first financial year did not end before the day the syndicated mortgage disclosure form was provided to the lender or investor or ended 120 days or less before that day, the borrower's audited financial statements for the period from its inception to a date that is 120 days or less before the day the syndicated mortgage disclosure form was provided to the lender or investor.
16. All other information, in writing, that a lender or investor of ordinary prudence would consider to be material to a decision about whether to lend money on the security of the property relating to the syndicated mortgage or to invest in the syndicated mortgage. O. Reg. 96/18, s. 7.

(2) For the purposes of subparagraph 2 ii of subsection (1), a member of the Appraisal Institute of Canada is independent if there are no circumstances that, in the opinion of a reasonable person aware of all relevant facts, could interfere with the member's judgment regarding the preparation of the appraisal. O. Reg. 96/18, s. 7.

(3) The following rules apply to the financial statements required by paragraph 15 of subsection (1):

1. The financial statements must be prepared in accordance with generally accepted accounting principles applicable to publicly accountable enterprises, the primary source of which is the *CPA Canada Handbook - Accounting*.
2. The most recently completed financial year referred to subparagraph i or ii of that paragraph must be audited.
3. For greater certainty, the brokerage may provide an audited version of a financial statement even if that paragraph does not require it to be audited.
4. Any audit of the financial statements must be conducted in accordance with generally accepted auditing standards, the primary source of which is the *CPA Canada Handbook - Assurance*.
5. Any unaudited financial statements must clearly be labelled as "unaudited". O. Reg. 96/18, s. 7.

Meaning of interim period

(4) In paragraph 15 of subsection (1),

"interim period" means a period that ends three, six or nine months after the end of the borrower's financial year. O. Reg. 96/18, s. 7.

Disclosure form for lenders re mortgage renewals

32. (1) A brokerage shall give each lender the following information and documents with respect to a renewal of a mortgage that the brokerage presents for the lender's consideration:

1. A completed renewal disclosure form, in a form approved by the Superintendent, signed by a broker.
2. If an appraisal of the property has been done in the preceding 12 months and is available to the brokerage, a copy of the appraisal.
3. If an agreement of purchase and sale in respect of the property has been entered into in the preceding 12 months and is available to the brokerage, a copy of the agreement of purchase and sale.
4. All other information, in writing, that a lender of ordinary prudence would consider to be material to a decision about whether to renew the mortgage. O. Reg. 188/08, s. 32 (1).

(2) Subsection (1) does not apply if the lender is a member of a designated class of lenders and investors. O. Reg. 188/08, s. 32 (2).

(3) A brokerage shall obtain the lender's written acknowledgement that the brokerage has disclosed the information and documents required by this section. O. Reg. 188/08, s. 32 (3).

GENERAL REQUIREMENTS FOR DISCLOSURES

Clarity of disclosure, etc.

33. A written disclosure, consent or acknowledgement required by this Regulation must be expressed in plain language that is clear and concise and it must be presented in a manner that is logical and is likely to bring to the attention of the borrower, lender or investor, as the case may be, the information that is required to be conveyed. O. Reg. 188/08, s. 33.

Disclosure based on estimate, etc.

34. (1) The information to be disclosed under this Regulation to a borrower, lender or investor may be an estimate or may be based upon an assumption if, when the disclosure is made, the brokerage cannot know the actual information to be disclosed and if the estimate or assumption is reasonable. O. Reg. 188/08, s. 34 (1).

(2) If the information disclosed under this Regulation to a borrower, lender or investor is an estimate or is based upon an assumption, the brokerage shall so notify the borrower, lender or investor, as the case may be, in writing. O. Reg. 188/08, s. 34 (2).

Deadline for disclosures to borrowers

35. (1) Unless the context requires otherwise, every disclosure of information to a borrower that is required by this Regulation must be made at the earliest opportunity and, in any case, no later than two business days before the borrower enters into a mortgage agreement or signs a mortgage instrument, whichever is the earlier. O. Reg. 188/08, s. 35 (1).

(2) If the borrower consents in writing to receiving the disclosure after the deadline described in subsection (1), the disclosure may instead be made at any time before the borrower signs a mortgage instrument. O. Reg. 188/08, s. 35 (2).

Deadline for disclosures to lenders and investors

36. (1) Unless the context requires otherwise, every disclosure of information to a lender or investor that is required by this Regulation must be made at the earliest opportunity and, in any case, no later than two business days before the earliest of the following events:

1. The brokerage receives money from the lender or investor.
2. The brokerage enters into an agreement to receive money from the lender or investor.
3. The lender enters into an agreement to enter into a mortgage or the investor enters into an agreement to purchase, exchange or sell a mortgage.
4. The money is advanced to the borrower under the mortgage.
5. The trade completion date. O. Reg. 188/08, s. 36 (1).

(2) If the lender or investor consents in writing to receiving the disclosure after the deadline described in subsection (1), the disclosure may instead be made no later than one business day before the earliest of the events described in that subsection. O. Reg. 188/08, s. 36 (2).

Note: On July 1, 2018, section 36 of the Regulation is amended by adding the following subsection: (See: O. Reg. 96/18, s. 8)

(3) Subsection (2) does not apply to the disclosure of information with respect to syndicated mortgages under section 31.1. O. Reg. 96/18, s. 8.

PAYMENTS BY BORROWERS, LENDERS, INVESTORS**Advance payment by borrower**

37. (1) If the principal amount of a mortgage is \$400,000 or less, a brokerage shall not require a borrower to make, and shall not accept, an advance payment or deposit for services to be rendered or expenses to be incurred by the brokerage or any other person. O. Reg. 188/08, s. 37 (1); O. Reg. 153/15, s. 4.

(2) REVOKED: O. Reg. 188/08, s. 37 (3).

(3) SPENT: O. Reg. 188/08, s. 37 (3).

Payment, etc., by lender or investor

38. (1) A brokerage shall not receive money from a lender or enter into an agreement to receive money from a lender in connection with any activity requiring a brokerage licence unless an application has been made for a mortgage on a specific property. O. Reg. 188/08, s. 38 (1).

(2) A brokerage shall not receive money from an investor or enter into an agreement to receive money from an investor in connection with any activity requiring a brokerage licence unless an existing mortgage is available on a specific property. O. Reg. 188/08, s. 38 (2).

Receipt for deemed trust funds

39. Upon receiving from a person or entity money that constitutes deemed trust funds, the brokerage shall give the person or entity a written statement setting out the following information:

1. The amount of the money received by the brokerage.
2. The date on which the brokerage received the money.
3. The name of the person or entity from whom the money was received and, if the money was received on behalf of another person or entity, the name of that person or entity.
4. The purpose for which the money was received, including particulars of the mortgage, if any, to which the money relates.
5. The terms on which the brokerage holds the money.
6. The name of the broker or agent who received the money on behalf of the brokerage. O. Reg. 188/08, s. 39.

MANAGING THE BROKERAGE**Duty to establish policies and procedures**

40. (1) A brokerage shall establish and implement policies and procedures that are reasonably designed to ensure that the brokerage and every broker and agent who is authorized to deal or trade in mortgages on its behalf complies with the requirements established under the Act. O. Reg. 188/08, s. 40 (1).

(2) A brokerage shall establish and implement policies and procedures providing for the adequate supervision of every broker and agent who is authorized to deal or trade in mortgages on its behalf. O. Reg. 188/08, s. 40 (2).

(3) Without limiting the generality of subsections (1) and (2), the brokerage shall establish and implement policies and procedures in respect of the following matters:

1. The description of the role of the brokerage in relation to borrowers and lenders and its disclosure to borrowers and lenders as required by this Regulation.
2. The verification of the identity of borrowers, lenders and investors in the circumstances required by this Regulation.
3. The determination of the suitability of a mortgage or investment in a mortgage for a borrower, lender or investor, as the case may be.
4. The identification of the material risks of a mortgage or investment in a mortgage for a borrower, lender or investor, as the case may be, and their disclosure to the borrower, lender or investor, as the case may be, as required by this Regulation.
5. The identification of conflicts of interest or potential conflicts of interest between the brokerage or any broker or agent authorized to deal or trade in mortgages on its behalf and a borrower, lender or investor who is represented by the brokerage, and their disclosure to the borrower, lender or investor, as the case may be, as required by this Regulation.
6. The provision of incentives other than money for dealing or trading in mortgages to its brokers and agents by other persons and entities, if the brokerage permits any of its brokers or agents to receive such incentives.
7. The provision of incentives other than money for dealing or trading in mortgages to brokers and agents who are authorized by another brokerage to deal or trade in mortgages on the other brokerage's behalf, if the brokerage provides incentives to any brokers or agents of the other brokerage.
8. Fraud prevention, including ensuring compliance with sections 12 to 14.2. O. Reg. 188/08, s. 40 (3); O. Reg. 153/15, s. 5.

Note: On July 1, 2018, subsection 40 (3) of the Regulation is amended by adding the following paragraphs: (See: O. Reg. 96/18, s. 9)

9. The maintenance and retention of records, including for the purpose of ensuring compliance with sections 46 to 48.
10. The verification of a lender's or investor's eligibility to invest in, or make a loan in respect of, a syndicated mortgage

other than a qualified syndicated mortgage.

Duty to establish complaints process

41. (1) A brokerage shall establish a process for resolving complaints from the public about the mortgage business activities of the brokerage or of any broker or agent authorized to deal or trade in mortgages on its behalf. O. Reg. 188/08, s. 41 (1).

(2) The brokerage shall designate one or more individuals to receive and attempt to resolve complaints from the public, and each designated individual must be an employee of the brokerage or someone who is otherwise authorized to act on its behalf. O. Reg. 188/08, s. 41 (2).

(3) The brokerage shall keep a record of all written complaints received from the public by the brokerage and all written responses by the brokerage. O. Reg. 188/08, s. 41 (3).

Duty to have insurance

42. (1) A brokerage shall maintain errors and omissions insurance in a form approved by the Superintendent with extended coverage for loss resulting from fraudulent acts or shall have some other form of assurance in a form approved by the Superintendent. O. Reg. 188/08, s. 42 (1).

(2) The insurance or other assurance must be sufficient to pay a minimum of \$500,000 in respect of any one occurrence involving the brokerage or any broker or agent authorized to deal or trade in mortgages on its behalf and \$1 million in respect of all occurrences during a 365-day period involving the brokerage or any such broker or agent. O. Reg. 188/08, s. 42 (2).

Duty re authorization of brokers, agents

43. (1) A brokerage shall not authorize an individual to deal or trade in mortgages on its behalf unless the brokerage takes reasonable steps to satisfy itself that the individual is eligible to be licensed as a broker or agent. O. Reg. 188/08, s. 43 (1).

(2) A brokerage shall not authorize an individual to deal or trade in mortgages on its behalf if the brokerage knows, or reasonably ought to know, that the individual is a broker or agent who is authorized to deal or trade in mortgages on behalf of another brokerage. O. Reg. 188/08, s. 43 (2).

(3) A brokerage shall immediately notify the Superintendent if the brokerage believes that there may be reasonable grounds upon which the Superintendent could determine that a broker or agent is not suitable to be licensed under the Act. O. Reg. 188/08, s. 43 (3).

Restrictions on payments by brokerage

44. (1) A brokerage shall not pay a fee or other remuneration for dealing or trading in mortgages on its behalf to another person or entity that carries on the business of dealing or trading in mortgages unless the other person or entity either has a brokerage licence or is exempted from the requirement to have such a licence. O. Reg. 188/08, s. 44 (1).

(2) A brokerage shall not pay a fee or other remuneration to an individual for dealing or trading in mortgages on its behalf if the brokerage knows, or reasonably ought to know, that the individual is a broker or agent who is authorized to deal or trade in mortgages on behalf of another brokerage. O. Reg. 188/08, s. 44 (2).

Payment of incentives other than money

45. (1) Despite subsection 44 (2), a brokerage is permitted to provide an incentive other than money for dealing or trading in mortgages to a broker or agent who is authorized to deal or trade in mortgages on behalf of another brokerage if all of the following conditions are satisfied:

1. The broker or agent has obtained the consent of the other brokerage.

2. The brokerages have a written agreement governing the provision of the incentive to the broker or agent.
3. The brokerage has a written agreement with the broker or agent governing the provision of the incentive to him or her.
4. Both agreements require the brokerage to give the other brokerage particulars of the following matters both periodically and upon request:
 - i. the incentives provided by the brokerage to the broker or agent during the applicable period, and
 - ii. if an incentive entitles the broker or agent to exercise one or more options in the future, particulars of the options exercised during the applicable period. O. Reg. 188/08, s. 45 (1).

(2) REVOKED: O. Reg. 188/08, s. 45 (3).

(3) SPENT: O. Reg. 188/08, s. 45 (3).

Required records

46. (1) A brokerage shall maintain the following records:

1. Complete and accurate financial records of its licensed activities in Ontario.
2. Complete and accurate records of every mortgage application, mortgage instrument and mortgage renewal agreement received or arranged by the brokerage.
3. Complete and accurate records of every other agreement entered into by the brokerage in the course of dealing or trading in mortgages or in the course of mortgage lending.
4. Complete and accurate records of all documents or written information given to or obtained from a borrower or prospective borrower, a lender or prospective lender, an investor or prospective investor or any other person or entity pursuant to a requirement established under the Act. O. Reg. 188/08, s. 46 (1).

(2) The financial records maintained by a brokerage must distinguish between the deemed trust funds held by the brokerage and any other assets pertaining to other activities. O. Reg. 188/08, s. 46 (2).

Security of records

47. A brokerage shall take adequate precautions, appropriate to the form of its records, to guard against the falsification of the records. O. Reg. 188/08, s. 47.

Records retention

48. (1) A brokerage shall retain all records that relate to a mortgage or mortgage renewal agreement, as the case may be, for at least six years after the expiry of the term of the mortgage or renewal or other expiry of the mortgage transaction. O. Reg. 188/08, s. 48 (1).

(2) A brokerage shall retain all records that relate to a purchase, sale or trade in a mortgage for at least six years after the trade completion date or other expiry of the transaction. O. Reg. 188/08, s. 48 (2).

(3) A brokerage shall retain for at least six years all other records that are required by subsection 46 (1) or that the brokerage is otherwise required to create or maintain under the Act. O. Reg. 188/08, s. 48 (3).

(4) A brokerage shall retain the records described in subsections (1), (2) and (3) at its principal place of business in Ontario, if any, or, if the brokerage has notified the Superintendent that it keeps records at other specified premises in Ontario, at those premises. O. Reg. 188/08, s. 48 (4).

(5) If the records described in subsection (1), (2) or (3) originate at another place of business, the brokerage shall forward them to its principal place of business in Ontario, if any, or to the other premises described in subsection (4). O. Reg. 188/08, s. 48 (5).

(6) Despite subsection (4), records in electronic form need not be retained at the premises described in that subsection if those records can be retrieved from those premises in an understandable electronic and paper form promptly upon request. O. Reg. 188/08, s. 48 (6).

(7) A brokerage shall ensure that it maintains the capacity to retrieve its electronic records throughout the period during which this section requires the records to be retained. O. Reg. 188/08, s. 48 (7).

MANAGING DEEMED TRUST FUNDS

Deemed trust funds

49. (1) Subject to subsection (2), money received by a brokerage directly or indirectly from a borrower, lender or investor in connection with carrying on the business of dealing or trading in mortgages is deemed, for the purposes of this Regulation, to be held in trust by the brokerage. O. Reg. 188/08, s. 49 (1).

(2) Money received by a brokerage for any of the following purposes is not deemed to be held in trust by the brokerage:

1. Money earned by the brokerage for its services.
2. Money received to reimburse the brokerage for its expenses.
3. Money payable to the brokerage as a mortgage lender. O. Reg. 188/08, s. 49 (2).

Authorized trust account

50. (1) A brokerage that receives or holds deemed trust funds shall maintain a trust account designated as its mortgage brokerage trust account at one of the following types of financial institutions in Ontario:

1. A bank or authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada).
2. A credit union or caisse populaire to which the *Credit Unions and Caisses Populaires Act, 1994* applies.
3. A corporation registered under the *Loan and Trust Corporations Act*.
4. A retail association as defined under the *Cooperative Credit Associations Act* (Canada). O. Reg. 188/08, s. 50 (1).

(2) A brokerage shall not establish or maintain more than one mortgage brokerage trust account unless it has the prior written consent of the Superintendent to do so. O. Reg. 188/08, s. 50 (2).

Administration of trust account

51. (1) A brokerage shall deposit deemed trust funds that it receives into its authorized trust account within two business days after receiving the funds. O. Reg. 188/08, s. 51 (1).

(2) A brokerage shall keep deemed trust funds separate from money that does not constitute deemed trust funds. O. Reg. 188/08, s. 51 (2).

(3) Unless otherwise agreed to in writing by the beneficial owner of deemed trust funds, any interest earned on the deemed trust funds shall be paid to the beneficial owner. O. Reg. 188/08, s. 51 (3).

(4) A brokerage shall not disburse any deemed trust funds except in accordance with the terms upon which the funds were received by the brokerage. O. Reg. 188/08, s. 51 (4).

Record of trust account transactions

52. A brokerage shall make a written record of all deemed trust funds that it receives and all transactions relating to the funds, and the record must include the following information:

1. The contents of the written statement required by section 39 that is given to the person or entity from whom money is received.
2. With respect to every deposit made to the authorized trust account, the amount of the deposit, the date on which it was made, the name of the person or entity from whom the deposited money was received and the purpose for the deposit, including particulars of the mortgage, if any, to which the deposit relates.
3. With respect to every disbursement made from the authorized trust account, the amount of the disbursement, the date on which it was made, the name of the person or entity to whom the money was disbursed and the purpose for the disbursement, including particulars of the mortgage, if any, to which the disbursement relates.
4. With respect to every payment of interest on money in the authorized trust account, a way of identifying the deposit of deemed trust funds to which the interest relates, the amount of the interest associated with the deposit and the date, if any, on which the interest was paid to the person or entity from whom the deposit was received. O. Reg. 188/08, s. 52.

Monthly reconciliation statement for trust account

53. (1) Every month, a brokerage shall prepare a reconciliation statement for the authorized trust account and the principal broker shall review the statement and sign and date it to indicate that he or she certifies that it is accurate. O. Reg. 188/08, s. 53 (1).

(2) The reconciliation statement for a month must be prepared, reviewed and signed by the following deadline:

1. If the brokerage receives a monthly account statement from the financial institution where the account is maintained, 30 days after the brokerage receives the monthly account statement.
2. In any other case, 30 days after the end of the month. O. Reg. 188/08, s. 53 (2).

(3) The reconciliation statement for a month must set out the following information:

1. The differences, if any, between the records of the brokerage and the records of the applicable financial institution as of the following date:
 - i. if the brokerage receives a monthly account statement from the financial institution, the date of the monthly account statement, and
 - ii. in any other case, the last day of the month.
2. The balance in the account that is owing to each person or entity as of the applicable date described in subparagraph 1 i or ii. O. Reg. 188/08, s. 53 (3).

Duty to report shortfall in trust account

54. If a brokerage determines that there is a shortfall in the authorized trust account, the brokerage shall immediately notify the Superintendent. O. Reg. 188/08, s. 54.

Annual reconciliation statement for trust account

55. (1) If, for any month during its fiscal year, a brokerage is required to prepare a reconciliation statement for the authorized trust account, the brokerage shall prepare an annual reconciliation statement for the account for the fiscal year within 90 days after the end of the year. O. Reg. 188/08, s. 55 (1).

(2) The annual reconciliation statement must summarize the contents of each of the required monthly reconciliation statements for the account for the fiscal year. O. Reg. 188/08, s. 55 (2).

OTHER MATTERS

Duty re concurrent businesses

56. A brokerage that engages in another business concurrently with carrying on the business of dealing or trading in mortgages or carrying on business as a mortgage lender shall not allow the other business to jeopardize its integrity, independence or competence when carrying on the business of dealing or trading in mortgages or carrying on business as a mortgage lender. O. Reg. 188/08, s. 56.

Use of certain information

57. A brokerage shall not use information obtained in the course of carrying on business for any purpose other than that for which the information was obtained unless the brokerage has the written consent of the person or entity who is the subject of the information. O. Reg. 188/08, s. 57.

Required addresses

58. (1) A brokerage shall maintain a mailing address in Ontario that is suitable to permit service by registered mail. O. Reg. 188/08, s. 58 (1).

(2) A brokerage shall maintain an e-mail address. O. Reg. 188/08, s. 58 (2).

Use of forms

59. If a form is approved by the Superintendent for a purpose under the Act, a brokerage shall ensure that the brokerage and its brokers and agents use the current approved version of the form. O. Reg. 188/08, s. 59.

60. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THE ENGLISH VERSION OF THIS REGULATION). O. Reg. 188/08, s. 60.

Syndicated Mortgages: How To Avoid The Risks

15th Annual Real Estate Summit

Law Society of Ontario

April 18, 2018

Mortgage Brokers, Lenders and Administrators Act, 2006 (S.O. 2006, c 29)

Ontario Regulation 191/08 - Cost Of Borrowing And Disclosure To Borrowers

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Mortgage Brokerages, Lenders and Administrators Act, 2006

ONTARIO REGULATION 191/08

COST OF BORROWING AND DISCLOSURE TO BORROWERS

Consolidation Period: From March 6, 2009 to the [e-Laws currency date](#).

Last amendment: [77/09](#).

Legislative History: [+]

This is the English version of a bilingual regulation.

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APPLICATION AND INTERPRETATION

Application

1. (1) This Regulation applies to every mortgage other than a mortgage entered into with a borrower who is not a natural person, or a mortgage that a borrower enters into for business purposes. O. Reg. 191/08, s. 1 (1).

(2) Sections 3 to 16 do not apply to a mortgage brokerage if the brokerage gives a disclosure statement to a borrower on behalf of a person described in Column 1 of the following Table who is acting as a mortgage lender and if the disclosure statement meets the disclosure requirements under the corresponding legislation set out in Column 2.

TABLE

Column 1	Column 2
A bank	<i>Bank Act (Canada)</i>
A retail association as defined under the <i>Cooperative Credit Associations Act (Canada)</i>	<i>Cooperative Credit Associations Act (Canada)</i>
A credit union	<i>Credit Unions and Caisses Populaires Act, 1994</i>
An insurance company	<i>Insurance Act</i>
An insurance company	<i>Insurance Companies Act (Canada)</i>
A trust corporation	<i>Trust and Loan Companies Act (Canada)</i>
A loan corporation	<i>Trust and Loan Companies Act (Canada)</i>
Another mortgage brokerage	<i>Mortgage Brokerages, Lenders and Administrators Act, 2006</i>

O. Reg. 191/08, s. 1 (2).

(3) Despite subsection (2), sections 3 to 16 continue to apply to a mortgage brokerage if the brokerage requires the borrower to pay for any of its services or for any of its disbursements, transactions or other activities in relation to the mortgage. O. Reg. 191/08, s. 1 (3).

Definitions

2. In this Regulation,

"APR" means the cost of borrowing expressed as an annual rate on the principal referred to in subsection 3 (1); ("TAC")

"disbursement charge" means a charge, other than one referred to in subsection 5 (1), to recover an expense incurred by the lender to arrange, document, insure or secure a mortgage and includes charges referred to in clauses 5 (2) (c) and (f) to (h); ("frais de débours")

"high-ratio mortgage" means a mortgage under which the amount advanced, together with the amount outstanding under any other mortgage that ranks equally with, or prior to, the mortgage loan exceeds 80 per cent of the market value of the property securing the loan; ("hypothèque à ratio élevé")

"principal" means the amount borrowed under a mortgage but does not include any cost of borrowing; ("principal")

"public index" means an interest rate, or a variable base rate for an interest rate, that is published at least weekly in a newspaper or magazine of general circulation, or in some media of general circulation or distribution, in areas where borrowers whose mortgages are governed by that interest rate reside. ("indice publié") O. Reg. 191/08, s. 2.

COST OF BORROWING

Calculation of the APR

3. (1) For the purpose of subsection 23 (2) of the Act, the cost of borrowing for a mortgage is the annual rate on the principal as calculated using the formula,

$$\text{APR} = 100 \times C / (T \times P)$$

in which,

"APR" is the annual percentage rate cost of borrowing,

"C" is the cost of borrowing within the meaning of section 5 over the term of the mortgage,

"P" is the average of the principal of the mortgage outstanding at the end of each period for the calculation of interest under the mortgage, before subtracting any payment that is due at that time, and

"T" is the term of the mortgage in years, expressed to at least two decimal points of significance.

O. Reg. 191/08, s. 3 (1).

(2) For the purpose of subsection (1),

(a) the APR may be rounded off to the nearest eighth of a per cent;

(b) each instalment payment made on the mortgage must be applied first to the accumulated cost of borrowing and then to the outstanding principal;

(c) a period of,

(i) one month is 1/12 of a year,

(ii) one week is 1/52 of a year, and

(iii) one day is 1/365 of a year;

(d) if the annual interest rate underlying the calculation is variable over the period of the mortgage, it must be set as the annual interest rate that applies on the day that the calculation is made;

(e) if there are no instalment payments under the mortgage, then the APR must be calculated on the basis that the outstanding principal is to be repaid in one lump sum at the end of the term of the mortgage; and

(f) a mortgage for an amount that comprises, in whole or in part, an outstanding balance from a prior mortgage is a new mortgage for the purpose of the calculation. O. Reg. 191/08, s. 3 (2).

(3) The cost of borrowing for a line of credit or credit card that is secured under a mortgage is,

- (a) if the mortgage has a fixed annual interest rate, that annual interest rate; or
 - (b) if the mortgage has a variable annual interest rate, the annual interest rate that applies on the date of the disclosure.
- O. Reg. 191/08, s. 3 (3).

Annual interest rate as APR

4. (1) The APR for a mortgage is the annual interest rate if there is no cost of borrowing other than interest. O. Reg. 191/08, s. 4 (1).

(2) If an interest rate is disclosed in accordance with section 6 of the *Interest Act* (Canada), the APR must be calculated in a manner that is consistent with that section. O. Reg. 191/08, s. 4 (2).

Included and excluded charges

5. (1) Subject to subsection (2), the cost of borrowing for a mortgage, other than one that secures a line of credit, consists of all the costs of borrowing under the mortgage over its term and including the following charges:

1. Administrative charges, including charges for services, transactions or any other activity in relation to the mortgage.
2. Charges for the services, or disbursements, of a lawyer or notary hired by the lender and payable by the borrower.
3. Insurance charges other than those excluded under clauses (2) (a), (f) and (h).
4. Brokerage charges paid by the lender to another brokerage in connection with the mortgage, if the borrower is required to reimburse the lender for the charges.
5. Charges for appraisal, inspection or surveying services provided directly to the borrower in relation to property that is security for the mortgage, if those services are required by the lender. O. Reg. 191/08, s. 5 (1).

(2) The cost of borrowing for a mortgage does not include,

- (a) charges for insurance on the mortgage,
 - (i) if the insurance is optional, or
 - (ii) if the borrower is its beneficiary and the amount insured reflects the value of an asset that is security under the mortgage;
- (b) charges for an overdraft;
- (c) charges paid to register documents or obtain information from a public registry about security interests related to property given as security;
- (d) penalty charges for the prepayment of the mortgage;
- (e) charges for the services, or disbursements, of a lawyer or notary, other than those mentioned in paragraph 2 of subsection (1);
- (f) charges for insurance against defects in title to real property, if the borrower selects the insurer, if the insurance is paid for directly by the borrower and if the borrower is the beneficiary of the insurance;
- (g) charges for appraisal, inspection or surveying services provided directly to the borrower in relation to property that is security for the mortgage, if the borrower receives a report from the person providing the service and is entitled to give the report to third parties;
- (h) charges for insurance against default on a high-ratio mortgage;
- (i) charges to maintain a tax account that are required for a high-ratio mortgage or that are optional;
- (j) any charges to discharge a security interest; or
- (k) default charges. O. Reg. 191/08, s. 5 (2).

DISCLOSURE TO BORROWERS**Manner of making disclosures**

6. (1) A mortgage brokerage must give the borrower a written disclosure statement that provides the information required by this Regulation. O. Reg. 191/08, s. 6 (1).

(2) A disclosure statement may be a separate document or it may be part of another document. O. Reg. 191/08, s. 6 (2).

(3) Information disclosed in a disclosure statement may be based on an assumption or estimate if the assumption or estimate is reasonable and if the information,

(a) cannot be known by the brokerage or the lender when the brokerage makes the statement; and

(b) is identified to the borrower as an assumption or estimate. O. Reg. 191/08, s. 6 (3).

(4) A disclosure statement, or a consent in relation to a disclosure statement, must be written in plain language that is clear and concise and it must be presented in a manner that is logical and likely to bring to the borrower's attention the information that is required to be disclosed. O. Reg. 191/08, s. 6 (4).

(5) If the borrower consents in writing, the disclosure statement may be provided by electronic means in an electronic form that the borrower can retrieve and retain. O. Reg. 191/08, s. 6 (5).

Timing of initial disclosure

7. (1) A mortgage brokerage that proposes to enter into or arrange a mortgage with a borrower must give the initial disclosure statement required by this Regulation to the borrower at least two business days before the earliest of,

(a) the day on which the borrower makes any payment, other than a disbursement charge, in relation to the mortgage;

(b) the day on which the borrower enters into the mortgage agreement; and

(c) the day on which the borrower incurs any obligation in relation to the mortgage. O. Reg. 191/08, s. 7 (1).

(2) Subsection (1) does not apply if the borrower consents in writing before the earliest of the dates described in clauses (1) (a), (b) and (c). O. Reg. 191/08, s. 7 (2).

Disclosure — fixed interest mortgage for a fixed amount

8. (1) A mortgage brokerage that enters into or arranges a mortgage for a fixed interest rate for a fixed amount, to be repaid on a fixed future date or by instalment payments, must give the borrower an initial disclosure statement that includes the following information:

1. The principal amount of the mortgage.

2. The amount of each advance of the principal and when each advance is to be made.

3. The total amount of all payments.

4. The cost of borrowing over the term of the mortgage, expressed in dollars and cents.

5. The term of the mortgage, and the period of amortization if it is different from the term.

6. The annual interest rate and the circumstances, if any, under which it is compounded.

7. The APR, if it differs from the annual interest rate.

8. The date on and after which interest is charged and information concerning any period during which interest does not accrue.

9. The amount of each payment and when it is due.

10. The fact that each payment made on the mortgage must be applied first to the accumulated cost of borrowing and then to the outstanding principal.
 11. An amortization schedule for the term of the mortgage showing the principal amount, the due date and amount of each periodic payment, the portion of each periodic payment that is charged as interest or is applied on principal, the outstanding balance of the mortgage after each periodic payment and the principal amount at maturity.
 12. Information about any optional service in relation to the mortgage that the borrower accepts, the charges for each optional service and the conditions under which the borrower may cancel the service, if that information is not disclosed in a separate statement before the optional service is provided.
 13. The information required by paragraphs 1 to 4 of section 24 of the Act, including a description of any components of a formula used to calculate a rebate, charge or penalty to be imposed on the borrower if the borrower exercises a right to repay the amount borrowed before the maturity of the mortgage.
 14. If section 16 of this Regulation applies with respect to the mortgage, the formula set out in subsection 16 (3).
 15. The particulars of the charges or penalties referred to in paragraph 5 of section 24 of the Act, including default charges that may be imposed under section 17 of this Regulation.
 16. The property in which the lender takes a security interest under the mortgage.
 17. Any charge for a brokerage, if the brokerage charges are included in the amount borrowed and are paid directly by the lender to the brokerage.
 18. The fact that there is a charge to discharge a security interest and the amount of the charge on the day that the statement was provided.
 19. The nature and amount of any charge other than an interest charge. O. Reg. 191/08, s. 8 (1).
- (2) If the outstanding balance of the mortgage is increased because the borrower has missed a scheduled instalment payment or because a default charge is levied on the borrower for missing a scheduled instalment payment, such that the amount of each of the subsequently scheduled instalment payments does not cover the interest accrued during the period for which a payment is scheduled, and if the brokerage is a lender under the mortgage, the brokerage must give the borrower a subsequent disclosure statement not more than 30 days after the missed payment or the imposition of the default charge that describes the situation and its consequences. O. Reg. 191/08, s. 8 (2).

Disclosure — variable interest mortgage for a fixed amount

9. (1) A mortgage brokerage that enters into or arranges a mortgage with a variable interest rate for a fixed amount, to be repaid on a fixed future date or by instalment payments, must give the borrower an initial disclosure statement that includes the following information:
1. The information described in subsection 8 (1).
 2. The annual rate of interest that applies on the date of the disclosure statement.
 3. The method for determining the annual interest rate that applies after the date of the disclosure statement and when that determination is made.
 4. The amount of each payment based on the annual interest rate that applies on the date of the disclosure statement and the dates when those payments are due.
 5. The total amount of all payments and of the cost of borrowing based on the annual interest rate that applies on the date of the disclosure statement.
 6. If the loan is to be paid by instalment payments and the amount to be paid is not adjusted automatically to reflect changes in the annual interest rate that apply to each instalment payment,
 - i. the annual interest rate above which the amount of a scheduled instalment payment on the initial principal does not

cover the interest due on the instalment payment, and

ii. the fact that negative amortization is possible.

7. If the loan does not have regularly-scheduled payments,

i. the conditions that must occur for the entire outstanding balance, or part of it, to become due, or

ii. the provisions of the mortgage that set out those conditions. O. Reg. 191/08, s. 9 (1).

(2) If the variable interest rate for the loan is determined by adding or subtracting a fixed percentage rate of interest to or from a public index that is a variable rate, and if the brokerage is the lender under the mortgage, the brokerage must give the borrower an additional disclosure statement at least once every 12 months that contains the following information:

1. The annual interest rate at the beginning and end of the period covered by the disclosure statement.

2. The outstanding balance at the beginning and end of the period covered by the disclosure statement.

3. The amount of each instalment payment due under a payment schedule and the time when each payment is due, based on the annual interest rate that applies at the end of the period covered by the disclosure statement. O. Reg. 191/08, s. 9 (2).

(3) If the variable interest rate for the mortgage is determined by a method other than that referred to in subsection (2), and if the brokerage is the lender under the mortgage, the brokerage must give the borrower an additional disclosure statement no more than 30 days after increasing the annual interest rate by more than 1 per cent above the most recently disclosed rate and the disclosure statement must contain the following information:

1. The new annual interest rate and the date on which it takes effect.

2. The amount of each instalment payment and the time when each payment is due, for payments that are affected by the new annual interest rate. O. Reg. 191/08, s. 9 (3).

Disclosure — line of credit

10. (1) A mortgage brokerage that enters into or arranges a mortgage securing a line of credit must give the borrower an initial disclosure statement that includes the following information:

1. The initial credit limit, if it is known at the time the disclosure is made.

2. The annual interest rate, or the method for determining it if it is variable.

3. The nature and amounts of any non-interest charges.

4. The minimum payment during each payment period or the method for determining it.

5. Each period for which a statement of account is to be provided.

6. The date on and after which interest accrues and information concerning any grace period that applies.

7. The particulars of the charges or penalties referred to in paragraph 5 of section 24 of the Act, including default charges that may be imposed under section 17 of this Regulation.

8. The property in which the lender takes a security interest under the mortgage.

9. Information about any optional service in relation to the mortgage that the borrower accepts, the charges for each optional service and the conditions under which the borrower may cancel the service, if that information is not disclosed in a separate statement before the optional service is provided.

10. A local or toll-free telephone number, or a telephone number with a prominent indication that collect calls are accepted, that the borrower may use to get information about the account during the lender's regular business hours.

11. Any charge for a brokerage, if the brokerage's charges are included in the amount borrowed and are paid directly by the lender to the brokerage. O. Reg. 191/08, s. 10 (1).

(2) If the initial credit limit is not known when the initial disclosure statement is made, and if the brokerage is a lender under the mortgage, the brokerage must disclose it,

(a) in the first statement of account provided to the borrower; or

(b) in a separate statement that the borrower receives on or before the date on which the borrower receives that first statement of account. O. Reg. 191/08, s. 10 (2).

(3) Subject to subsection (4), if the brokerage is a lender under the mortgage, the brokerage must give the borrower an additional disclosure statement at least once a month that contains the following information:

1. The period covered by the disclosure statement and the opening and closing balances in the period.

2. An itemized statement of account that discloses each amount credited or charged, including interest, and the dates when those amounts were posted to the account.

3. The sum for payments and the sum for credit advances and interest and other charges.

4. The annual interest rate that applied on each day in the period and the total of interest charged at those rates in the period.

5. The credit limit and the amount of credit available at the end of the period.

6. The minimum payment and its due date.

7. The borrower's rights and obligations regarding any billing error that may appear in the statement of account.

8. A local or toll-free telephone number, or a telephone number with a prominent indication that collect calls are accepted, that the borrower may use to get information about the account during the brokerage's regular business hours. O. Reg. 191/08, s. 10 (3).

(4) The additional disclosure statements described in subsection (3) are not required for a period during which there are no advances or payments and,

(a) there is no outstanding balance at the end of the period; or

(b) the borrower has notice that the mortgage has been suspended or cancelled due to default and the lender has demanded payment of the outstanding balance. O. Reg. 191/08, s. 10 (4).

Disclosure — credit card applications

11. (1) A mortgage brokerage that issues a credit card secured by a mortgage or arranges a mortgage securing a credit card and distributes an application form for credit cards must specify the following information in the application form or in a document accompanying it, including the date on which each of the matters mentioned takes effect:

1. The annual interest rate for a credit card with a fixed rate of interest.

2. If the credit card does not have a fixed rate of interest, the fact that the variable interest rate is determined by adding or subtracting a fixed percentage rate of interest to or from a public index, the public index and the fixed percentage rate to be added or subtracted from it.

3. The day on and after which interest accrues and information concerning any grace period that applies.

4. The amount of any charges other than interest charges. O. Reg. 191/08, s. 11 (1).

(2) Subsection (1) does not apply if, on the application form or in a document accompanying it, the mortgage brokerage prominently discloses,

(a) a local or toll-free telephone number, or a telephone number with a prominent indication that collect calls are accepted, that the borrower may use to get information required by subsection (1) during the mortgage brokerage's regular business hours; and

(b) the fact that the applicant may obtain the information otherwise required by subsection (1) at that telephone number.

O. Reg. 191/08, s. 11 (2).

(3) If an individual applies for a credit card by telephone or any electronic means, the mortgage brokerage must give the applicant the information required by paragraphs 1 and 4 of subsection (1) when the application is made. O. Reg. 191/08, s. 11 (3).

(4) If a mortgage brokerage solicits applications for credit cards secured by a mortgage in person, by mail, by telephone or by any electronic means, the information required by paragraphs 1 and 4 of subsection (1) must be disclosed at the time of the solicitation. O. Reg. 191/08, s. 11 (4).

Disclosure — credit cards

12. (1) A mortgage brokerage that enters into or arranges a mortgage secured by a credit card must give the borrower an initial disclosure statement that includes the following information:

1. The information described in paragraphs 1 and 3 to 11 of subsection 10 (1).

2. The manner in which interest is calculated and the information required by paragraph 1 or 2, as the case may be, of subsection 11 (1).

3. If the credit agreement requires the borrower to pay the outstanding balance in full on receiving a statement of account,

i. mention of that requirement,

ii. the grace period by the end of which the borrower must have paid that balance, and

iii. the annual interest rate charged on any outstanding balance not paid when due.

4. If a lost or stolen credit card is used in an unauthorized manner, the fact that the maximum liability of the borrower is the lesser of \$50 and the maximum set by the credit agreement.

5. If a transaction is entered into at an automated teller machine by using the borrower's personal identification number, the fact that the liability incurred by the transaction is the borrower's maximum liability, despite paragraph 4.

6. If the mortgage brokerage has received a report from the borrower, whether written or verbal, of a lost or stolen credit card, the fact that the borrower is not liable for any transaction entered into through the use of the card after the mortgage brokerage receives the report. O. Reg. 191/08, s. 12 (1).

(2) If the initial credit limit is not known when the initial disclosure statement is made, the mortgage brokerage must disclose it,

(a) in the first statement of account provided to the borrower; or

(b) in a separate statement that the borrower receives on or before the date on which the borrower receives that first statement of account. O. Reg. 191/08, s. 12 (2).

(3) Despite section 13, if a credit agreement for a credit card is amended, the mortgage brokerage must give the borrower a written statement at least 30 days before the amendment takes effect, and the statement must set out the changes to the information that was required to be given to the borrower in the initial disclosure statement, excluding information about the following changes:

1. Any change in the credit limit.

2. Any extension to the grace period.
 3. Any decrease in charges other than interest charges and default charges referred to in paragraphs 3 and 7 of subsection 10 (l).
 4. Any change concerning information about any optional service in relation to the credit agreement that is referred to in paragraph 9 of subsection 10 (1).
 5. Any change in a variable interest rate referred to in paragraph 2 of subsection 11 (1) as a result of a change in the public index referred to in that paragraph. O. Reg. 191/08, s. 12 (3).
- (4) A change described in paragraphs 1 to 4 of subsection (3) must be disclosed in the first periodic disclosure statement that is given to the borrower after the amendment to the credit agreement is made. O. Reg. 191/08, s. 12 (4).
- (5) A mortgage brokerage that issues credit cards must give each borrower additional disclosure statements on a regular periodic basis, at least once a month that contain the following information:
1. The information described in subsections 10 (3) and (4), other than paragraphs 2 and 3 of subsection 10 (3).
 2. An itemized statement of account that describes each transaction and discloses each amount credited or charged, including interest, and the dates when those amounts were posted to the account.
 3. The amount that the borrower must pay, on or before a specified due date, in order to have the benefit of a grace period.
 4. The sum for payments and the sum for purchases, credit advances and interest and other charges. O. Reg. 191/08, s. 12 (5).
- (6) For the purpose of paragraph 2 of subsection (5), an itemized statement of account is adequate if it permits the borrower to verify each transaction described by linking it with a transaction record provided to the borrower. O. Reg. 191/08, s. 12 (6).

Disclosure after amendment to a mortgage

13. (1) This section applies if a mortgage brokerage is a lender under the mortgage. O. Reg. 191/08, s. 13 (1).
- (2) Subject to subsection (3), if a mortgage is amended by a subsequent agreement, the brokerage must give the borrower a written statement within 30 days after the borrower enters into the subsequent agreement, and the statement must describe the changes to the information required to be disclosed in the initial disclosure statement for the mortgage. O. Reg. 191/08, s. 13 (2).
- (3) If a mortgage for a fixed amount has a schedule for instalment payments and the schedule is amended by a subsequent agreement, the brokerage must give the borrower a written statement within 30 days after entering into the subsequent agreement, and the statement must set out the new payment schedule and any increase in the total amount to be paid or the cost of borrowing. O. Reg. 191/08, s. 13 (3).

Disclosure — renewal of a mortgage

14. (1) This section applies if a mortgage brokerage is a lender under the mortgage. O. Reg. 191/08, s. 14 (1).
- (2) If a mortgage is to be renewed on a specified date, the brokerage must give the borrower a subsequent disclosure statement at least 21 days before the specified renewal date, and the statement must contain the information required by,
- (a) section 8, if the mortgage is for a fixed interest rate; or
 - (b) section 9, if the mortgage is for a variable interest rate. O. Reg. 191/08, s. 14 (2).
- (3) The subsequent disclosure statement must specify that,

- (a) the cost of borrowing will not be increased after the disclosure statement is given to the borrower and before the mortgage is renewed; and
- (b) the borrower's rights under the mortgage continue, and the renewal does not take effect, until the day that is the later of the specified renewal date and the day that is 21 days after the borrower receives the statement. O. Reg. 191/08, s. 14 (3).
- (4) If the brokerage does not intend to renew a mortgage after its term ends, the brokerage shall so notify the borrower at least 21 days before the end of the term. O. Reg. 191/08, s. 14 (4).

Disclosure — offer to waive payment

15. (1) This section applies if a mortgage brokerage is a lender under the mortgage. O. Reg. 191/08, s. 15 (1).

(2) If, under a mortgage for a fixed amount, the brokerage offers to waive a payment without waiving the accrual of interest during the period covered by the payment, the brokerage must disclose to the borrower in a prominent manner in the offer that interest will continue to accrue during that period if the borrower accepts the offer. O. Reg. 191/08, s. 15 (2).

(3) If the brokerage offers to waive a payment under a mortgage that secures a line of credit or a credit card, the brokerage must disclose to the borrower in a prominent manner in the offer whether interest will continue to accrue during any period covered by the offer if the borrower accepts the offer. O. Reg. 191/08, s. 15 (3).

Disclosure — cancellation of optional services

16. (1) This section applies if a mortgage brokerage is a lender under the mortgage and if the brokerage provides optional services, including insurance services, to a borrower on an ongoing basis in connection with the mortgage. O. Reg. 191/08, s. 16 (1).

(2) A disclosure statement in relation to the mortgage must specify that,

- (a) the borrower may cancel the optional service by notifying the brokerage that the service is to be cancelled effective as of the day that is the earlier of one month after the day that the disclosure statement was provided to the borrower and the last day of a notice period provided for under the mortgage agreement; and
- (b) the brokerage shall, without delay, refund or credit the borrower with the proportional amount, calculated in accordance with the formula set out in subsection (3), of any charges for the service paid for by the borrower and added to the balance of the mortgage loan, but unused as of the cancellation day referred to in the notice. O. Reg. 191/08, s. 16 (2).

(3) The proportion of charges to be refunded or credited to a borrower are calculated using the formula,

$$R = A \times (n - m) / n$$

in which,

"R" is the amount to be refunded or credited,

"A" is the amount of the charges,

"n" is the period between the imposition of the charge and the time when the services were, before the cancellation, scheduled to end, and

"m" is the period between the imposition of the charge and the cancellation.

O. Reg. 191/08, s. 16 (3).

DEFAULT CHARGES

Default charges

17. If a mortgage brokerage is a lender under a mortgage and if a borrower fails to make a payment when it becomes due or fails to comply with an obligation under the mortgage, in addition to interest, the brokerage may impose charges for the sole purpose of recovering the costs reasonably incurred,

- (a) for legal services required to collect or attempt to collect the payment;
- (b) for expenses incurred to realize on a security interest taken under the mortgage or to protect such a security interest, including the cost of legal services required for that purpose; or
- (c) for expenses incurred to process a cheque or other payment instrument that the borrower used to make a payment under the mortgage but that was dishonoured. O. Reg. 191/08, s. 17.

ADVERTISING

Advertising — mortgage for a fixed amount

18. (1) If a mortgage brokerage advertises a mortgage for a fixed amount and if the advertisement includes a representation about the interest rate or the amount of any payment or of any charge other than interest, the advertisement must also include the APR and the term of the mortgage and the APR must be provided at least as prominently as the representation and in the same manner as the representation is made, whether visually or aurally, or both. O. Reg. 191/08, s. 18 (1).

(2) If the APR or the term of the mortgage is not the same for all mortgages to which the advertisement relates, the disclosure must be based on an example of a mortgage that fairly depicts all those mortgages and is identified as a representative example of them. O. Reg. 191/08, s. 18 (2).

Advertising — line of credit

19. If a mortgage brokerage advertises a mortgage that secures a line of credit and if the advertisement includes a representation about the annual interest rate or the amount of any payment or of any charge other than interest, the advertisement must also include the annual rate of interest on the date of the advertisement and any initial or periodic charges other than interest and that information must be provided at least as prominently as the representation and in the same manner as the representation is made, whether visually or aurally, or both. O. Reg. 191/08, s. 19.

Advertising — interest-free periods

20. (1) If a mortgage brokerage advertises a mortgage and if the advertisement includes a representation, express or implied, that a period of the mortgage is free of any interest charges, the advertisement must indicate whether interest accrues during the period and is payable after the period and that information must be provided at least as prominently as the representation, if it was express, or in a prominent manner, if it was implied. O. Reg. 191/08, s. 20 (1).

(2) If interest does not accrue during the period, the advertisement must also disclose any conditions that apply to the forgiving of the accrued interest and the APR, or the annual interest rate in the case of a mortgage that secures a credit card or line of credit, for a period when those conditions are not met. O. Reg. 191/08, s. 20 (2).

PURCHASING INSURANCE

Insurance

21. (1) This section applies if a brokerage is a lender under the mortgage. O. Reg. 191/08, s. 21 (1).

(2) If the brokerage requires a borrower to purchase any insurance, and if the brokerage offers to provide or arrange the insurance, the brokerage must at the same time clearly disclose to the borrower in writing that the borrower may purchase the required insurance through any insurer who may lawfully provide that type of insurance except that the brokerage may reserve the right to disapprove on reasonable grounds an insurer selected by the borrower. O. Reg. 191/08, s. 21 (2).

22. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THE ENGLISH VERSION OF THIS REGULATION). O. Reg.

191/08, s. 22.

Français

Syndicated Mortgages: How To Avoid The Risks

15th Annual Real Estate Summit

Law Society of Ontario

April 18, 2018

**Notice to Lawyers Concerning Syndicated Mortgages,
published by the Law Society of Ontario**



NOTICE TO LAWYERS CONCERNING SYNDICATED MORTGAGES

A syndicated mortgage is a mortgage where two or more persons participate as investors. Syndicated mortgages can be as simple as two people lending to a third person, the loan secured against a single family home, or as complex as a group of people pooling individual investments in a major development proposal known as a Syndicated Mortgage Investment (“SMI”).

The Law Society has become aware of instances in the marketplace where individuals have sustained significant financial loss by investing their savings in SMIs in which Ontario lawyers have played a role. The purpose of this notice is to alert lawyers to potential pitfalls when acting for clients on SMIs and to highlight lawyers’ obligations in dealing with syndicated mortgages.

High risk SMIs typically involve a third party entity such as a promoter or facilitator who promotes the investment to investors. The purpose of the syndicated mortgage loan is usually to fund “soft costs” in a development project such as applying for zoning changes, advertising, interior design and architect’s fees or to purchase real property for development.

In these syndicated mortgage transactions, a lawyer may be asked or offered an inducement by the facilitator or promoter to provide legal advice to the investors. The inducement might include the promise to refer investor clients to the lawyer or a commitment to pay the lawyer’s account for the legal advice given to the investor client. In addition, the lawyer may also be retained by the investors to:

- provide independent legal advice to a group or one or more of the investors with respect to the transaction;
- act on behalf of the investors in the transaction; and/or
- hold the syndicated mortgage in trust on behalf of the investors including administering the mortgage proceeds and interest payments.

Before accepting such retainers and during the course of the retainer, lawyers must ensure that they are in a position to act in the best interests of their clients. In addition, lawyers should use care in accepting and fulfilling these retainers to ensure that they comply with their professional obligations.

Some of these obligations include the duty to:

- avoid conflicts of interests in accordance with Section 3.4 of the *Rules of Professional Conduct (Rules)* including the rules on joint retainers and transactions with clients;
- be honest and candid with the client in accordance with Rule 3.2-2;
- represent clients competently in accordance with Rule 3.1;
- keep books and records in accordance with the provisions of By-Law 9;
- delegate tasks only in accordance with Part 1 of By-Law 7.1 and Section 6.1 of the *Rules*; and
- not assist in or encourage any dishonesty, fraud, crime or illegal conduct as provided in Rule 3.2-7.

The following are examples of situations that would place a lawyer in breach of the lawyer's professional obligations under the *Rules* and other Law Society requirements. A lawyer:

- representing multiple clients in a syndicated mortgage transaction in circumstances where the interests of the joint clients are not sufficiently similar to allow the lawyer to act in the best interests of all of the clients in the retainer;
- providing independent legal advice to one or more investors in the syndicated mortgage transaction when the lawyer has a conflict of interest. For example, the lawyer may possess information relevant to the investor client that the lawyer cannot disclose to this client because of an obligation owed to another client or person;
- delegating to someone who is not a lawyer, the responsibility of reviewing with the client the documentation relating to the transaction and providing the client with legal advice regarding these documents;
- accepting a retainer to provide legal advice to an investor regarding the transaction and/or the agreements and other documents to be signed by the investor and failing to provide such advice competently in accordance with Section 3.1 of the *Rules*. For example, the lawyer fails to perform all functions diligently and to communicate with the client at all relevant stages of the matter in a timely and effective way. Effective communication may vary depending on the nature of the retainer and the needs and sophistication of the client.
- assisting in or encouraging any dishonesty, fraud, crime or illegal conduct by a promoter, facilitator or other person involved in the syndicated mortgage transaction. Sometimes lawyers are used in such schemes by third parties to give an appearance of legitimacy to an investment that is risky and/or involves dishonesty or other illegal conduct. Lawyers should be on guard against becoming the tool or dupe of an unscrupulous person.

The Law Society has prepared the following resources to assist lawyers in identifying these types of syndicated mortgage arrangements and to highlight some of the lawyer's ethical obligations when representing investor clients in syndicated mortgage transactions:

Appendix 1: Some Characteristics of SMI's referenced in this Notice

Appendix 2: Syndicated Mortgages: Some Professional Obligations

Appendix 3: Syndicated Mortgages: Some Practice Tips

Lawyers who have questions or require further information may contact the Law Society at 416-947-3315 or 1-800-668-7380, ext. 3315, Monday to Friday, 9:00 a.m. to 5:00 p.m. EST, and ask to be connected to the Practice Management Helpline.

Dated October 24, 2017.



The Law Society of
Upper Canada

Barreau
du Haut-Canada

APPENDIX 1

Characteristics of Syndicated Mortgage Investments (SMIs) referenced in the Law Society’s “Notice to Lawyers” dated October 24, 2017

The following is a list of characteristics, one or more of which may be present in high risk SMIs. Lawyers retained or being retained to act for parties involved in SMIs should be vigilant of their professional and ethical obligations.¹

- The syndicated mortgage arrangement involves an entity that promotes and/or facilitates the syndicated mortgage loan (Syndicator) and a mortgage broker.
- The Syndicator is not licensed under the *Mortgage Brokerages, Lenders and Administrators Act, 2006* to deal in mortgages.
- Individual investors are encouraged to invest monies from their registered savings accounts such as a Self-Directed Registered Retirement Savings Plan or Tax Free Savings Account in the syndicated mortgage.
- The stated purpose of the syndicated mortgage loan is to fund “soft costs” in the development project such as applying for zoning changes, advertising, interior design and architect’s fees or to acquire the real property for development.
- The investment is promoted to prospective investors as a safe and guaranteed investment when it actually involves significant risk. For example, the mortgage includes a high loan to value ratio.
- The promotional materials for the syndicated mortgage investment indicate that a lawyer is available to provide free independent legal advice on the investment to the investor.

¹ The presence of one or more of these characteristics in a transaction does not necessarily mean that the transaction is a high risk SMI. Lawyers should use their professional judgment to identify these types of transactions.

- The Syndicator or mortgage broker or agent makes the arrangements with the lawyer for the provision of independent legal advice to the investors.
- The lawyer is requested to provide the independent legal advice to the investors remotely via Skype, phone or video conferencing and sometimes in the presence of the Syndicator, mortgage broker or agent.
- The loan agreement provides that the lawyer will hold the mortgage in trust for the investors and administer the syndicated mortgage proceeds and interest payments.
- The mortgage securing the loan does not rank in first priority or the priority of the mortgage changes over time pursuant to the terms of the loan agreement.
- Higher fees than usual are payable or paid to the Syndicator, mortgage broker and/or lawyer and these fees are paid from the loan advances of the mortgage.
- The lawyer's fees are a percentage of the loan advances.
- The Syndicator or borrower requests that the lawyer release mortgage advances on terms different than those set out in the loan agreement.
- The loan agreement and/or advertising materials indicate that a quantity surveyor or loan monitor will be engaged to protect the interests of the lenders, but a quantity surveyor or facilitator is not engaged.
- The lawyer who provides the independent legal advice to the investors may be asked to act for other parties in the transaction.
- The Investor/Lender Disclosure Statement(s) for Brokered Transactions required pursuant to the *Mortgage Brokerages, Lenders and Administrators Act, 2006* are incomplete or do not have the required documentation attached.



The Law Society of
Upper Canada

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APPENDIX 2

Professional Development and Competence

SYNDICATED MORTGAGES: SOME PROFESSIONAL OBLIGATIONS

What is a syndicated mortgage?

A syndicated mortgage is a mortgage having more than one investor.² Syndicated mortgage transactions can vary in complexity. For example a syndicated mortgage transaction may include a transaction in which two lenders lend monies to a borrower for the purchase of a home and the loan is secured by a first mortgage on the real property; or a more complex arrangement such as a transaction in which multiple investors pool their monies and lend them to a developer for the funding of construction or pre-construction costs of the development project, the loan being secured by a mortgage on the real property. In some of these arrangements, the mortgage may be registered on title in the name of a third party trustee or the lawyer as trustee for the investors.

Lawyers may be asked to act for various parties in syndicated mortgage transactions: investors, borrowers, developers and perhaps others. Lawyers who accept such retainers must ensure that they are in a position to act in the best interests of their clients and in compliance with their professional obligations.

What are some of the key ethical issues and professional responsibility requirements that arise when a lawyer acts in a syndicated mortgage transaction?

² Rule 3.4-27 of the *Rules of Professional Conduct (Rules)*.

The following is a summary of some of the key ethical issues and professional responsibility requirements that may arise when lawyers act for clients involved in syndicated mortgage transactions.

Conflicts of Interest

- Joint Retainers
- Transactions with Clients

Dishonesty and Fraud by the Client or Others

Independent Legal Advice

Recordkeeping Requirements

- Holding Mortgages in Trust for Clients
- Completing Forms 9D and 9E

Conflicts of Interest – Section 3.4

Examples of some conflict of interest situations that may arise when lawyers act for clients in syndicated mortgage transactions include: conflicts that arise as a result of the lawyer acting for multiple parties in the transaction; or personal conflicts by reason of the lawyer or someone connected to the lawyer having a personal interest in the transaction.

Section 3.4 of the *Rules of Professional Conduct (Rules)* deals with conflicts of interest. The issue of whether there is a conflict of interest and whether the lawyer may act despite the conflict, will depend on the circumstances of the transaction or matter.

The *Rules* provide that a lawyer cannot represent:

- opposing sides of a dispute; or
- a client in a matter when there is a conflict of interest unless there is consent from all of the affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client. Consent must be in writing or confirmed in writing and must be fully informed and voluntary after disclosure.³

The following resource may be of assistance to lawyers when dealing with conflicts of interest. Steps for Dealing with Conflicts of Interest under Section 3.4 of the *Rules of Professional Conduct*

<http://www.lsuc.on.ca/with.aspx?id=2147499259>

³ Rules 3.4-1 and 3.4-2 and Commentaries.

Joint Retainers - Acting for More than One Client in the Transaction

A joint retainer is a retainer in which a lawyer acts for more than one client in a matter or transaction. Some examples of joint retainers in syndicated mortgage transactions include a lawyer acting in the transaction for: the investor(s) and the borrower(s); the investor(s) and the developer/borrower; the investors and the syndicator; two or more investors; or two or more borrowers.

Before accepting a joint retainer, lawyers must ensure that they are able to act in the best interests of all of the clients in the retainer. In addition, there is no confidentiality as between the clients in the joint retainer and the lawyer has a duty to be honest and candid with all of the clients in the retainer when advising them.

Lawyers should be alert to situations where the interests of the clients in the joint retainer are not sufficiently similar to allow the lawyer to act in the best interests of all of the clients. Depending on the circumstances of the matter, there may be situations where one or more of the parties will require separate representation or perhaps independent legal advice on one or more issues. In making such determinations, lawyers must consider the duties that the lawyer owes to the client(s), other clients, former clients and third parties and the lawyer's personal interests that affect the duties owed to the clients. In addition the lawyer may also wish to consider the complexity of the transaction, the sophistication of the parties and the nature of the retainer. For example, depending on the circumstances of the matter, it may not be prudent for a lawyer to act for both an investor client and the promoter of a syndicated mortgage as the interests of these two parties may not be sufficiently similar to allow the lawyer to act in the best interests of both of these clients. Similarly where a lawyer intends to act for multiple borrowers in a syndicated mortgage transaction and one of the clients is less sophisticated than the other(s), the lawyer should recommend that the less sophisticated client obtain independent legal advice. In some cases depending on the circumstances of the matter, the lawyer may determine that it is preferable if that client receives separate representation in the matter.

When the lawyer accepts a joint retainer, the *Rules* set out a procedure that lawyers must follow. At the outset of the retainer, the lawyer must advise all of the clients in the joint retainer that:

- the lawyer has been asked to act for both or all of them;
- no information that the lawyer receives with respect to the matter from one client can be treated as confidential so far as any of the other clients in the retainer are concerned; and
- if a conflict develops that cannot be resolved the lawyer cannot continue to act for both or all of them and may have to withdraw completely.⁴

⁴ Rules 3.4-5 to 3.4-9 set out the lawyer's obligations regarding joint retainers.

After providing such advice, if the clients are content that the lawyer act, the lawyer must obtain the clients' consent. Consent must be fully informed and voluntary after disclosure and must be in writing or confirmed in writing.⁵

In addition, the lawyer should be vigilant for conflicts of interest that may arise during the course of the retainer. If a conflict develops that cannot be resolved the lawyer may need to withdraw completely.

Acting for both the Lender and the Borrower in the Mortgage or Loan Transaction

If the joint retainer involves representing both the lender and borrower in a mortgage or loan transaction, the lawyer must comply with Rules 3.4-12 to 3.4-14 often referred to as the "Two Lawyer Mortgage Rules". These rules provide that a lawyer or two or more lawyers practising in partnership or in association cannot act for or otherwise represent both the lender and the borrower in a mortgage or loan transaction except in certain limited defined circumstances and then only if the lawyer is able to comply with the rule on conflicts of interest. These limited circumstances are:

- the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business;
- the lender is selling real property to the borrower and the mortgage represents part of the purchase price (vendor take back mortgage);
- the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction;
- the consideration for the mortgage or loan is \$50,000.00 or less;
- the lender and borrower are not at "arm's length" as defined in Section 251 of the *Income Tax Act* (Canada).⁶

The lawyer should assess the individual circumstances of the transaction when determining whether or not to act for both the borrower and the lender in a transaction. There may be situations where, although the *Rules* permit the lawyer to act for both parties, it may not be prudent for the lawyer to do so because of the high potential for a conflict of interest developing as the matter progresses. An example of this might be a situation where one of the clients is more vulnerable than the other and the lawyer determines that it would be in that person's best interests if the person were separately represented.

Transactions with Clients

⁵ Section 1.1 defines the term "consent".

⁶ Rules 3.4-12 to 3.4-14.

Lawyers sometimes directly or indirectly through another person, a self-directed RRSP or other entity invest in syndicated mortgage transactions in which their clients are also investors or have an interest. While transactions between a lawyer and a client are not prohibited, the *Rules* impose strict requirements for lawyers who engage in these transactions. Rules 3.4-28 to 3.4-36 deal with transactions with clients. These rules provide that a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client. In addition, the lawyer cannot do indirectly what the lawyer is prohibited from doing directly under these rules. Apart from a few limited exceptions, lawyers are prohibited from borrowing from clients.⁷

The rules on transactions with clients specifically address syndicated mortgages. Generally a lawyer engaged in the private practice of law cannot directly or indirectly through an entity in which the lawyer or a related person to the lawyer has a financial interest:

- hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives:
 - a complete reporting letter on the transaction;
 - a trust declaration signed by the person in whose name the mortgage or any security instrument is registered; and
 - a copy of the duplicate registered mortgage or security instrument
- arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment; or
- sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.⁸

If the lawyer determines that the transaction with the client is a permitted transaction under the *Rules*, the lawyer must take some additional steps. The lawyer must in sequence:

- disclose the nature of any conflicting interest or how and why it might develop later;
- depending on the circumstances recommend or require that the client obtain independent legal advice or independent legal representation; and
- obtain the client's consent to the transaction in accordance with Rule 3.4-29.

⁷ Rule 3.4-28 provides that a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client. Rule 3.4-28.1 provides that except for borrowing from a regulated lender or from a related person, a lawyer shall not borrow from a client. The term "related person" is defined in 3.4-27. In addition Rule 3.4-28.2 provides that a lawyer shall not do indirectly what the lawyer is prohibited from doing directly under Rules 3.4-28 to 3.4-36.

⁸ Rule 3.4-33.1 and commentary.

The lawyer retained to provide independent legal advice in such transactions must not have a conflicting interest with respect to the client's transaction. The lawyer must:

- advise the client that the client has the right to independent legal representation as opposed to independent legal advice and satisfy himself or herself that the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or representation from the other lawyer;
- explain the legal aspects of the transaction to the client and satisfy himself or herself that the client appears to understand the advice given;
- inform the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.⁹

Where a client elects to waive independent legal representation and rely on independent legal advice only, the lawyer who provides the independent legal advice has a responsibility that should not be lightly assumed or perfunctorily discharged.¹⁰

The lawyer who provides the independent legal advice should document the independent legal advice by: providing the client with a written certificate that the client has received independent legal advice; having the client sign a copy of the certificate of independent legal advice; and forwarding the signed copy of the certificate of independent legal advice to the lawyer with whom the client proposes to transact business.¹¹

Dishonesty and Fraud by the Client or Others

Lawyers who act for clients engaged in syndicated mortgage transactions may be used by their clients or persons associated with their clients for the purpose of giving the appearance of legitimacy to a transaction or mortgage investment that is fraudulent in nature or involves misrepresentation, dishonesty or illegal conduct. Lawyers should be on guard against becoming the tool or dupe of unscrupulous persons. Lawyers must act with integrity and in the best interests of their clients. In addition, the *Rules* provide that a lawyer cannot:

- knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct;
- do or omit to do anything that the lawyer ought to know assists in, encourages or facilitates any dishonesty, fraud, crime or illegal conduct by a client or any other person;
- advise a client or any other person on how to violate the law and avoid punishment.¹²

⁹ Section 1.1.

¹⁰ Commentary [1], Rule 1.

¹¹ Rule 3.4-29 and commentary.

¹² Rules 3.2-7.

Lawyers have a duty to make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation. They should be alert to identifying the presence of “red flags” and make inquiries to determine whether a transaction relates to a *bona fide* transaction. In addition lawyers cannot use their trust account for purposes not related to the provision of legal services.¹³

Independent Legal Advice

Lawyers may be asked to give independent legal advice to one or more parties engaged in syndicated mortgage transactions. A retainer to give such advice is a limited form of retainer in which legal advice is provided by a lawyer who does not have a conflicting interest with respect to the client’s transaction or matter. The lawyer is retained for the limited purpose of providing independent legal advice to a person so that the person appreciates the nature and consequences of a decision to be made. The role of the lawyer is to provide legal advice that is objective and unbiased regarding the decision that the client is facing.

Some practice tips on giving independent legal advice are attached to this article.

Recordkeeping Requirements

The *Rules* impose certain recordkeeping requirements on lawyers handling monies in syndicated mortgage transactions.

Collecting Mortgage or Loan Payments made Payable to the Lawyer

A lawyer may only collect mortgage or loan payments on behalf of a client payable in the name of the lawyer if:

- the client has directed the borrower or mortgagor in writing to do so; and
- the monies are deposited into the lawyer’s trust account and the lawyer complies with all recordkeeping and other obligations under the *Rules* and By-Law 9.¹⁴

Holding Mortgages in Trust for Clients

Section 20 of By-Law 9 sets out certain recordkeeping requirements for lawyers holding mortgages or charges in trust for clients. In addition to other recordkeeping requirements contained in By-Law 9, lawyers must maintain:

- a mortgage asset ledger containing separately for each mortgage or charge:
 - all funds received and disbursed on account of the mortgage or charge;

¹³ Rules 3.2-7 to 3.2-8 and commentaries.

¹⁴ Commentary [1(c)] of Rule 3.4-33.1.

- the balance of the principal amount outstanding for each mortgage or charge;
 - an abbreviated legal description or the municipal address of the real property; and
 - the particulars of registration of the mortgage or charge.
- a mortgage liability ledger showing separately for each person on whose behalf a mortgage or charge is held in trust:
 - all funds received and disbursed on account of each mortgage or charge held in trust for the person;
 - the balance of the principal amount invested in each mortgage or charge;
 - an abbreviated legal description or the municipal address for each mortgaged or charged real property; and
 - the particulars of registration of each mortgage or charge; and
 - a record showing a monthly comparison of the total of the principal balances outstanding on the mortgages or charges held in trust and the total of all principal balances held on behalf of investors as they appear from the financial records together with reasons for any differences between the totals and the following records to support the monthly comparison:
 - a detailed listing made monthly identifying each mortgage or charge and showing for each the balance of the principal amount outstanding; and
 - a detailed listing made monthly identifying each investor and showing the balance of the principal invested in each mortgage.

Completing Forms 9D and 9E

By-Law 9 sets out some recordkeeping requirements for lawyers who act for or receive money from a lender. In addition to other recordkeeping requirements, a lawyer acting in these transactions must maintain a file for each charge containing:

- if required under Section 24 of By-Law 9, a completed investment authority (Form 9D) signed by each lender before the first advance of funds to or on behalf of the borrower and a completed report on the investment (Form 9E);
- an original declaration of trust if the charge is not held in the name of all of the lenders;
- a copy of the registered charge; and
- any supporting documents supplied by the lender.

Where Form 9E is required, the lawyer must deliver the original completed form to each lender forthwith after the first advance of money to or on behalf of the borrower along with a copy of the declaration of trust if applicable.

Forms 9D and 9E are required when a lawyer acts for or receives money from a lender unless one of the six exceptions in subsection 24(2) of By-Law 9 applies. These forms are not required if:

- the lender:
 - is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund or any other entity that lends money in the ordinary course of its business;
 - has entered into a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge; and
 - has given the lawyer a copy of the written commitment before the advance of money to or on behalf of the borrower;
- the lender and borrower are not at arm's length as defined in the *Income Tax Act* (Canada);
- the borrower is an employee of the lender or of a corporate entity related to the lender;
- the lender has executed the Investor/Lender Disclosure Statement for Brokered Transactions, approved by the Superintendent under subsection 54(1) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, and has given the lawyer written instructions, relating to the particular transaction, to accept the executed disclosure statement as proof of the loan agreement;
- the total amount advanced by the lender does not exceed \$6,000.00; or
- the lender is selling real property to the borrower and the charge represents part of the purchase price.

Please note that this information is not a substitute for the member's own research, analysis and judgement. Professional Development and Competence does not provide substantive legal advice or opinions.



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Attachment to “Syndicated Mortgages: Some Professional Obligations”

SOME PRACTICE TIPS WHEN GIVING ILA

- 1. Determine who is your client.**
Rule 1.1-1 – Definition of “Client”
http://lsuc.on.ca/with.aspx?id=2147502061#ch1_sec1-1-client

- 2. Determine if you have a conflict of interest.**
Section 3.4 – Duty to Avoid Conflicts of Interest
http://lsuc.on.ca/with.aspx?id=2147502071#ch3_sec4-conflicts

Steps for Dealing with Conflicts of Interest under Section 3.4 of the *Rules of Professional Conduct*
<http://www.lsuc.on.ca/with.aspx?id=2147499259>

Steps for Dealing with the Joint Retainer Rules
<http://www.lsuc.on.ca/with.aspx?id=2147499258&langtype=1033>

Sample Joint Retainer Form Acknowledgment and Consent for Use in Real Estate Transactions
<http://www.lsuc.on.ca/with.aspx?id=2147499281>

- 3. Determine the nature of your retainer. Is ILA sufficient or should the client receive ILR?**

Definitions of ILA and ILR- Rule 1.1-1
http://lsuc.on.ca/with.aspx?id=2147502061#ch1_sec1-1-independent-legal-advice

- 4. Determine if you are competent to provide the ILA.**

Rule 3.1-2 – Competence

http://www.lsuc.on.ca/with.aspx?id=2147502071#ch3_sec1-competence

- 5. Determine if there are any language or other barriers to communicating effectively with the client.**

Clients with Diminished Capacity

<http://lsuc.on.ca/with.aspx?id=2147502071#ch3-sec2-9-diminished-capacity>

Language Rights- Rules 3.2-2A and B

http://lsuc.on.ca/with.aspx?id=2147502071#ch3_sec2-2A-language-rights

Competence - commentary [8.1], Rule 3.1-2

http://lsuc.on.ca/with.aspx?id=2147502071#ch3_sec1-2-competence

- 6. Consider whether it might be useful to use a checklist when meeting with the client.**

[Independent Legal Advice Checklist](#)

- 7. Consider making and retaining notes of your meeting with the client.**
- 8. If the client declines to follow your advice, consider having the client sign an acknowledgment confirming the fact that the client has declined to accept your advice.**
- 9. If the ILA involves a transaction between a lawyer and a client (either directly or indirectly), comply with Rule 3.4-29 and its commentary.**



APPENDIX 3

SYNDICATED MORTGAGES: SOME PRACTICE TIPS

- Determine who your client(s) is.
- Before accepting the retainer, ensure that you are able to act in the best interests of the client(s).
- Before accepting the retainer, ensure that you are competent to handle the matter.
- If you are being retained to provide independent legal advice, determine whether you can properly provide independent legal advice or whether the matter is such that the client should have independent legal representation.
- Before accepting the retainer, ensure that you do not have a conflict of interest that would preclude you from accepting the retainer.
- If there is a conflict of interest and you determine that you may act despite the conflict, make the necessary disclosure about the conflict to all of the affected clients and obtain their informed consent.
- If the transaction involves a transaction with a client, ensure that the transaction is fair and reasonable to the client and that you have complied with Rules 3.4-27 to 3.4-35.
- Determine the purpose of the retainer and ensure that you are not assisting in or encouraging any dishonesty, fraud, crime or illegal conduct.

Syndicated Mortgages: How To Avoid The Risks

15th Annual Real Estate Summit

Law Society of Ontario

April 18, 2018

Sample form of Loan Participation and Servicing Agreement

LOAN PARTICIPATION AND SERVICING AGREEMENT

THIS AGREEMENT is made as of the _____ day of [MONTH, YEAR] (the “Effective Date”)

BETWEEN:

[ORIGINATING PARTICIPANT],
hereinafter called the “Originating Participant”,

- and -

[SUBSCRIBING PARTICIPANT],
[SUBSCRIBING PARTICIPANT] and
[SUBSCRIBING PARTICIPANT],
hereinafter individually and collectively called the “Subscribing Participant”,

- and -

[LENDER],
hereinafter called the “Custodian” or the “Lender”,

- and -

[SERVICER],
hereinafter called the “Servicer”;

WHEREAS the meaning of certain capitalized words and phrases used in this Agreement are defined in Article 1 hereof;

AND WHEREAS pursuant to the Commitment Letter, the Lender has agreed to make the Loan to the Borrower to be secured by the Loan Documents;

AND WHEREAS the Participants have agreed to participate in the Loan to the extent of their respective Proportionate Shares on the terms and subject to the conditions of this Agreement;

AND WHEREAS the Participants have agreed that the Custodian shall hold registered and documentary title to the Investment as custodian, agent and bailee for and on behalf of the Participants;

AND WHEREAS the Participants have agreed that the Servicer shall service and administer the Investment on behalf of the Participants on the terms and subject to the conditions of this Agreement.

NOW THEREFORE, THIS AGREEMENT WITNESSES THAT in consideration of the premises and the covenants and agreements herein set out and for other good and valuable consideration paid by each party to the other (the receipt and sufficiency of which are hereby acknowledged), the parties agree as follows:

ARTICLE 1 - INTERPRETATION

1.1 **Defined Terms** - In addition to capitalized words and phrases elsewhere defined herein, in this Agreement the following capitalized words and phrases shall have the following meanings ascribed thereto:

- (a) “**Agreement**” means this Agreement, as the same may be amended, supplemented, replaced or restated from time to time;
- (b) “**Borrower**” means [BORROWER];

- (c) **“Borrower Entity”** means, individually and collectively, the Borrower, each Guarantor, each beneficial owner of the Mortgaged Property if any and at any time and from time to time, any affiliate of any of the foregoing Persons, and the respective successors and assigns of any of the foregoing Persons;
- (d) **“Business Day”** means any day other than a Saturday, a Sunday or a day on which banking institutions in Toronto, Ontario are obligated by law or executive order to remain closed;
- (e) **“Collection Account”** means a segregated trust account (which may be a pooled trust account) established and maintained by the Servicer on behalf of and for the benefit of the Participants with any bank listed in Schedule I or Schedule II of the Bank Act (Canada) or any trust company incorporated under the laws of Canada, which account is subject to a separate ledger system;
- (f) **“Commitment Letter”** means the letter of commitment dated [DATE] issued by the Lender to the Borrower, and as the same may be amended, supplemented, replaced or restated from time to time;
- (g) **“Costs”** means all customary and reasonable out-of-pocket costs, fees, expenses, taxes, Servicing Advances and interest thereon at the Servicing Advance Rate, interest, payments, losses, liabilities, judgments and/or causes of action of any kind suffered, incurred or paid by the Servicer, the Custodian or any Participant (including any permitted subcontractor or subservicer hereunder) pursuant to or in connection with the servicing and administration of the Loan, the Loan Documents, the Mortgaged Property or this Agreement or the holding of registered or documentary title thereto, including, without limitation, all “Costs” as defined in the Loan Documents, the costs of all Enforcement Proceedings, all legal fees and disbursements, taxes, assessments, insurance premiums, protective advances and all other costs incurred pursuant to the Loan Documents or this Agreement relating to the Loan, except for those resulting from the negligence or wilful misconduct of the Servicer, the Custodian or any Participant; provided, however, that “Costs” shall not include (a) the costs and expenses relating to the origination of the Loan and (b) ordinary office overhead and employee salaries of the Servicer;
- (h) **“Defaulting Participant”** means, at any time, any Participant in respect of which any Participation Default has occurred and is continuing;
- (i) **“Enforcement”** or **“Enforcement Proceedings”** means, with respect to the Mortgaged Property or any Person, the commencement of power of sale, foreclosure or other judicial or private sale proceedings or other similar process, appointing or obtaining the appointment of a receiver, a manager or a receiver and manager, interim receiver, custodian, liquidator or other Person having similar powers in respect of any Person or property, attornment of rents, taking possession or control of any property or undertaking, commencing, giving or making any demand for payment, any notice of intention to enforce security or any action or proceeding seeking payment or recovery of all or any part of any indebtedness or damages in lieu thereof, or accepting a transfer of any property in lieu of foreclosure, or the exercise of any other rights or remedies available to a creditor under its security or otherwise at law or in equity, including without limitation, any bankruptcy, insolvency, reorganization, arrangement, winding-up or other similar proceedings;
- (j) **“Event of Default”** means any event which constitutes a default or an event of default under or a breach or other contravention of or non-compliance with any Loan Document or which, with the passage of time or the giving of notice or both, would constitute the same;
- (k) **“Force Majeure”** means any cause beyond the control of any party hereto which prevents the performance or compliance by such party of any of its obligations hereunder and not caused by any act, omission or default on its part and not avoidable by such party exercising reasonable effort or foresight, including, without limitation, strikes, lockouts or other labour disturbances, shortages of materials, services or labour, the requirements of any law, by-law, regulation, order or directive of any governmental authority having jurisdiction, acts of war, riots, sabotage, embargo or other civil disturbances, lightning, earthquakes, floods, storms or other natural causes, acts of God, and any act, omission or default by any other party hereto, but specifically excluding any failure of such party to perform or comply with its obligations hereunder solely as a result of financial inability;
- (l) **“Guarantor”** means, individually and collectively, [NAME(S) OF EACH GUARANTOR AND

INDEMNITOR OF THE LOAN] and each other Person that has guaranteed payment to the Lender of all or any part of the Loan or has covenanted to indemnify the Lender for or in respect of any obligation of any Borrower Entity or any matter relating to the Mortgage Property;

- (m) **“Interest Accrual Period”** means each monthly, quarterly, half-yearly, yearly or other period in respect of which interest (whether interest only or on a blended principal and interest basis) is payable on the outstanding Principal Amount, commencing on the first day of each such period to and including the last day of the same period, provided that the first Interest Accrual Period shall mean the period from and including the date of the initial Loan advance to and including the day immediately preceding the first day of the first full Interest Accrual Period occurring thereafter;
- (n) **“Interest Rate”** means the annual rate or rates of interest as applicable at any time and from time to time on the outstanding Principal Amount, which rate or rates shall be calculated, compounded and payable at such frequency(ies) as provided by the Loan Documents, not in advance and both before and after maturity, demand, default and judgement;
- (o) **“Investment”** means, collectively, the Loan, the aggregate interests of the Participants in the Loan, the Loan Documents and all rights, powers and remedies of the Lender thereunder;
- (p) **“Lands”** means those lands and premises comprising [THUMBNAIL LEGAL DESCRIPTION & ADDRESS], and including, without limitation, all buildings, fixtures and improvements now or hereafter situate thereon and all easements, rights-of-way and any other rights appurtenant to or used in connection therewith;
- (q) **“Loan”** means the loan in the principal amount of \$ _____ advanced or to be advanced to the Borrower by the Lender on and subject to the terms and conditions set out in the Commitment Letter and includes, without limitation, all principal, interest, interest on overdue interest, fees, expenses, charges and all other amounts owing by the Borrower from time to time to the Lender pursuant to the Commitment Letter or any of the Loan Documents;
- (r) **“Loan Documents”** means (i) the Commitment Letter; (ii) all agreements, undertakings, instruments and documents executed and delivered by the Borrower to the Lender as security for the Loan, whether direct, indirect, primary or collateral, and including, without limitation, any type of hypothec, mortgage, charge, assignment, pledge or other security agreement of or in respect of the Mortgaged Property; (iii) all policies of insurance relating to the Mortgaged Property or any part thereof as required under the Commitment Letter or under the Loan Documents; and (iv) all instruments, documents and other writings supplemental or ancillary to any of the foregoing;
- (s) **“Mortgaged Property”** means: (i) the Lands; (ii) all of the Borrower's rights, privileges, advantages and benefits arising out of or from the use or occupation of the Lands or any part thereof including, without limitation, all rental and other income arising pursuant to any one or more leases, agreements to lease, tenancies and other agreements providing for the use or occupation of the Lands or any part thereof; (iii) all personal property now or hereafter owned or acquired by or on behalf of the Borrower and all proceeds and renewals thereof, accretions thereto and substitutions therefor which are used in connection with or which arise out of the Borrower's business and assets located on the Lands; and (iv) any other personal property of the Borrower securing the Loan and any personal property of any other Person that is mortgaged, charged, pledged, assigned or otherwise encumbered in favour of the Lender pursuant to any one or more of the Loan Documents;
- (t) **“Non-Defaulting Participant”** means, individually and collectively, each Participant that at any time is not a Defaulting Participant;
- (u) **“Participants”** means the Originating Participant and each Subscribing Participant, and **“Participant”** means any one of them;
- (v) **“Participation Default”** means, with respect to a Participant, the occurrence of any one or more of the following events which is/are continuing; (i) if any proceedings in insolvency, bankruptcy, receivership or liquidation be taken against such Participant; (ii) if such Participant makes any assignment for the

- benefit of its creditors or commits any act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act (Canada); (iii) except as expressly permitted hereby, if such Participant assigns or purports to assign its Proportionate Share or any of its rights under this Agreement; (iv) if such Participant either directly or indirectly comes under the direction or management control of a branch of the Federal or a Provincial Government; or (v) if such Participant commits a breach or default under this Agreement which is not remedied within thirty (30) days after written notice has been received by the Participant from the Servicer;
- (w) “**Person**” means any individual, corporation, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof;
 - (x) “**Principal Amount**” means the Principal Amount of the Loan advanced and outstanding at any time and from time to time;
 - (y) “**Proportionate Share**” means the respective proportionate share of each Participant in the Investment as stipulated in Section 2.3 hereof, and “**Proportionate Shares**” has the corresponding meaning;
 - (z) “**Remittance Date**” means the fifth (5th) day of each calendar month, or if such day is not a Business Day, the next succeeding Business Day, which occurs after the Effective Date;
 - (aa) “**REO Acquisition**” means the acquisition of title to the REO Property by or on behalf of the Participants pursuant to this Agreement;
 - (bb) “**REO Property**” means the Mortgaged Property, if ownership of the Mortgaged Property is acquired pursuant to Enforcement Proceedings by or on behalf of the Participants;
 - (cc) “**Servicing Advance**” means any servicing advance made by the Servicer or any Participant pursuant to this Agreement in respect of the Loan or the Mortgaged Property;
 - (dd) “**Servicing Advance Rate**” means the interest rate per annum rate which is equal to the Interest Rate compounded monthly;
 - (ee) “**Servicing Fee Rate**” means 0.10% per annum (ten basis points); and
 - (ff) “**Servicing Fee**” means, as of any date of determination, an amount which is equal to the product of (a) the Servicing Fee Rate, and (b) the outstanding principal balance of the Loan, plus applicable taxes; and

ARTICLE 2 - LOAN ACQUISITION AND PARTICIPATION

2.1 **Acquisition of Loan** – Subject to Sections 2.9, 4.19 and 4.20 hereof, the Lender shall be responsible for the acquisition and processing of the Loan, including, without limitation, the following:

- (a) acquiring, assembling, recording and processing all the necessary information, data, applications, forms and reports in connection with the Loan;
- (b) retaining solicitors to perform and carry out instructions and requirements necessary to complete the Loan including, without limitation, all requisite searches, preparing and attending upon the execution and delivery of the Loan Documents and attending to all necessary registrations and filings as may be required to ensure the perfection and the priority of the Loan Documents, subject only to such encumbrances and other qualifications specifically permitted by the Commitment Letter or by the Lender in writing;
- (c) ensuring that the Borrower has made satisfactory arrangements for insurance as is required by the Commitment Letter and the Loan Documents;

- (d) if a requirement for the Loan, obtaining copies of building and plot plans and specifications in respect of the improvements being constructed on the Lands and verifying that the completion of construction is in accordance with the plans and specifications provided to the Lender by the Borrower and as contemplated by the Commitment Letter; and
- (e) generally attend to the performance of such other things in connection with the closing and funding of the Loan as the Lender would normally perform if the Loan were for its own account.

2.2 **Endorsement of Loan Documents** - All Loan Documents shall be taken, held and registered (as applicable), only in the name of the Lender and the Lender shall hold same at all times for the Participants as to their respective Proportionate Shares in accordance with this Agreement. Save and except as set out in Section 4.18, the Lender hereby assigns the benefit of all of its right, title and interest in the Commitment Letter to the Participants.

2.3 **Proportionate Share of Participants** - The principal amount to be advanced by each Participant on account of the Loan shall be as follows:

Participant	Portions of Principal Amount of Initial Advance	Maximum Portions of Principal Amount on Subsequent Advances
Originating Participant		
[Name of Subscribing Participant]		
[Name of Subscribing Participant]		
[Name of Subscribing Participant]		
TOTAL:		

2.4 **Proportionate Share of Participants** - The Proportionate Share of each Participant in the Investment at any time and from time to time shall be the fraction of which the numerator is equal to the portion of the outstanding Principal Amount advanced by the Participant at such time and of which the denominator is equal to the outstanding Principal Amount at such time.

2.5 **Interest in the Investment** - Upon each Participant making advances in accordance with Section 3.1 hereof and such advances being made by the Lender to the Borrower or as the Borrower may direct, each Participant shall have a beneficial interest in the Investment to the extent of its respective Proportionate Share, subject to repayment thereof in accordance with Section 4.17 hereof.

2.6 **Fixed Investment** - Each Participant agrees that, except otherwise provided in this Agreement, it may not withdraw from the Investment or its obligations hereunder without the prior written consent of the other Participant.

2.7 **Sale or Assignment of Interest in Investment** - Except as otherwise expressly provided by this Agreement, no Participant shall sell, transfer, assign or in any way dispose of or encumber, directly or indirectly, the whole or any part of its interest in the Investment, or its rights, title, interest and/or obligations under this Agreement, without the prior written consent of the Lender; and if any such consent is given, then subject to and only upon the transferee or assignee entering into an agreement with all other parties hereto to assume and become bound by and perform all of the obligations of the transferor or assignor from and after the date of such transfer or assignment.

2.8 **Acknowledgement of Beneficial Interest** - The Lender will, at the request and expense of any Participant, execute and deliver from time to time such additional acknowledgements as such Participant may reasonably require to confirm such Participant's beneficial interest in the Investment.

2.9 **Acknowledgements by Participant** - Each Participant acknowledges and agrees that:

- (a) it has been and will continue to be solely responsible for making its own independent appraisal of and investigations into the financial condition, credit worthiness, soundness, affairs, status, and nature of each Borrower Entity, the Mortgaged Property and the risks of any other matter relating to the Investment and

has reviewed and approved each of the Loan Documents;

- (b) it has not relied and will not hereafter rely on the Lender or the Servicer or any of their respective directors, officers, agents or employees to make investment or other business decisions on behalf of the Participant with respect to the condition, credit worthiness, soundness, affairs, status or nature of each Borrower Entity, the Mortgaged Property or the risks of any other matter relating to the Investment from time to time; provided that nothing set out in this subsection 2.8(b) shall restrict, limit or detract from the duties and obligations of the Lender and the Servicer set out in this Agreement including, without limitation, their obligations to uphold the Servicing Standard;
- (c) the onus is on the Participant to review and evaluate all the information and documentation provided to it by the Lender and/or the Servicer; and
- (d) subject to this Agreement, the Proportionate Share of the Participant is at the entire risk of the Participant.

ARTICLE 3 - ADVANCES

3.1 **Advances Generally** - Within two (2) Business Days of receipt of a request for funds from the Lender, each Participant shall remit to the Lender, or as the Lender may otherwise direct in writing, an amount equal to its respective Proportionate Share of the Loan to be advanced pursuant to the Loan Documents, provided that:

- (a) a Subscribing Participant shall not be required to make any advance unless concurrently therewith each other Participant advances an amount equal to its Proportionate Share of the Loan to be advanced to the Borrower at such time; provided that the Originating Participant may at its option advance to the Lender more than its Proportionate Share of the Loan to be advanced to the Borrower and subsequently reimburse itself from advances made by the Subscribing Participant hereunder;
- (b) all amounts advanced by each Participant to the Lender shall be held by the Lender in trust for such Participant until advanced to the Borrower in accordance with the Commitment Letter and such amounts shall not bear interest until advanced to the Borrower, provided that if the Lender directly or indirectly earns interest on any such amounts prior to the advance of such amounts to the Borrower, the Lender shall remit all such interest earned to each Participant in accordance with Section 4.4 hereof; and
- (c) nothing in this Section shall limit the obligations of any Participant with respect to any Servicing Advance as herein provided.

3.2 **No Obligation to Advance** - The Lender shall not be required to advance its own funds for any purpose and, in particular, shall not be required to pay with its own funds any insurance premiums, taxes, public utility charges, costs of repairs or maintenance of the Mortgaged Property, or costs of solicitors, counsel, experts or agents engaged by it as permitted by this Agreement. It is acknowledged by the Participants that it shall not be the obligation of the Lender to maintain the Loan in good standing.

3.3 **Advances by the Lender** - The Lender may advance its own funds for any of the purposes set out in section 3.2 hereof if it deems it advisable to do so and, in such event, the Lender shall be reimbursed by the Participants to the extent of their respective Proportionate Shares within two (2) Business Days following each Participant's receipt of a written demand therefor, together with interest thereon at the Servicing Advance Rate accruing from the later of receipt of demand for payment by the Participant and the date of the making of any such advance by the Lender.

ARTICLE 4 - SERVICING OF LOAN

4.1 **Role of the Servicer** - The Servicer will service and administer the Loan and any related REO Property in accordance with this Agreement. Each Participant hereby irrevocably authorizes, directs and appoints the Servicer to so act and agrees that no Person, other than the Servicer, shall have the right to service and administer the Loan or any related REO Property.

4.2 **Servicing Standard** - The Servicer will service and administer the Loan (i) in accordance with (A) applicable laws, (B) the terms and provisions of the Loan Documents, (C) the terms of this Agreement, and (D) the customary and

usual standards of prudent Canadian commercial loan servicers for comparable loans and (ii) to the extent consistent with the foregoing requirements, the Servicer will act on a basis which is fair and reasonable to the Participants and exercise its powers and discharge its duties under this Agreement honestly, in good faith and in the best interests of the Participants and, in connection therewith, will exercise that degree of care, diligence and skill that a Person of ordinary prudence would exercise in dealing with the property of another Person. The Servicer will act at all times with a view to the timely collection of all scheduled payments under the Loan, or if an Event of Default occurs, the maximization of recovery of all Loan indebtedness then owing to the Participants on a collective basis. The Servicer will act at all times without regard to any relationship which the Servicer or any affiliate of the Servicer may have with any Borrower Entity or to the Servicer's right to receive the Servicing Fee hereunder. The servicing standards set out in this Section are collectively called, the "Servicing Standard".

4.3 **Delegation of Duties** - The Servicer may delegate or subcontract any of its servicing obligations hereunder to any Person; provided, however, that the Servicer shall provide oversight and supervision with regard to the performance of all delegated or subcontracted services and any subservicing agreement shall be consistent with and subject to the servicing provisions of this Agreement. Neither the existence of any subcontract or subservicing agreement nor any of the provisions of this Agreement relating to any subcontract or subservicing shall relieve the Servicer of its servicing obligations under this Agreement. The Servicer shall be solely liable for all fees owed by it to any subcontract or subservicer, regardless of whether the Servicer's compensation hereunder is sufficient to pay such fees, provided that (i) in no event will the Servicer be responsible for any fees of any subcontractor or subservicer which would be customarily payable by the owner of a similar mortgage loan in the ordinary course (such as the fees of any appraiser, property manager, leasing agent, environmental consultant, etc.), all of which will be "Costs" for the purposes of this Agreement, and (ii) any Costs incurred by such subcontract or subservicer in performing any services under such subcontract or subservicing agreement will be paid from Loan collections as a "Cost" pursuant to Section 4.6 of this Agreement.

4.4 **Collection Account & Remittances** - The Servicer will establish and maintain the Collection Account with respect to the Loan. Subject to the terms of this Agreement, the Servicer will (i) deposit into the Collection Account within one (1) Business Day after receipt, all payments and other collections received by it with respect to the Loan, and (ii) subject to and in accordance with the priorities set forth in Section 4.17 hereof, remit from the Collection Account for deposit or credit on each Remittance Date all payments received with respect to the Loan and allocable to the Participants for such Remittance Date by wire transfer or direct deposit to the applicable accounts maintained and designated by each Participant to the Servicer in writing from time to time.

4.5 **Servicing Fee** - As consideration for its servicing and administration of the Loan pursuant to this Agreement, the Servicer will be entitled to payment of the Servicing Fee during each calendar month or part of a month that the Loan remains outstanding (provided that the full monthly amount of such Servicing Fee will be payable for any partial month) commencing on the Effective Date. Such Servicing Fee will be payable monthly on each Remittance Date and will be computed on the basis of the same outstanding principal balance and same period for which the monthly interest payment on the Loan is computed. The Servicer may pay itself the Servicing Fee (plus applicable taxes) on each Remittance Date from amounts on deposit in the Collection Account from time to time. If the amounts on deposit in the Collection Account are insufficient to pay the Servicing Fee to the Servicer, each Participant will pay its Proportionate Share of such shortfall to the Servicer within three (3) Business Days after the receipt of an itemized invoice from the Servicer.

4.6 **Servicing Costs** - In addition to the Servicing Fee, the Servicer will be entitled to be reimbursed for all Costs (including all Servicing Advances) incurred by the Servicer in connection with its servicing and administration of the Loan. The Servicer may pay or reimburse itself at any time for all such Costs from amounts on deposit in the Collection Account from time to time. The Servicer has no obligation to advance its own funds for payment of any Costs or to otherwise risk its own funds in the performance of its duties and obligations under this Agreement. If the Servicer, at its option exercisable in its sole discretion, makes any advance from its own funds to pay any Costs, it will be entitled to immediate reimbursement of such amounts from the Collection Account, or if the amounts on deposit in the Collection Account are insufficient to pay such amounts, each Participant will pay its Proportionate Share of such amounts to the Servicer within three (3) Business Days after receipt of an itemized invoice from the Servicer.

4.7 **Servicing Advances** - If the Servicer determines in accordance with the Servicing Standard that a Servicing Advance is necessary to protect the Participants' interests in the Loan and/or the Mortgaged Property, the Servicer shall notify the Participants promptly, which notice will include the amount of the proposed Servicing Advance, the date such funds are required and the purpose of such Servicing Advance. Each Participant will have the right (but no obligation) to advance its respective Proportionate Share of such Servicing Advance on or before the date specified in such notice. If any Participant elects not to advance its Proportionate Share of such Servicing Advance, the other Participant or the Servicer

will have the right to make such Servicing Advance or any unfunded portion thereof. All such Servicing Advances, together with interest thereon at the Servicing Advance Rate, will be reimbursed to the Servicer or any Participant from amounts on deposit in the Collection Account from time to time. Notwithstanding any other provision of this Agreement and for greater certainty, neither the Servicer nor any Participant has any obligation to make any Servicing Advance.

4.8 **Authority of Servicer** - To the extent consistent with this Agreement, the Servicer has the sole and exclusive authority to exercise all rights and remedies with respect to the Loan, including the sole and exclusive authority (i) to modify or waive any of the terms of the related Loan Documents, (ii) to consent to any action or failure to act by the Borrower or other party to the Loan Documents, (iii) to vote all claims of the Participants (who will grant to the Servicer an irrevocable power of attorney coupled with an interest, with power of substitution for the purpose of exercising such voting rights) with respect to the Loan, the Borrower and any other Borrower Entity in any bankruptcy, insolvency or other similar proceedings (whether voluntary or involuntary, including without limitation, the right to approve or reject any plan of reorganization), and (iv) to take any legal action to enforce or protect the Participants' interests with respect to the Loan or the Mortgaged Property, or to refrain from exercising any powers or rights under the Loan Documents, including the right to call or waive any Events of Default, accelerate payment of the Loan or institute any Enforcement Proceedings in respect of the Loan and, except as otherwise provided in this Agreement, no other Person, other than the Servicer, will have any voting, consent or other rights whatsoever with respect to the servicing and administration of, or the exercise of any rights and remedies with respect to, the Loan or the Mortgaged Property. Each Participant will, from time to time, execute such further documents and assurances as the Servicer may reasonably require to give effect to the foregoing.

4.9 **No Material Changes** - Notwithstanding Section 4.8 hereof, the Lender and the Servicer shall not, without the consent of the Participants: (a) amend, modify or waive any of the terms of the Commitment Letter or the Loan Documents or give or withhold consent or approval to any action or failure to act by the Borrower thereunder if to do so would materially change the terms of the Investment or otherwise contravene any other provisions of this Agreement; or (b) permit substitutions or withdrawals of the Loan Documents which would materially reduce the aggregate value of the Mortgaged Property.

4.10 **Experts** - In exercising its rights and powers under this Agreement, the Servicer may engage and rely upon the advice of legal counsel, accountants and other experts (including those retained by the Borrower) and upon any written communication or telephone conversation which the Servicer believes to be genuine and correct or to have been signed, sent or made by the proper Person.

4.11 **Servicing of REO Property** - If the Mortgaged Property becomes an REO Property, (i) it shall be acquired, managed and operated as determined by the Servicer in accordance with the provisions hereof (including Article 5), (ii) the respective rights, interests and priorities between the Participants in respect of the Loan will survive any REO Acquisition and continue to apply to the REO Property, and (iii) all distributions to Participants will be made in accordance with Section 4.17 hereof (whether or not the Loan Documents then remain in effect).

4.12 **Remittance Reports** - On each Remittance Date, the Servicer shall prepare and/or provide a remittance report to the Participants in a form reasonably agreed upon by the parties hereto. In addition, the Servicer will deliver such other statements, reports and other information from time to time as may be agreed to by the Participants and the Servicer, each acting reasonably.

4.13 **Custodial Duties** - The Custodian agrees to hold registered and documentary title to the Investment as custodian, agent and bailee for and on behalf of the Participants in accordance with the terms of this Agreement. Each Participant hereby irrevocably authorizes, directs and appoints the Custodian to so act. The originals of all Loan Documents shall be held by the Custodian or the Servicer on and subject to the terms of this Agreement. So long the Custodian is Institutional Mortgage Capital Canada Inc., in its capacity as sole general partner of IMC Limited Partnership, it will not charge a custodian fee for its custodial services under this Agreement. The Custodian will be entitled to be reimbursed for all Costs incurred or paid by the Custodian arising from or relating to its holding of registered and documentary title from amounts on deposit in the Collection Account from time to time. The Custodian has no obligation to advance its own funds for payment of any Costs or to otherwise risk its own funds in the performance of its custodial duties. The Custodian may resign at any time in its sole discretion (with or without cause). Any replacement Custodian will be appointed by the Servicer on such terms (including fees) as the Servicer may determine (in accordance with the Servicing Standard). If any replacement Custodian charges a fee for providing its custodial services, such fees will be considered a "Cost" incurred by the Servicer for the purposes of the Agreement and will be paid in accordance with Section 4.6 hereof.

4.14 **Actions Protected** - Neither the Servicer, the Custodian, nor any of their respective partners, directors, officers,

employees or agents shall be under any liability to the Participants or any third party for taking or refraining from taking any action, in good faith pursuant to or in connection with this Agreement, or for errors in judgment; provided, however, that this provision shall not protect the Servicer, the Custodian or any other Person against any liability which would otherwise be imposed on the Servicer, the Custodian, or such Person by reason of the wilful or deliberate breach by the Servicer or the Custodian under this Agreement or the wilful misconduct or negligence of the Servicer or the Custodian in the performance of its duties hereunder. The Servicer, the Custodian and their respective partners, directors, officers, employees and agents may rely in good faith on any document of any kind which, prima facie, is properly executed and submitted by any appropriate Person respecting any matters arising hereunder.

4.15 **Indemnity** - The Servicer, the Custodian and their respective partners, directors, officers, employees and agents thereof shall be indemnified and held harmless by the Participants against any loss, liability or expense incurred, including reasonable legal fees, in connection with any claim, legal action, investigation or proceeding relating to this Agreement, the performance of the duties and obligation of the Servicer and/or the Custodian hereunder, or any specific action which any Participant has authorized or requested the Servicer or the Custodian to perform pursuant to this Agreement, as such are incurred, except for any loss, liability or expense incurred by reason of the willful misconduct or negligence by the Servicer or Custodian respectively. Notwithstanding the exception set forth in the preceding sentence, in the event that the Servicer sustains any loss, liability or expense by reason of such exception and which results from any overcharges to the Borrower under the Loan, to the extent that such overcharges were collected by the Servicer and applied in accordance with this Agreement, the Participants shall promptly repay such overcharge to the Servicer after receipt of written notice from the Servicer regarding such overcharge.

4.16 **Additional Servicing Duties** - In addition to and without limiting the foregoing provisions of this Article 4, in servicing and administering the Loan, the Servicer shall perform, without limitation, the following duties:

- (a) at the request and expense of any Participant, make available to such Participant copies of the Loan Documents, title reports, surveys, insurance policies and other documents and papers pertaining to the Investment and the Mortgaged Property in the possession of the Lender or the Servicer;
- (b) use reasonable efforts to collect all amounts owing by the Borrower under the Loan including, without limitation, all fees as defined in the Commitment Letter, all principal, interest and compound interest, taxes and any other amounts or payments required by the Commitment Letter or the Loan Documents;
- (c) give such notices to the Borrower, its successors and permitted assigns, and tenants of the Lands and others as the Lender may consider necessary;
- (d) perform any and all necessary services with respect to the settlement of loss under insurance policies in the event of damage to or destruction of the Mortgaged Property or any part thereof;
- (e) settle with the Borrower and any expropriating authority the amount and disposition of any compensation payable in connection with any expropriation of any part of or any interest in the Mortgaged Property; provided that the Lender shall give prompt written notice to the Participants as soon as it receives notice of any such expropriation;
- (f) maintain proper records and accounts showing all receipts, payments and disbursements in respect of the Investment and allow each Participant, its auditors and agents to examine such accounts, records and documents from time to time at their own expense, and provide such copies thereof as they may reasonably require from time to time at their own expense;
- (g) periodically, if the Servicer deems it necessary, satisfy itself that all insurance premiums, realty taxes, utility charges and any other charges with respect to the Lands are being paid as they fall due;
- (h) inform the Participants as soon as the Servicer becomes aware of any default by any Borrower Entity under the Loan or any of the Loan Documents and refrain from taking any action or take whatever action that the Servicer in its sole discretion considers necessary or expedient under the Loan Documents including, without limitation, enforcing performance of the obligations of each Borrower Entity, its successors and assigns, under the Loan Documents, accelerating repayment of the Loan and realizing upon the Mortgaged Property, including the appointment of a receiver, the exercise of powers of distress, lease or sale given by the Loan Documents or by law and take foreclosure proceedings and pursue any

other remedy available to protect and preserve the Investment;

- (i) inform the Participants from time to time and upon the reasonable request of the Participants regarding the course of conduct or action being taken by the Servicer pursuant to subsection 4.2(h); and
- (j) generally attend to the performance of such other things and matters as a prudent lending institution would normally perform if the Loan was for its own account exclusively.

4.17 **Application of Payments** – All amounts paid by the Borrower or otherwise received by on or behalf of the Servicer or any Participant on account of, with respect to or in connection with the Loan or the Mortgaged Property and all amounts realized as proceeds thereof, whether received in the form of monthly payments, balloon payments, principal prepayments, prepayment premiums, liquidation proceeds, insurance proceeds or otherwise (other than (i) the application fee and the commitment fee, which will be applied in accordance with Section 4.18, and (ii) proceeds, awards or settlements applied to the restoration or repair of the Mortgaged Property or released to the Borrower in accordance with the Servicing Standard) will be applied by the Servicer in the following order of priority:

- (a) firstly, to the Servicer, the Custodian or any Participant, any unpaid or unreimbursed Costs paid, advanced or otherwise incurred by the Servicer, Custodian or any Participant in respect of the Investment pursuant to this Agreement, including without limitation, unreimbursed Servicing Advances and interest thereon at the Servicing Advance Rate;
- (b) secondly, to the Servicer, any accrued and unpaid Servicing Fees for each completed Interest Accrual Period, together with applicable taxes thereon; and
- (c) thirdly, and subject to Section 6.3 hereof, the balance of each amount so paid or received to each Participant in the amount equal to its Proportionate Share thereof.

4.18 **Application and Commitment Fees** – Notwithstanding Section 4.17 or any other provisions of this Agreement, the parties agree as follows:

- (a) **Sharing of the Commitment Fee:** The respective entitlements of the Participants to the commitment fee under or in respect of the Loan (as and when paid by the Borrower) is as follows:

Participant	Share of Commitment Fee (%)
Originating Participant	
[Name of Subscribing Participant]	
[Name of Subscribing Participant]	
[Name of Subscribing Participant]	
TOTAL:	100.00%

- (b) **Application Fee To be Paid to Lender as Mortgage Broker:** The Participants acknowledge and agree that (i) the Lender is acting as mortgage broker for and on behalf of the Participants in respect of the origination of the Loan, and (ii) in consideration of the Lender acting in such capacity as mortgage broker, the Participants agree that the Lender is entitled to be paid and to retain for its sole account the application fee in respect of the Loan (as and when paid by the Borrower).

4.19 **No Warranties or Representations** - The Lender and the Servicer make no warranty or representation with respect to; (i) the Investment, (ii) the financial viability of any Borrower Entity, (iii) the value or condition of the Lands, including physical, financial, or environmental condition or otherwise (iv) the due execution, legality, validity, enforceability, genuineness, adequacy, sufficiency or priority of any of the Loan Documents. The Lender and the Servicer shall not be responsible for the observance or performance of any of the terms, covenants, conditions or obligations of any Borrower Entity pursuant to the Commitment Letter and the Loan Documents. Each Participant acknowledges that it has made its own decision to participate in the Investment without any inducement from or reliance upon the Lender or the

Servicer.

4.20 **Reliance on Information and Advice** - Subject to the Lender and the Servicer upholding the Servicing Standard, the Lender and the Servicer shall not incur any liability under or with respect to this Agreement, the Investment or otherwise by acting or by refraining from acting, in good faith, upon: (a) any notice, consent, certificate or other instrument or writing (sent by letter, telephone, telegram, cable, telex, facsimile, email or otherwise) believed by the Lender or the Servicer to be genuine and signed or sent by the proper party or parties; (b) any representation or warranty made by any Borrower Entity any of them in the Loan Documents or in connection therewith; and (c) any advice solicited by or given to the Lender or the Servicer by experts retained pursuant to section 4.10 hereof.

4.21 **Sale or Assignment by Lender or Servicer** - Except as otherwise expressly provided by this Agreement, neither the Lender nor the Servicer shall sell, transfer, assign or in any way dispose of or encumber, directly or indirectly, the whole or any part of its rights, title, interest and/or obligations under this Agreement, without the prior written consent(s) of the Participants (which shall include the Originating Participant) then holding in the aggregate not less than 70.0% of the Proportionate Shares; and if any such consent is given, then subject to and only upon the transferee or assignee entering into an agreement with all other parties hereto to assume and become bound by and perform all of the obligations of the transferor or assignor from and after the date of such transfer or assignment.

ARTICLE 5 - REO PROPERTY

5.1 **REO Acquisitions** - If title to the Mortgaged Property is acquired for the benefit of the Participants in any Enforcement Proceedings, title to the Mortgaged Property shall be taken in the name of a nominee corporation on behalf of the Participants. The Servicer, on behalf of the Participants, shall dispose of any REO Property utilizing reasonable best efforts, consistent with the Servicing Standard, to maximize the proceeds of such disposition to the Participants as a collective whole, if and when the Servicer determines, consistent with the Servicing Standard, that such disposition would be in the best economic interest of the Participants as a collective whole. Unless otherwise directed by the Originating Participant, the Servicer shall manage, conserve, protect and operate each REO Property for the Participants solely for the purpose of its prompt disposition and sale in accordance with the Servicing Standard.

5.2 **Servicer Authority to Service REO Properties** - The Servicer shall have full power and authority, subject only to the specific requirements and prohibitions of this Agreement, to do any and all things in connection with any REO Property as are consistent with the Servicing Standard and the terms of this Agreement, all on such terms and for such period as such Servicer deems to be in the best interests of the Participants (as a collective whole) and, in connection therewith, such Servicer shall only agree to the payment of management fees that are consistent with general market standards or to terms that are more favourable to the Participants. The Servicer shall segregate and hold all revenues received by it with respect to any REO Property separate and apart from its own funds and general assets and shall establish and maintain with respect to any REO Property a segregated custodial account (each, an "**REO Account**"). The Servicer shall deposit or cause to be deposited in the REO Account within one (1) Business Day after receipt all revenues received by it with respect to any REO Property (other than liquidation or realization proceeds, which shall be remitted to the Collection Account), and shall withdraw therefrom funds necessary for the proper operation, management and maintenance of such REO Property and for other Costs with respect to such REO Property including: (a) all insurance premiums due and payable in respect of any REO Property; (b) all real estate taxes and assessments in respect of any REO Property that may result in the imposition of a lien thereon; and (c) all costs and expenses reasonable and necessary to protect, maintain, manage, operate, repair and restore any REO Property.

5.3 **Right to Retain Independent Contractors** - The Servicer may contract with an independent contractor, the fees and expenses of which shall be an expense of the Participants and payable out of amounts on deposit in the REO Account, for the operation and management of any REO Property, provided that:

- (a) the terms and conditions of any such contract shall be reasonable and consistent with the terms of this Agreement and customary for the area and type of property and shall not be inconsistent herewith;
- (b) any such contract shall require, or shall be administered to require, that the independent contractor pay all costs and expenses incurred in connection with the operation and management of such REO Property, including those listed above, and remit all related revenues (net of such costs and expenses) to the Servicer as soon as practicable, but in no event later than thirty (30) days following the receipt thereof by such independent contractor;

- (c) none of the provisions of this section 5.3 relating to any such contract or to actions taken through any such independent contractor shall be deemed to relieve the Servicer of any of its duties and obligations to the Participants with respect to the operation and management of any such REO Property; and
- (d) the Servicer shall be obligated with respect thereto to the same extent as if it alone were performing all duties and obligations in connection with the operation and management of such REO Property.

5.4 **Indemnification of Independent Contractors** - The Servicer shall be entitled to enter into any agreement with any independent contractor performing services for it related to its duties and obligations hereunder for indemnification of such Servicer by such independent contractor, and nothing in this Agreement shall be deemed to limit or modify such indemnification.

5.5 **Sale of REO Properties** - With respect to any REO Property which the Servicer has determined to sell in accordance with the Servicing Standard, the Servicer shall deliver to the Participants a certificate to the effect that the Servicer has determined to sell such REO Property in accordance with this Section 5.5. The Servicer may then offer to sell the REO Property to any Person (and shall report to the Participants in writing on an ongoing basis (not less than monthly) as to the status of such sale process). The Servicer will be entitled to accept the highest offer to purchase the REO Property received from any Person that the Servicer (acting in accordance with the Servicing Standard) considers to be a fair price, subject to approval thereof by the Originating Participant. Notwithstanding anything to the contrary herein, no Borrower Entity may make an offer or purchase any REO Property pursuant hereto.

5.6 **Purchase Price** - The Servicer shall not be obligated, by any of the foregoing provisions or otherwise, to accept the highest offer if it determines, in accordance with the Servicing Standard, that rejection of such offer would be in the best interests of the Participants as a collective whole. In addition, the Servicer may accept a lower offer if it determines, in accordance with the Servicing Standard, that acceptance of such offer would be in the best interests of the Participants as a collective whole (for example, if the prospective buyer making the lower offer is more likely to perform its obligations, or the terms offered by the prospective buyer making the lower offer are more favourable). The Servicer shall not sell any REO Property other than for all cash.

5.7 **Determination of Fair Price** - In determining whether any offer constitutes a fair price for the REO Property, the Servicer shall take into account any appraisal previously obtained, the period and amount of any delinquency on the Loan, the physical (including environmental) condition of the REO Property, the state of the local economy and whether or not such offer will maximize the recovery of all Loan indebtedness then owing to the Participants.

5.8 **Terms of Sale** - Subject to the other provisions of this Article 5, the Servicer shall act on behalf of the Participants in negotiating and taking other action necessary or appropriate in connection with the sale of any REO Property, including the negotiation of the purchase price. Any sale of an REO Property shall be without recourse to, or representation or warranty by, the Servicer or any Participant, other than customary and standard representations and warranties provided by a secured creditor in similar sale transactions.

5.9 **Sale Proceeds** - The proceeds of any sale of any REO Property (after deduction of the direct out-of-pocket expenses of such sale incurred in connection therewith) shall be promptly, and in any event within one (1) Business Day following receipt thereof, deposited in the Collection Account. Within thirty (30) days after the sale of the REO Property, the Servicer shall provide to the Participants a statement of accounting for such REO Property, including without limitation, (i) the date of disposition of the REO Property, (ii) the gross sales price, the selling and other expenses and the net sale price, and (iii) such other information as the Participants may reasonably request. As and when necessary, the Servicer shall provide the Participants with all information reasonably required from time to time in connection with any federal or provincial tax returns or other filings required to be made by the Participants as it relates to the acquisition, ownership and disposition of any REO Property.

ARTICLE 6 - DEFAULT

6.1 **Termination of the Role of Servicer** - The role of the Servicer in administering and servicing the Investment may be terminated by both Participants upon giving notice to that effect in writing to the Servicer only upon the happening of any of the following events: (i) if the Servicer makes any assignment for the benefit of its creditors or commits any act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act (Canada); (ii) if the Servicer either directly or indirectly comes under the direction or management control of a branch of the Federal or a Provincial Government; or (iii)

if the Servicer commits a breach or default under this Agreement which is not remedied within thirty (30) days after written notice of such breach has been received by the Servicer from the Participants. If the Servicer's role under this Agreement is terminated pursuant to the provisions of this subsection 6.1(a), the Participants shall make all appropriate financial adjustments effective as of the date of the Servicer's termination. In addition, the Servicer shall, at its expense, execute and deliver such documents as may be necessary to give effect to such termination, and to give effect to the appointment of a replacement administrator and servicer of the Investment which is acceptable to the Originating Participant, acting reasonably, as the successor to administer and service the Investment on behalf of the Participants, and shall deliver to the replacement administrator and servicer all documents in its possession relating to the Investment and good, valid and binding assignments of the Loan Documents as applicable; provided that the replacement administrator and servicer shall first execute and deliver to the other parties to this Agreement a counterpart of this Agreement agreeing to be bound hereby as if the replacement administrator and servicer had been the original administrator and servicer of the Loan and, if applicable, one or agreements assuming of the Loan Documents.

6.2 **Termination of the Role of Custodian** - The provisions of subsection 6.1 hereof shall apply *mutatis mutandis* in the case of termination of the role of the Custodian under this Agreement.

6.3 **Subordination Upon Participation Default** - Upon the occurrence of a Participation Default and for so long as any Participation Default exists,

- (a) all amounts that have been advanced by the Defaulting Participant on account of the Loan prior to the date of the Participation Default shall be postponed in favour of, and shall rank subordinate to, all amounts advanced on account of the Loan by the Non-Defaulting Participant both before and after the date of the Participation Default; and
- (b) notwithstanding subsection 4.17(c) hereof, upon repayment of the Loan by the Borrower or in consequence of any realization of the Mortgaged Property, the Defaulting Participant shall be entitled to repayment of its Proportionate Share of the Loan only after the Non-Defaulting Participant has been repaid all of its Proportionate Share of the Loan.

6.4 **Option to Purchase Interest of Defaulting Participant** - In addition to all other rights and remedies of the Lender, the Servicer or the Non-Defaulting Participant as set out in this Agreement or at law, upon the occurrence of a Participation Default and for so long as any Participation Default exists the Non-Defaulting Participant may, at its option exercised by giving not less than seven (7) days prior written notice to the Defaulting Participant, purchase the Proportionate Share of the Defaulting Participant at a price payable at the time of completion of such purchase which is equal to the aggregate amount of all advances made by the Defaulting Participant prior to the Participation Default and all accrued interest thereon at the rate payable to the Defaulting Participant hereunder. Such purchase transaction shall be completed within five (5) Business Days after the Non-Defaulting Participant gives such notice to the Defaulting Participant. Upon the completion of such purchase transaction, the Defaulting Participant shall no longer have any interest in the Investment and shall execute any and all transfers, assignments and other documents and instruments necessary to give effect thereto. If the Defaulting Participant is a Subscribing Participant and provided that the Originating Participant does not elect to purchase the Proportionate Share of such Subscribing Participant in accordance with the foregoing, the Lender will also have the option to purchase the Proportionate Share of such Subscribing Participant on the same terms as set out in this Section.

ARTICLE 7 - GENERAL

7.1 **Termination** - This Agreement shall remain in full force and effect until the Loan and any other amounts expressed to be owing to the Lender under the Loan Documents have been paid in full and all Loan Documents have been reassigned or discharged or the security therefor shall have been realized upon and the proceeds of realization shall have been distributed between the Participants in accordance with this Agreement.

7.2 **Registration or Publication Prohibited** - Each Participant agrees that it shall not cause or permit any registration pursuant to the Personal Property Security Act of Ontario, as amended from time to time, or otherwise publicize, register or in any manner whatsoever give notice of this Agreement, the Investment or its interest therein.

7.3 **Dealings with Borrower** - The Subscribing Participant agrees not to contact or deal either directly or indirectly with any Borrower Entity regarding the Investment without the prior written approval of the Servicer.

7.4 **Set-Off by Participant** - Unless the Servicer otherwise agrees in writing, no Participant shall exercise any right of set-off, counterclaim, banker's lien or any other claim it may have against the Borrower with respect to the Investment.

7.5 **Other Business Activities** - The parties and their respective affiliates may make loans or otherwise extend credit to, and generally engage in any kind of business with any Borrower Entity and may receive payments on such other loans or extensions of credit to any Borrower Entity and otherwise act with respect thereto freely and without accountability in the same manner as if this Agreement and the transactions contemplated hereby were not in effect.

7.6 **No Partition** - No Participant shall make any application to a court or commence any action for the partition or sale of the Investment. Upon any breach of the provisions of this Section by any Participant, the other Participant shall, in addition to all other rights and remedies under this Agreement and under applicable law, be entitled to a decree or order restraining and enjoining such application, petition, action or proceeding and the party in breach shall not plead in defence thereto that there would be an adequate remedy at law, it being recognized and agreed that the injury and damage resulting from such breach would be impossible to measure monetarily.

7.7 **Legal Capacity** - Each Participant warrants and represents to the other Participant that it has the legal capacity pursuant to its incorporating or constating documents and any applicable legislation to enter into this Agreement and participate in the Investment and has not violated its incorporating or constating documents or any applicable legislation by so doing.

7.8 **Acknowledgement of Related Parties** - The Subscribing Participant acknowledges and accepts that each of the Originating Participant, the Lender and the Servicer are related to and/or affiliated with each other and are or may be directly or indirectly controlled by one or more of the same Persons. The Subscribing Participant hereby waives any claim that it may have against the Originating Participant, the Lender and/or the Servicer which is based upon the fact that they are so related and/or affiliated or any actual or perceived bias or conflict of interest that exists or may exist amongst any of them in relation to their respective rights and carrying out their respective obligations under this Agreement.

7.9 **Independent Legal Advice** - Each party hereto warrants and represents to each of the other parties hereto that, prior to entering into this Agreement, such party has obtained the benefit of independent legal representation and advice regarding this Agreement and the rights and obligations of such party hereunder, and that such party has entered into this Agreement freely and voluntarily as its own act without any fear, threat, influence, duress or compulsion of, from, by or on behalf of any other Person.

7.10 **Notices** - All notices or other communications to be given pursuant to or in connection with this Agreement shall be in writing, signed by the party giving such notice or by its solicitors, and shall be personally delivered or sent by registered mail, facsimile transmission or email addressed as follows:

- (a) to the Originating Participant at _____, Fax No. _____, Attention: _____, Email: _____; and
- (b) to the [NAME OF SUBSCRIBING PARTICIPANT] at _____, Fax No. _____, Attention: _____, Email: _____;
- (c) to the [NAME OF SUBSCRIBING PARTICIPANT] at _____, Fax No. _____, Attention: _____, Email: _____;
- (d) to the [NAME OF SUBSCRIBING PARTICIPANT] at _____, Fax No. _____, Attention: _____, Email: _____;
- (e) to the Lender at _____, Fax No. _____, Attention: _____, Email: _____; and
- (f) to the Servicer at _____, Fax No. _____, Attention: _____, Email: _____.

Any notice given by personal delivery shall be deemed to have been received on the day of and at the time of such delivery, provided that if such day is not a Business Day, then such notice shall be deemed to have been received at 9:00 a.m. on the

next following Business Day. Any notice given by facsimile transmission or email transmission shall be deemed to have been received, in the absence of evidence to the contrary, on the day of and one (1) hour after the time of its transmission. A read receipt in respect of any notice given by email transmission shall constitute rebuttable presumptive evidence that such notice was received by the party intended to receive it. Any notice given by registered mail shall be deemed to have been received at 2:00 p.m. on the second Business Day after the posting thereof. Any notice requesting or requiring response within five (5) or less Business Days from the date thereof shall be given by personal delivery, facsimile transmission or email transmission. In the event of actual or reasonably anticipated postal disruption, all notices shall only be given by personal delivery, facsimile transmission or email transmission. Any party may from time to time, by notice given as provided herein, change its mailing address, email address or fax number for the purposes of this provision.

7.11 **General Contract Provisions** - This Agreement constitutes the entire agreement between the parties and supersedes all prior registrations, proposals and agreements, whether oral or written, with respect to the Investment and there are no other representations, warranties, terms or conditions pertaining to this Agreement or the subject matter hereof other than as herein set forth. Any amendment, waiver or discharge of this Agreement or of any schedules attached hereto shall be made only in writing signed by all of the parties hereto. Time is and shall remain of the essence under and pursuant to this Agreement. Failure by any party to strictly enforce any provisions hereof shall not operate as a waiver or limitation of such party's rights hereunder in respect of any subsequent default. If any provision of this Agreement or the application thereof to any Person or circumstance is to any extent held or rendered invalid, unenforceable or illegal, same shall be considered separate and severable herefrom and all other provisions of this Agreement shall remain in full force and effect and be binding upon the parties hereof. The headings set forth in this Agreement are inserted for convenience and reference only and shall in no way define or limit the intent or interpretation of any of the provisions hereof. Wherever in this Agreement any subject matter is described as including specifically described Persons, things, events or other items, unless expressly stated to the contrary, the words "include", "includes" and "including" shall mean "include", "includes" or "including", as the case may be, "without limiting the generality of the foregoing.". This Agreement shall be read and construed with all changes of gender and number of the party or parties referred to in each case as required by the context, and the covenants and agreements of each party shall be deemed to be joint and several where such party is more than one Person. With respect to each party which is a partnership, each Person who is presently a member of such partnership and each Person who becomes a member of such partnership shall be and continue to be jointly and severally liable for all covenants and agreements of such party notwithstanding that any such Person subsequently ceases to be a member of such partnership.

7.12 **Applicable Law** - This Agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein, and the parties hereto attorn to the jurisdiction of the Province of Ontario.

7.13 **Statutory References** - All references in this Agreement to any federal, provincial or municipal statute, regulation, by-law, order, directive or other governmental enactment shall be deemed to be and construed as a reference to the same as amended from time to time.

7.14 **Financial References** - All accounting terms not specifically defined herein shall be construed in accordance with generally accepted accounting principles applied on a consistent basis. All amounts referred to in dollars shall mean dollars in lawful money of Canada unless otherwise expressly provided herein.

7.15 **Time Calculations** - All time periods referred to herein shall be calculated exclusive of the first day and inclusive of the last day. In the event that the time for doing any act falls on a Saturday, Sunday or a statutory holiday in the Province of Ontario, such time shall be extended to the immediately following Business Day. The time for performing or completing any matter under or pursuant to this Agreement may be extended or abridged by an agreement in writing by the parties or their respective solicitors.

7.16 **Force Majeure** - Whenever and to the extent any party is prevented, hindered or delayed in the fulfilment of any obligation hereunder by reason of Force Majeure, that party's liability to perform such obligation shall be postponed and it shall be relieved from any liability in damages or otherwise for breach thereof for so long as and to the extent that such Force Majeure continues to exist. Nothing in this paragraph shall operate in any way to excuse any party hereto from prompt payment of any and all monies due and payable to any or all other parties hereto pursuant to the provisions of this Agreement.

7.17 **No Partnership, Etc.** - Nothing in this Agreement shall constitute the parties hereto or any of them as a partner of each other in the conduct of their respective businesses or otherwise, or a members of a trust, association, joint venture or

Syndicated Mortgages: How To Avoid The Risks

15th Annual Real Estate Summit

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April 18, 2018

Recent changes to Ontario Regulation 407/07 - Mortgage Brokerages: Standards of Practice, coming into effect on July 1, 2018 and dealing with expanded requirements for “non-qualified” syndicated mortgages

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Changes to syndicated mortgage transactions take effect July 1, 2018

The Government of Ontario has made regulatory amendments to [O. Regulation 188/08 Mortgage Brokerages Standards of Practice](#)  [New Window] under the [Mortgage Brokerages, Lenders and Administrators Act, 2006 \(MBLAA\)](#)  [New Window] that affect **non-qualified** syndicated mortgages.

Under the MBLAA, mortgage brokerages are already required to take reasonable steps to ensure that a mortgage or an investment in a mortgage is suitable for a client (i.e., borrower, lender or investor) based on the needs and circumstances of the client. Brokerages are also required to provide clients with certain disclosures, including written disclosure of the material risks of a mortgage or investment in a mortgage.

As of **July 1, 2018**, mortgage brokerages that deal with **non-qualified** syndicated mortgage transactions will have to comply with expanded requirements.

What is a non-qualified syndicated mortgage?

A **non-qualified** syndicated mortgage is generally a more complex, higher risk product that may not be suitable for the average investor. Non-qualified syndicated mortgages are all syndicated mortgages that do not meet the regulatory definition of a **qualified** syndicated mortgage.

What is a qualified syndicated mortgage?

As defined in the [amended regulation](#)  [New Window], as of July 1, 2018, a **qualified** syndicated mortgage is a syndicated mortgage that meets all of the following criteria:

1. It is negotiated or arranged through a mortgage brokerage.
2. It secures a debt obligation on property that,
 - i. is used primarily for residential purposes,
 - ii. includes no more than a total of four units, and
 - iii. if used for both commercial and residential purposes, includes no more than one unit that is used for commercial purposes.
3. At the time the syndicated mortgage is arranged, the amount of the debt it secures, together with all other debt secured by mortgages on the property that have priority over, or the same priority as, the syndicated mortgage, does not exceed 90 per cent of the fair market value of the property relating to the mortgage, excluding any value that may be attributed to proposed or pending development of the property.
4. It is limited to one debt obligation whose term is the same as the term of the syndicated mortgage.
5. The rate of interest payable under it is equal to the rate of interest payable under the debt obligation.

(3) A syndicated mortgage that secures a debt obligation incurred for the construction or development of property is not a qualified syndicated mortgage.

What is changing?

As of **July 1, 2018**, mortgage brokerages that deal with **non-qualified** syndicated mortgage transactions will be required to:

- Collect and document specific information related to a potential investor's or lender's financial circumstances, needs and risk tolerance using a new FSCO form.

- Undertake and document a suitability assessment, using specific criteria, for each potential investor or lender using a new FSCO form.
- Collect and document expanded disclosure information using a new FSCO form. This includes information regarding the property appraisal and, in the case where the borrower is not an individual, the borrower's financial statements.
- Observe a \$60,000 limit on non-qualified syndicated mortgage investments over a 12-month period for investors or lenders who are not part of the 'designated' class of investors or lenders. The regulation defines the designated class of investors or lenders as those that have already met higher income and asset tests.
- Report written complaints received by the brokerage related to non-qualified syndicated mortgages to FSCO's Superintendent of Financial Services within 10 business days.

When will the three new FSCO forms be ready?

The three new forms will be available for download from FSCO's website in June 2018 in advance of the **July 1, 2018** implementation date.



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Syndicated Mortgages: How To Avoid The Risks

15th Annual Real Estate Summit

Law Society of Ontario

April 18, 2018

Press Release dated March 8, 2018 regarding proposals for a regulatory framework for syndicated mortgages under Canadian securities legislation and amendment of prospectus exemptions

For Immediate Release
March 8, 2018

Canadian securities administrators propose changes to the syndicated mortgage regime

Toronto – The Canadian Securities Administrators (CSA) today published for comment proposed changes to substantially harmonize the regulatory framework for syndicated mortgages in Canada. The changes are reflected in [proposed amendments](#) to National Instrument 45-106 *Prospectus Exemptions* and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, as well as changes to Companion Policy 45-106CP *Prospectus Exemptions*.

“The proposed amendments introduce a common regulatory approach for syndicated mortgages across Canada,” said Louis Morisset, CSA Chair and President and CEO of the Autorité des marchés financiers. “The measures also enhance investors’ ability to make informed decisions when purchasing these investments.”

Under the proposed amendments, prospectus and registration exemptions that currently apply to syndicated mortgages in certain jurisdictions would be removed. As a result, investors would benefit from the potential involvement of a registrant.

Additionally, the amendments would introduce changes to certain existing prospectus exemptions to address specific concerns with syndicated mortgages. These include revisions to the offering memorandum exemption to provide heightened disclosure for investors. Under this proposal, issuers would be required to deliver property appraisals prepared by an independent, qualified appraiser.

The proposed amendments exclude syndicated mortgages from the private issuer exemption, so that they will be offered under exemptions that may be more appropriate for this type of security. These alternative prospectus exemptions generally have reporting requirements, which will help in monitoring this segment of the market.

The [proposed amendments](#) and [CSA Notice and Request for comment](#) can be found on the websites of CSA members. Comments should be submitted in writing by June 6, 2018.

The CSA, the council of securities regulators of Canada’s provinces and territories, coordinates and harmonizes regulation for the Canadian capital markets.

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For more information:

Kristen Rose
Ontario Securities Commission
416-593-2336

Hilary McMeekin
Alberta Securities Commission
403-592-8186

Alison Walker
British Columbia Securities Commission
604-899-6713

Sylvain Théberge
Autorité des marchés financiers
514-940-2176

Jason (Jay) Booth
Manitoba Securities Commission
204-945-1660

Erin King
Financial and Consumer Services
Commission, New Brunswick
506-643-7045

David Harrison
Nova Scotia Securities Commission
902-424-8586

Steve Dowling
Office of the Superintendent of Securities
P.E.I.
902-368-6288

John O'Brien
Office of the Superintendent of Securities
Newfoundland and Labrador
709-729-4909

Rhonda Horte
Office of the Yukon Superintendent
of Securities
867-667-5466

Jeff Mason
Nunavut Securities Office
867-975-6591

Tom Hall
Northwest Territories Securities Office
867-767-9305

Shannon McMillan
Financial and Consumer Affairs
Authority of Saskatchewan
306-798-4160



15TH ANNUAL Real Estate Law Summit

The “Abolition” of the Ontario Municipal Board and the Curtailment of Appeal Rights

Leo Longo, C.S.
Patrick Harrington
Aird & Berlis LLP

April 18, 2018

The “Abolition” of the Ontario Municipal Board and the Curtailment of Appeal Rights

15th Annual Real Estate Law Summit

Leo F. Longo & Patrick J. Harrington[©]

Aird & Berlis LLP
Toronto, Ontario

The new Ontario regime for handling appeals related to certain *Planning Act* applications and municipal land use decisions came into effect on April 3, 2018 with the proclamation of the *Building Better Communities and Conserving Watersheds Act, 2017*¹ [Bill 139]. Schedules to this Act included the new *Local Planning Appeal Tribunal Act, 2017*² and the *Local Planning Appeal Support Centre Act, 2017*³.

The purpose of this paper is to introduce the principal changes created to the Province’s land use planning regime by this legislation.

The *Ontario Municipal Board Act*⁴ has been repealed; however the Ontario Municipal Board (“OMB”) was not abolished. It has been continued under the name of the “Local Planning Appeal Tribunal” (“LPAT”). As such, the newly named LPAT remains Ontario’s first and oldest administrative tribunal. Current OMB members are now LPAT members.

Under the new regime, LPAT will continue to hear appeals filed pursuant to the amended *Planning Act*. As will be described, the statutory tests and the appellate processes have been significantly changed by Bill 139. However, the current appeal process and hearing procedures of some *Planning Act* matters have not been altered; for example, minor variance, consent and site plan applications. Appeals will now be determined by LPAT, but nothing else has changed for these matters. Similarly, current hearing procedures dealing with development charge appeals, expropriations, aggregate matters and other proceedings where the former OMB would have been involved have not been changed and will continue to be heard and determined by LPAT in the same manner.

¹ *Building Better Communities and Conserving Watersheds Act, 2017*, S.O. 2017, c. 23

² *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1

³ *Local Planning Appeal Support Centre Act, 2017*, S.O. 2017, c. 23, Sched. 2

⁴ *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28

NEW RESTRICTIONS ON APPEALS

Major Transit Station Areas. Upper and single-tier municipal OPs may prescribe policies in areas of existing or planned higher order transit. To qualify as a Major Transit Station Area, these policies must include minimum heights, minimum employment/residential densities and prescribed land uses. The policies may also include maximum heights and densities and other land use controls. Once approved, the maps and policies associated with the Major Transit Station Area are immune from appeal and cannot be amended absent permission from council.

Major Transit Station Areas will be a double-edged sword. While the policies and maps adopted by the municipality (and approved by the Province) will be protected and very difficult to change, applications that implement the municipality's vision for these areas will effectively be immune from ratepayer challenges. Landowners within these areas will need to work closely with staff and their local councillor to ensure that a mutually-acceptable vision for the area can be achieved.

Secondary Plan Two-Year Freeze. No one may request an amendment to a secondary plan, all or any part of which comes into force on or after April 3, 2018, before the second anniversary of the secondary plan coming into force. The lone exception is where council has authorized an application to proceed. The definition of "secondary plan" is very broad. Stakeholders must also be aware of the restriction on appeals of Minister's decisions described below.

No Appeals of Minister's Decisions. Where the Minister of Municipal Affairs is the approval authority of an OP or OPA, there will be no ability to appeal the Minister's decision to approve. This becomes important in the context of OP reviews and conformity exercises, where exemptions from Ministerial approval do not apply. Further, the definition of a Municipal Comprehensive Review (MCR) has changed under the *2017 Growth Plan for the Greater Golden Horseshoe* such that a MCR may only be undertaken by an upper or single-tier municipality. Because upper and single-tier decisions on OP Reviews are subject to Ministerial approval, none of these matters will be appealable.

While the requirement for Ministerial approval is not new, the inability to challenge a Ministerial approval presents its own issues. The Province has not explained what new resources they will be committing to ensure these "final" reviews are thorough and justified. It is also not clear what recourse a municipality will have if the Province makes an unwelcomed revision (or series of revisions) to the product of a lengthy and expensive MCR.

One Year Moratorium on Private Appeals of Interim Control By-laws. Formerly, private stakeholders could appeal the passage of an ICBL right away. Under the new

regime, decisions to adopt ICBLs can only be appealed by the Minister within a one year period following council's decision. Only extensions to an ICBL past the one year period will be capable of being appealed.

“TESTS”

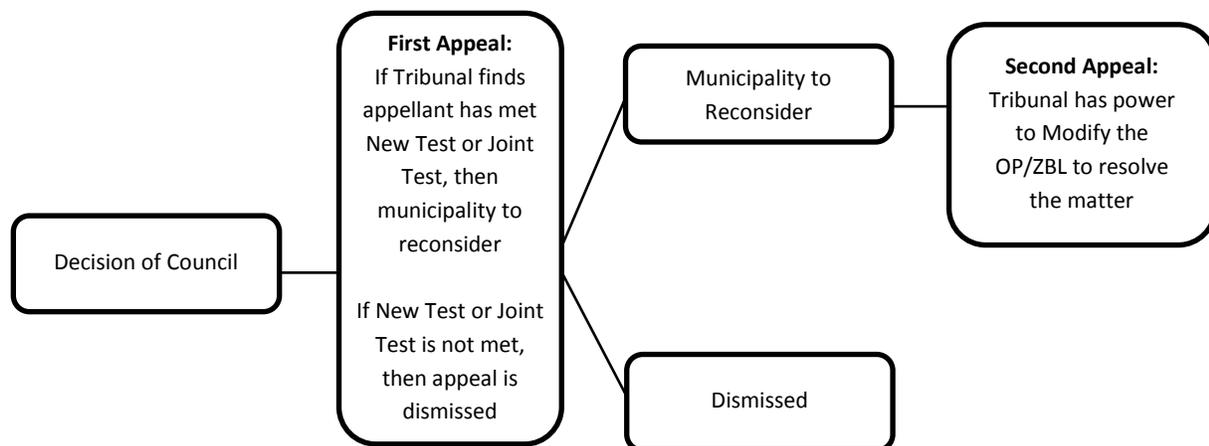
The New Test. On an appeal of a municipally-adopted/approved Official Plan or Amendment (OP/OPA), or a Zoning By-law or Amendment (ZB/ZBA), the appellant will have to explain how the relevant part or section of the aforementioned instrument is inconsistent with a provincial policy statement, fails to conform with or conflicts with a provincial plan, or fails to conform with the applicable upper-tier OP. LPAT must dismiss without a hearing any appeal that does not satisfactorily address this test.

Throughout consultation on Bill 139, various municipalities pushed strongly for the imposition of a standard of review of council decisions that is more deferential to the opinions of local authorities. The first few decisions from LPAT (and any judicial appeals therefrom) will be instructive on how narrow or wide this new test will be applied.

The Joint Test. On an appeal from a refusal of a privately-initiated OPA or ZBA, the applicant/appellant will have to explain (i) how the existing policies/regulations of the OP or ZB sought to be amended do not satisfy the New Test and (ii) how the proposed OPA or ZBA does satisfy the New Test.

In short, not only must a private applicant demonstrate how a proposed amendment satisfies the New Test, the applicant must also explain how keeping the status quo does not address the New Test. This may prove difficult in areas where new official plans or secondary plans have been adopted. Conversely, it may be easier to satisfy in areas where the applicable zoning has not been kept up to date.

NEW APPEALS PROCESS



Non-Decisions. The First Appeal period on a private OPA is extended from 180 days to 210 days. The First Appeal period on a private ZBA is extended from 120 days to 150 days, unless the private ZBA is accompanied by a private OPA, in which case the First Appeal period for both would be 210 days. This is in addition to all of the Bill 73⁵ amendments regarding approval authority extensions.

First Appeal Process. Except as required by LPAT, no party will be permitted to call evidence or examine witnesses in most planning appeals (Official Plans and Amendments, Zoning By-laws and Amendments, and non-decisions on Plans of Subdivision). Instead, evidence will be based primarily on the record that was before council when it made its original decision. An oral hearing before the new Tribunal will most often involve only submissions by the parties to the appeal, either in writing or orally. Time limits for parties' oral submissions are 75 minutes for each "party" and 25 minutes for each "participant."⁶ These hearings will be organized by the Tribunal in advance through mandatory case management conferences.

With these changes, we expect these First Appeal hearings will look more like court applications/motions than traditional hearings. Emphasis has been placed on front-loading the development application process by limiting the evidence on appeal to what was submitted to council. Consultants will need to take extra care with their justification reports and studies as there may not be an opportunity to revise or supplement.

On reconsideration matters (i.e. Second Appeals), the non-decision period is reduced to 90 days.

The Province has required⁷ that appeals be resolved in accordance with overall timelines: 10 months for resolving First Appeals of OPs, OPAs, ZBs and ZBAs; 6 months for resolving Second Appeals involving those instruments; 12 months for appeals of municipal non-decisions on OPs and draft subdivision plan applications; 6 months for all other types of appeals (minor variance, consents, site plan, etc.). There is currently no indication of how the Province intends to enforce these timelines.

LPAT has indicated that it may need to reschedule existing "legacy" appeals filed with the OMB to ensure that new appeals to LPAT are heard and determined in accordance with the Province's timelines.

⁵ *Smart Growth for Our Communities Act, 2015*, S.O. 2015, c. 26

⁶ See O.Reg. 102/18, s. 2

⁷ *Ibid.*, s. 1

TRANSITION

The Province's transition regulation⁸ sets out the following transition protocols between the pre-Bill 139 OMB regime and the post-Bill 139 LPAT regime as follows:

- If you have appealed to the OMB before Dec. 12, 2017, your appeal will be considered by LPAT under the former OMB Act, rules and procedures;
- If you have filed a complete application before Dec. 12, 2017, and you have filed an appeal before April 3, 2018, your appeal will be considered by LPAT under the former OMB Act, rules and procedures;
- If you appealed a municipal decision rendered after Dec. 12, 2017, your appeal will go to LPAT - even if your appeal was filed with the OMB prior to April 3, 2018. LPAT will be issuing a directions notice to these appellants to explain how they may convert their OMB appeals to LPAT appeals. Failing to convert one's appeal within 20 days of receiving LPAT's directions notice will result in the appeal being dismissed;
- If you filed a complete application after Dec. 12, 2017, your appeal (if any) will be considered by LPAT under the new regime rules; and
- If you file any appeals after April 3, 2018 (decisions or non-decisions), your appeal will be considered by LPAT under the new regime rules.

⁸ O.Reg. 101/18, ss. 1 & 2



15TH ANNUAL Real Estate Law Summit

Understanding the Risks of the Web and How to Avoid Them

Phil Brown, Counsel, Practice Management Helpline,
Law Society of Ontario

Raymond Leclair, Vice-President, Public Affairs,
Lawyers' Professional Indemnity Company (LAWPRO®)

April 18, 2018

The 15th Annual Real Estate Summit

Raymond G Leclair
Vice President, Public Affairs
Lawyers' Professional Indemnity Company

April 18, 2018
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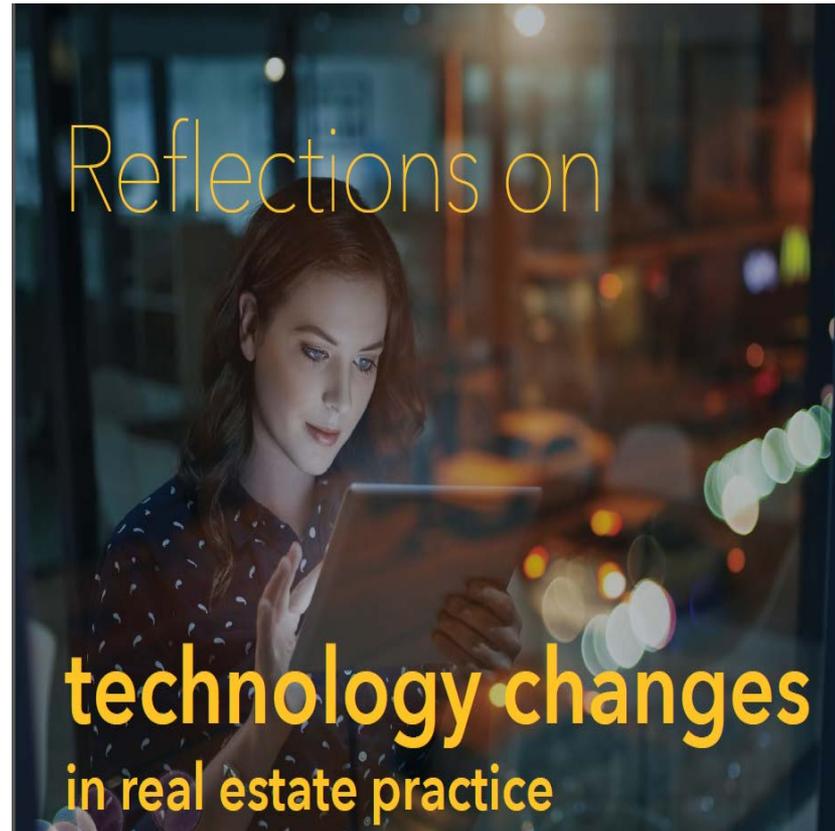
- Remote Access Risks
- Cyber Risks
- REPCO Availability

Cyber Risks

- General cautions:
 - Unsecured internet connections
 - Coffee shops, hotel business centers, malls, hotel rooms(?)
 - Third party computers
 - Library, hotel business centers, Airbnb host's computer, internet cafe

New technology demanded by clients

Advantages
of
portals



<http://www.practicepro.ca/2017/08/reflections-on-technology-changes-in-real-estate-practice/>

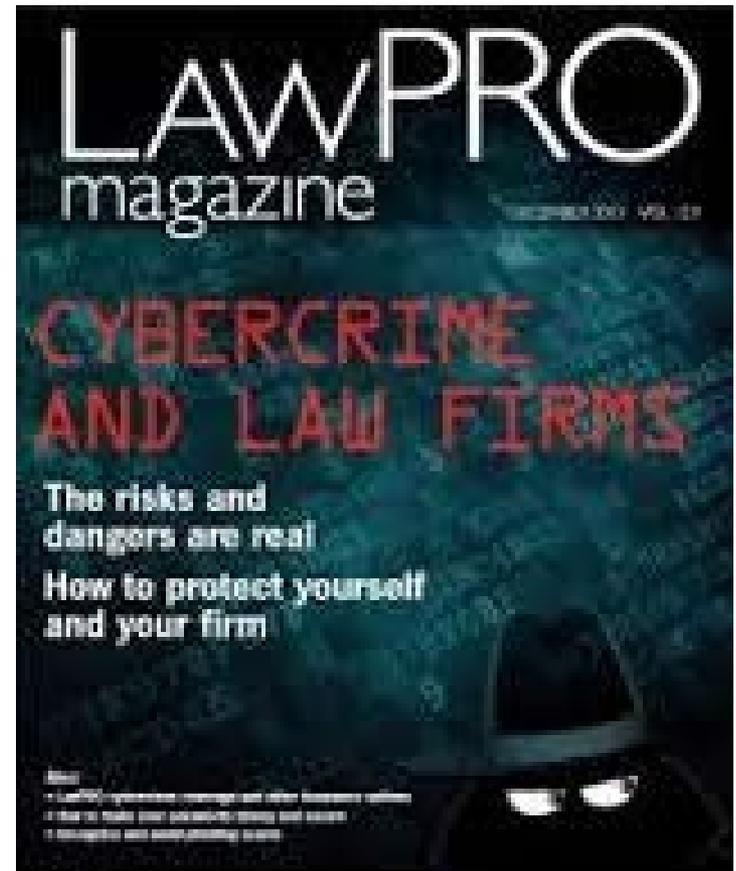
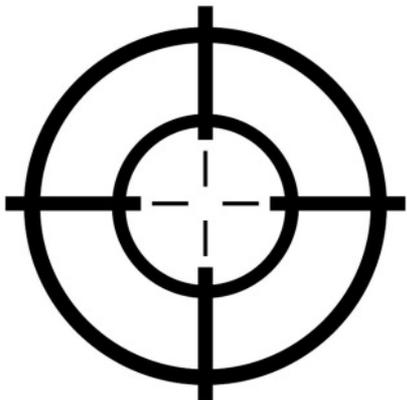
Cybercrime

Targets

How?

- Spam and phishing messages;
- Installing malware;
- Etc.

See special LawPRO magazine on cybercrime



http://www.practicepro.ca/LawPROmag/LawPROmagazine12_4_Dec2013.pdf

“Bad” cheque fraud

- Email from new client
- Matter involves payment of some type
- You receive bad cheque
- Deposit it in your trust account
- Disburse (wire) funds
- Left with trust account shortfall



Cheque in + wire out = CAUTION

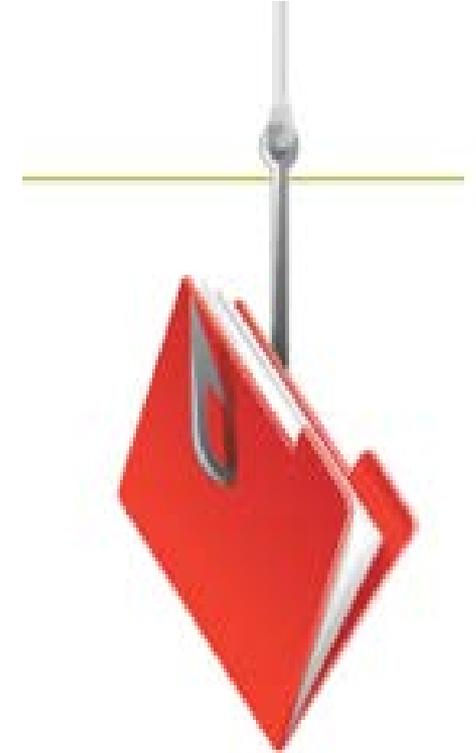
Types of “Bad” Cheques Scam

- Real Estate
- Business Loan
- Debt Collection
- Collaborative Family Law Agreement
- Employee Theft
- Retainer or Deposit Refunds

What is phishing?

Trying to obtain financial or other confidential information from Internet user or getting the user to do something or go to a website

Typically, by sending an email that looks as if it is from a legitimate organization



Spear phishing

A phishing attack directed at a specific person

Will use information known of that person (posted online – Facebook, Twitter, Amazon, LinkedIn, etc.) to make it more convincing



To: Undisclosed recipients
From: BMO <xxcze@bmocm.com>
Subject: New Security Measures

To protect your account, Bank of Montreal has implemented security questions and answers for you to create and use whenever you log in from a different location.

Please create security questions and answers for your BMO online account by [<<clicking here >>](#)

We strongly advise you to enroll now. **The new login method will be effective within the next 24 hours.**

Hover mouse over words – DO NOT CLICK!

Thank you for using BMO.

Regards,
BMO Support Dept.



http://www.onb.it/wp-admin/css/on/bmo/

Fraud by Hacked Email Account



- Client email account hacked
- Hackers monitor email
- Watch for discussion of payment of some sort
- Hackers send spoofed email redirecting payment (e.g. once settlement is achieved or closing upcoming)
- Variations on who is hacked
 - Lawyer, self-rep opponent, third-party dealing with client
- Subscribe to LAWPRO Avoid A Claim to get updates and read more about how these and other frauds work
 - <http://avoidaclaim.com/subscribe>

Corporate records fraud



Identity theft of the corporation

Fraudster files change of Directors and Officers and/or
Registered Office

Shows up with “made up” minute book

Attempts to refinance or sell property

Be aware, look for:

- Document Last filed on Corporate Profile Report
- Get listing of filings for the corporation

Article: <http://avoidaclaim.com/2017/recognizing-the-red-flags-of-real-estate-scams-involving-corporate-identity-theft/>



REPCO Availability

- Self-Assessment Tool
 - <https://www.practicepro.ca/2007/10/self-assessment-tool-for-real-estate-practice-coverage-option/>
- Real Estate Practice Coverage Option
 - http://lawpro.ca/insurance/Practice_Type/REPCO_coverage.asp
- Must be ELIGIBLE to apply
 - Means eligible to practice REAL ESTATE LAW in Ontario as permitted by the Law Society of Ontario
- Not eligible, lawyers:
 - in bankruptcy
 - convicted or disciplined re: real estate fraud
 - Under investigation, where LSO obtains interlocutory suspension or restriction or undertaking not to practice real estate

Self-Assessment Tool

for Real Estate Practice Coverage Option

Not sure if you need to apply for the new Real Estate Practice Coverage Option? Take our self-assessment test to determine your obligations.

As soon as you answer "yes" to any of the questions where there is a "✓" in the "Yes" column, you will have to apply for the Real Estate Practice Coverage Option.

For more information see www.lawpro.ca/Insurance/Practice_Type/REPCO_coverage.asp

Do you...	Yes – you need to buy the endorsement	No – this alone does not require the endorsement	Comments
Register or deposit any instrument(s) under the Land Titles Act or Registry Act?	✓		
Act on transfers (whether purchases, sales or transfers to or from trusts), charges or discharges of charges?	✓		
Arrange title insurance or give opinions/certificates on real estate interests?	✓		
Prepare documents for or undertake searches for real estate transactions?	✓		
Prepare or opine on leases or related documents for residential or commercial tenancies or other leasehold interests?	✓		
Prepare or opine on documents for the development or re-development of land?	✓		
Undertake advocacy before a court or tribunal where a real property interest may be affected by the outcome, or relevant in the course of the litigation, but make no registrations or deposits on title to real estate yourself?		✗	This could include mortgage enforcement, construction lien, zoning or related municipal administrative proceedings, bankruptcy & insolvency, residential rental terminations, residential rent control, human rights, matrimonial or aboriginal/First Nations, environmental, property & casualty insurance litigation. In these cases, the court or tribunal is ultimately "affecting" the "estate, right or interest in land", not yourself.
Prepare wills?		✗	The "estate, right or interest in land" will not be affected simply by your drafting of the will; steps will be taken at a later date by the Estate Trustee or a beneficiary that will affect title.
Administer estates, but make no registrations or deposits on title yourself?		✗	The "estate, right or interest in land" will not be affected simply by your acting for the Estate, provided that you are not dealing with the real estate assets.
Give opinions on environmental, municipal or tax law compliance?		✗	You are not opining on or affecting the ownership of, or priorities in, the underlying real estate interest, but instead commenting on the application of legal principles to a given state of affairs.
Register security interests under the PPSA or equivalent personal property regime, but make no registrations or deposits on title to real estate?		✗	
Act on purchase or charging of shares of a company, where the company owns real estate, but make no registrations or deposits on title to real estate yourself?		✗	

Supplemental Materials

- Tech tip: Don't take the bait on a spear phishing attack
•http://www.practicepro.ca/LAWPROMag/Dont_Take_Bait_Phishing_Attack.pdf
- Tech tip: Danger - when a hacker emails you instructions in the name of your client
•http://www.practicepro.ca/LAWPROMag/Danger_Hacker_Email_Instructions.pdf
- Tech tip: Keeping your passwords strong and secure
•http://www.practicepro.ca/LawPROMag/Keeping_Passwords_Secure.pdf
- Tech tip: 15 tips for preventing identity theft and online fraud
•<http://www.practicepro.ca/LawPROMag/TechTip-15-Tips-Identity-Fraud.pdf>
- Fraud: How to avoid becoming its next victim
•<http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf>
- Show me the money – Funds handling
•http://www.practicepro.ca/LawPROMag/Wire_Transfer_Benefits.pdf
- PracticePRO's best claims prevention tools and resources
•http://www.practicepro.ca/LAWPROMag/LAWPRO_best_claims_prevention_tools.pdf
- Run-Off Insurance Coverage
•http://lawpro.ca/insurance/insurance_type/run-off_ins_cover.asp



FRAUD FACT SHEET
LawPRO - Making a difference for legal professionals

How can you avoid being duped?

Fraud continues to be a significant and costly problem for LawPRO's. Fraudsters are increasingly using lawyers and law firms, and it's not just real estate lawyers who are being targeted. Bankers, legislators, IT and family law lawyers are frequent targets of bad cheque scams involving debt collection, business loans, equipment purchases, special support payments, and housing disputes.

Don't be complacent and think you would never be fooled. These cheats are very sophisticated. The numbers will look legitimate. The fraudsters will be very convincing and the client ID and other documents can get well back real. The fake cheques are printed on real cheque stock and will fool you, and bank staff. They may even be true or even people collaborating on both sides of a transaction to make the scenario more convincing.

What to do if you have a suspicious file

Proceed with caution if you have one of the signs or symptoms that the matter you are handling may be suspicious.

- Look for the red flag of a fraud: see the list on the following pages.
- Ask questions and dig deeper, especially if the facts don't add up or seem unusual for the next page for the whole of things you can do.
- Visit the Avoid Claims Center for more tips and avoid addresses from the Avoid Claims Center. Click on the "Avoid Claims" link to see a full listing of names of confirmed fraudsters.

If you still aren't sure the matter is legitimate, all LawPRO's that experience with multiple bank can help determine if you are being duped. If the matter involved in a bank machine or payment, then we will work with you to prevent the loss, if possible, and to ensure prompt dispute.

Obviously, if you aren't completely sure a matter is legitimate, because the matter should be worked to help you to ensure a strong defense to help. Check for the list of signatures for more tips to ensure your contact with the legitimacy of a matter. The bank can even be involved in a full listing of names of confirmed fraudsters.

Report obvious frauds to LawPRO

Helping to help other lawyers by working closely with the insurance or names of individuals and other documents provided to you in the Avoid Claims Center.

Get fraud updates from Avoid Claims Center Mag

For regular updates on fraud and claims prevention, subscribe to the monthly or quarterly LawPRO's Avoid Claims Mag.

For more info:



lawpro.ca/excess



practicepro.ca



LAWPRO
TitlePLUS Home Buying Guide



@lawpro
@practicepro
@titlepluscanada



LAWPRO
LAWPRO staff

Contact Info

Raymond G Leclair, LL.B.

Vice President, Public Affairs, LAWPRO, Toronto

(416) 598-5890 or 1-800-410-1013

ray.leclair@lawpro.ca

www.practicepro.ca and www.lawpro.ca

Blog: AvoidAClaim.com;

LAWPRO is on LinkedIn & Facebook

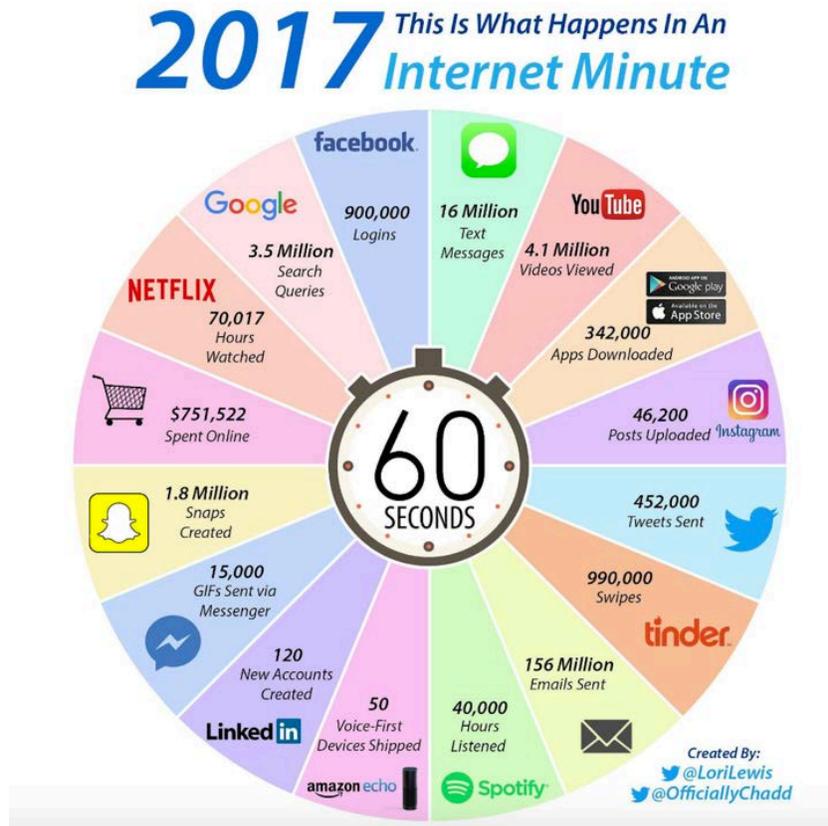
Twitter: @LAWPRO and @practicePRO

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- LinkedIn: Raymond G Leclair
- Twitter: @RayLeclair

Understanding the Risks of the Web and How to Avoid Them

PHIL BROWN,
COUNSEL PRACTICE SUPPORTS & RESOURCES
pbrown@lso.ca
LAW SOCIETY OF ONTARIO



the internet...you're soaking in it

- wifi, ATMs, smart tvs
- what/where is this cloud you speak of?
- SaaS PaaS IaaS
- the IoT will get you next
- smart tvs calling "home"

- home wifi
- weak point
- hub - did u change your pws?
- set up any firewalls?
- MAC filters?
- change your hardware
- public wifi
Its in the name!
- you're connected. . .LSO?
- pineapples are good for you
- man in the middle
- its not just the internet
- humans!
You ARE the weakest link
- bash bunnies
Such a cute name...awwww
- dark web
sex, drugs, and your personal data
- NIST
you're not doing it right
- how to be safer
- vpns
- clean laptops
- 2FA

- data hotspots
get your own
- tether
- a whole new world
be suspicious
- Security - its supposed to be inconvenient

Law Society of Ontario podcasts

<https://www.lsuc.on.ca/technology-practice-tips-podcasts-list/>

Everything you ever wanted to know about technology, but were afraid to ask. New technology Practice Tips from the Law Society give you the answers.

- **10 Serious Email Tips**
- **2Factor**
- **Anonymous Browsers**
- **BYOD**
- **Backups**
- **Clean Devices**
- **Cloud Computing - Introduction**
- **Cloud Regulations**
- **Cloud Location**
- **Desktop Search**
- **Email**
- **Email Encryption**
- **Encryption**
- **Engagement Letters and Retainers**
- **File Management**
- **File Management ... More on**
- **Five Questions about Encryption**
- **Inputs-to-Devices**
- **Internet Of Things**
- **Internet Printing**
- **Juice Jacking**
- **Man in the Middle**
- **News Readers**
- **Panama Papers and Patches**
- **Passwords**
- **PDFs**

- **Phishing**
- **Ports**
- **Public Internet Access**
- **Ransomware**
- **Remote Access**
- **Routers**
- **RSS**
- **Smartphone Security**
- **Social Engineering**
- **Social Media**
- **Tech Audits**
- **Technology Jargon: A through F**
- **Technology Jargon: G through L**
- **Technology Jargon: M through Q**
- **Technology Jargon: R through Z**
- **Texting**
- **Twitter**
- **USB**
- **Voice Recognition**
- **Web Site Tips**
- **Wireless Security**
- **Writing Apps**



15TH ANNUAL Real Estate Law Summit

A Lot from the DOT: An Overview of Recent Developments and Future Bulletins

Jeffrey Lem, C.S., Director of Titles,
Ministry of Government and Consumer Services

April 18, 2018

A LOT FROM THE DOT: AN OVERVIEW OF RECENT DEVELOPMENTS AND FUTURE BULLETINS

15th Annual Real Estate Law Summit
April 18, 2018

- I. Teraview on the Web and the End of Teraview 9.0
 - All regions now on Teraview on the Web
 - All regions (except Toronto) weaned-off Teraview 9.0
 - Teraview 9.0 to be retired in Toronto on May 14

- II. Onland – Virtual Registry Office
 - Phase I Online
 - Phase II due at the end of the year

- III. The 2018 -2019 Bulletin Season

TOPIC	BRIEF SUMMARY
ERPG	New Electronic Registration Procedures Guide
Returns and Withdrawals	If it is certifiable, it will be certified – no withdrawals
Expired Instruments	Expired instruments are only applications to delete
Inadvertent s/t Writs	Allow Teraview to pre-populate writs
First Dealings (Probate)	If you buy in Registry, you get to die in Registry
Double Discharges	Penalties for registering discharges twice
Trusts	No notices of any nature of any trusts
Erroneous Birthdates	Application to amend to correct birthdates
Court Orders	Court order essentials and proscriptions
Municipal Tax Deeds	No more paper registration
Transfer/Deeds	No more paper registration, even if pre-Regulation II
Reference Plans	New rules and protocols for exemptions
Trustee in Bankruptcy	New nomenclature rules
Corporate Re-orgs	No application to amend in lieu of transfers
Construction Liens	More changes to vacating, releasing, discharging
FCPA	New statements re corporate existence and escheat
Large Plans, Colour	Large plans “chunked”; no colour
Conservation Easements	New Section 71 format for conservation easements
Notices of Lease	Variable term start dates permitted
Royalties	Law Statement proving royalty is a land interest
Airport Zoning Regulations	New protocol for registering notice of AZRs
Section 71 Notices	Elimination, once and for all, of “no notice notice”
Inhibiting Orders	Protocol for registering inhibiting orders
Public Streets and Roads	Inter-tier municipal transfers of streets and PAHJ PINS
Development Charges	No registration of DCA Deferral Agreements
Realty Tax Deferrals	No registration of Older Adult Tax Deferral Program
Release of Easement	Allowing single party release by dominant owner



15TH ANNUAL Real Estate Law Summit

A Remedies Refresher for Purchasers

The Honourable Paul Perell
Superior Court of Justice

April 19, 2018

A Remedies Refresher for Purchasers*

When an innocent purchaser refuses to close because of the vendor's breach of contract, he or she may have the remedies of rescission, damages, or specific performance. When the parties close, but the vendor has breached the contract, the innocent purchaser may have the remedy of damages. Where the vendor makes a material misrepresentation, the purchaser may have claims for rescission and or damages depending upon the nature of the misrepresentation and when the misrepresentation was made.

In the context of contracts for the sale of land, there are two types of promises: (1) conditions, which are the fundamental or essential promises, and (2) warranties, which are minor promises incidental to the purpose of the contract.¹ If a condition or fundamental term is breached, the innocent party has the choice of treating the breach of contract as: (a) grounds to end the contract and to claim damages and a return of the deposit, or (b) as a breach of warranty, in which case the innocent party has a right to claim damages but must perform his or her promises because they are not discharged by the guilty party's breach.² Thus, upon a breach of a condition or fundamental term of a contract for the sale of land, the innocent party has a choice or election; the innocent party can elect to end the contract and claim damages, or the innocent party can elect to keep the contract alive by a claim for specific performance.³ The party with the right of election can keep the contract alive and delay the ultimate choice between specific performance or damages up until judgment.⁴

The innocent party, however, does not have to wait up until trial if its choice is to end the contract and claim damages. But to end a contract, the breach must be accepted. As noted in *Howard v. Pickford Tool*:⁵ "An unaccepted repudiation is a thing writ in water and is of no value to anybody: it confers no legal rights of any sort or kind." As a general rule, for the contract to come to an end, the innocent party must communicate his or her decision to treat the contract as at an end to the breaching party within a reasonable time, although in some cases the election to treat the contract at an end will be found to have been sufficiently communicated by the innocent party's conduct.⁶

* Paul M. Perell, judge Superior Court of Justice, March 2018.

¹ *Jorian Properties Ltd. v. Zellenrath* (1984), 46 O.R. (2d) 775 (C.A.); *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1973] 2 All E.R. 39 (H.L.); *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.).

² *Johnson v. Agnew*, [1980] A.C. 367 (H.L.).

³ *Dobson v. Winton and Robbins Ltd.*, [1959] S.C.R. 775; *Johnson v. Agnew* [1979] 1 All E.R. 883 (H.L.); *McNabb v. Smith* (1981), 124 D.L.R. (3d) 547 (B.C.S.C.), aff'd (1982), 132 D.L.R. (3d) 523 (B.C.C.A.); *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338; *Chaulk v. Fairveiw Construction Ltd.* (1977), 3 R.P.R. 116 (Nfld. C.A.); *Zalandek v. De Boer* (1981), 33 B.C.L.R. 57 (S.C.)

⁴ *Dobson v. Winton and Robbins Ltd.*, [1959] S.C.R. 775; *Johnson v. Agnew* [1979] 1 All E.R. 883 (H.L.); *306793 Ontario Ltd. v. Rimes* (1979), 25 O.R. (2d) 79 at pp. 84–5 (C.A.).

⁵ [1951] 1 K.B. 419 at p. 421 (Eng. C.A.); *2071111 Ontario Inc. v. Hirji*, 2018 ONSC 291 (Div. Ct.).

⁶ *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd.* (2006), 270 D.L.R. (4th) 181 (Ont. C.A.); *Chapman v. Ginter*, [1968] S.C.R. 560 at 568; *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.* (2008) 88 O.R. (3d) 721 at para. 53 (C.A.).

A fundamental breach is a refusal by a party to perform his or her major promise or promises under the contract. A fundamental breach deprives the innocent party of substantially the whole benefit of the contract. There are five factors that a court will consider in determining whether there has been a fundamental breach. The five factors are: (1) the ratio of the party's obligations not performed to that party's obligations as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of such breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation performed to the whole obligation.⁷

Repudiation is conduct that demonstrates that a contracting party has absolutely renounced its contractual obligations.⁸ A party to a contract repudiates by clearly stating that he or she does not intend to perform his or her obligations under the contract.⁹ Repudiation may be implied if the conduct of a contracting party is such that a reasonable person would conclude that the party will not or cannot perform the contract in accordance with its terms.¹⁰ Repudiation will occur if a party insists on the performance of the contract in a way that is outside of what the contract requires or if he or she makes demands or introduces pre-conditions for performance without any contractual entitlement to make the demand or introduce the pre-condition.¹¹ Conduct may be repudiatory even if the party has the explanation that he or she mistakenly thought the position being taken was justified under the contract.¹²

For the innocent party to treat the agreement at an end for fundamental breach or repudiation, time must be of the essence. The commonly recited rule for time of the essence is that time may be insisted upon as of the essence only by a litigant: (a) who has shown himself or herself ready, desirous, prompt, and eager to carry out the agreement; (b) who has not been the cause of the delay or default; and, (c) who has not subsequently recognized the agreement as still existing.¹³ When

⁷ *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.* (2008) 88 O.R. (3d) 721 (C.A.) at paras. 35-36; *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd.* (2006), 211 O.A.C. 141; 968703 Ontario Ltd. v. Vernon (2002), 58 O.R. (3d) 215 (C.A.).

⁸ *Piggot Const. Co. v. W.J. Crowe Ltd.*, [1961] O.R. 305 (C.A.), aff'd. [1963] S.C.R. 238; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1993] 3 S.C.R. 423 at para. 40; *Mersey Steel & Iron Co. v. Naylor, Benzons & Co.* (1884), 9 App. Cas. 434 (H.L.); D.M. McCrae, "Repudiation of Contracts in Canadian Law" (1978), 56 *Can. Bar. Rev.* 233.

⁹ *Netupsky v. Hamilton*, [1970] S.C.R. 203.

¹⁰ *Piggot Const. Co. v. W.J. Crowe Ltd.*, [1961] O.R. 305 (C.A.), aff'd. [1963] S.C.R. 238; *McCallum v. Zivojinovic* (1977), 16 O.R. (2d) 721 (C.A.); *Mersey Steel & Iron Co. v. Naylor, Benzons & Co.* (1884), 9 App. Cas. 434 (H.L.).

¹¹ *Wile v. Cook*, [1986] 2 S.C.R. 137; *Weenies Inc. v. 364558 Ontario*, [1987] O.J. No. 1026 (H.C.), aff'd. [1988] O.J. No. 1805 (C.A.), leave to appeal to the S.C.C. ref'd [1989] S.C.C.A. 8; *Canada (Attorney General) v. Rostrust Investments Inc.*, [2009] O.J. No. 5506 (S.C.J.) at paras. 150-158.

¹² [1986] 2 S.C.R. 137; *Weenies Inc. v. 364558 Ontario*, [1987] O.J. No. 1026 (H.C.), aff'd. [1988] O.J. No. 1805 (C.A.), leave to appeal to the S.C.C. ref'd [1989] S.C.C.A. 8.

¹³ *King v. Urban & Country Tpt. Ltd.* (1973), 1 O.R. (2d) 449 (C.A.); *Domicile Developments Inc. v. McTavish* (2000), 45 O.R. (3d) 302 (C.A.); *2329131 Ontario Inc. v. Carlyle Development Corp.*, 2014 ONCA 123; *Morgan v. Lucky Dog Ltd.* (1987), 45 R.P.R. 263 (Ont. H.C.J.); *Bethco Ltd. v. Clareco Can. Ltd.* (1985), 52 O.R. (2d) 609 (C.A.); *Metro. Trust Co. v. Pressure Concrete Services Ltd.*, (1976), 9 O.R. (2d) 375 (C.A.), affg. [1973] 3 O.R. 629 (H.C.J.); *Bayshore Invs. Ltd. v. Wilson* (1975), 11 O.R. (2d) 392 (H.C.J.); *Campbell v. Sovereign Securities & Holdings Co.*, [1958] O.R. 441 (H.C.J.); aff'd [1958] O.R. 719 (C.A.); *Lucifora v. Walfish*, [1955] O.W.N. 898 (C.A.); *Shaw v.*

both contracting parties breach the contract, the contract remains alive with time no longer of the essence, but either party may restore time of the essence by giving reasonable notice to the other party of a new date for performance.¹⁴

If the innocent party accepts the repudiation, then he or she has made an irrevocable choice to treat the agreement at an end and he or she may not claim specific performance.¹⁵ A purchaser who demands the return of this or her deposit is electing to end the contract and will not have a claim for specific performance.¹⁶

An award of damages is a substitutionary remedy measured by the expectation interest of the innocent party; the goal of an award of damages is to place the innocent party in the financial position, he or she would have been had the contract been performed.¹⁷ The measure of damages for the loss of the benefit of the bargain, the main head of damages, is the difference between the market value of the land and the contract price at the date of assessment, which will be the date when the innocent party should have mitigated, typically around the time of the breach of contract, or the date when specific performance was abandoned.¹⁸ When the innocent party does not have a justifiable claim for specific performance, damages are calculated as at the date the innocent party should have mitigated.¹⁹

The onus is on the defendant to prove any failure to mitigate. but the plaintiff must prove his or her calculation of damages. Thus, the proper course is for plaintiff to adduce evidence of the contract price and of the market price or resale price upon which he or she relies in establishing the loss of bargain and then the onus is on the defendant to show, if he or she can, that if the plaintiff had taken certain reasonable mitigating steps, then the innocent party's losses would be lower.²⁰

In 1996, in *Semelhago v. Paramadevan*,²¹ the Supreme Court of Canada altered the law about the availability of specific performance for contracts for the sale of land. Under the former

Holmes, [1952] 2 D.L.R. 330 (C.A.); *Walton v. Morris*, [1944] O.W.N. 410 (H.C.J.); *Toronto Gen. Trusts Corp. v. Smith* (1927), 32 O.W.N. 26 (H.C.J.); *Rice v. Knight* (1920), 18 O.W.N. 393 (H.C.); *Brickles v. Snell* (1916), 30 D.L.R. 3 (P.C.); *Mills v. Haywood* (1877), 6 Ch. D. 196.

¹⁴ *King v. Urban & Country Tpt. Ltd.* (1973), 1 O.R. (2d) 449 (C.A.); *Domicile Developments Inc. v. McTavish* (2000), 45 O.R. (3d) 302 (C.A.); *Shaw Industries Ltd. v. Greenland Enterprises Ltd.*, (1991), 79 D.L.R. (4th) 641 (B.C.C.A.).

¹⁵ *Johnson v. Agnew*, [1979] 1 All E.R. 884 (H.L.).

¹⁶ *Macnaughton v. Stone*, [1949] O.R. 853 (H.C.J.); *Arbutus Garden Homes Ltd. v. Arbutus Gardens Apartments Corp.*, [1996] 7 W.W.R. 338 (B.C.S.C.).

¹⁷ *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 at para. 26; *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707 at para. 29; *Baud Corp., N.V. v. Brook*, [1979] 1 S.C.R. 633 at para. 18; *Main Street Ltd. v. W.B. Sullivan Construction* (1978), 20 O.R. (2d) 401 at para. 51 (C.A.); *Robinson v. Harman* (1848), 1 Ex. 850 at p. 855.

¹⁸ *Main Street Ltd. v. W.B. Sullivan Construction* (1978), 20 O.R. (2d) 401 (C.A.); *642947 Ontario Ltd. v. Fleischer* (2002), 56 O.R. (3d) 417 (C.A.).

¹⁹ *Domowicz v. Orsa Investments Ltd.* (1994), 15 O.R. (3d) 661 and (1994), 20 O.R. (3d) 722 (Gen. Div.), aff'd [1998] O.J. NO. 452 (C.A.).

²⁰ *Main Street Ltd. v. W.B. Sullivan Construction* (1978), 20 O.R. (2d) 401 at para. 78. (C.A.).

²¹ [1996] 2 S.C.R. 415. See also: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, affg. 2010 ONCA 310, revg. [2010] O.J. No. 1772 (S.C.J.); *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.* (2010), 97 O.R.

law, a purchaser was presumptively entitled to specific performance and the remedy was said to be available in the normal course. In *Semelhago*, Justice Sopinka for the Supreme Court stated that specific performance should be granted only if the property in question is unique in the sense that a substitute would not be readily available. The Court stated that a claimant must justify his or her claim for specific performance as an alternative to the common law remedy of damages. Thus, specific performance of an agreement for the purchase and sale of land is no longer available as a matter of course and each situation of a breach of contract for the sale of land must be examined to determine whether damages would be an inadequate remedy.

Since *Semelhago*, plaintiffs have had their claims for specific performance rejected because they did not prove that the subject property was unique at least in the sense that a substitute would not be readily available.²² Damages are usually an adequate remedy, and specific performance may not be an appropriate remedy when land is purchased as an investment to be developed and resold at a profit.²³ However, specific performance remains an available remedy for breach of contract when the property being sold, including commercial properties, has unique or special characteristics.²⁴

A purchaser may refuse to close if the vendor has made a false representation and the other elements of a claim for the equitable remedy of rescission are satisfied. Misrepresentations are

(3d) 241 (C.A.); *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.J.), aff'd. (2003), 63 O.R. (3d) 304 (C.A.), leave to appeal to S.C.C. ref'd. [2003] S.C.C.A. No. 145; *Konjevic v. Horvat Properties Ltd.* (1998), 40 O.R. (3d) 633 (Ont. C.A.); *Domowicz v. Orsa Investments Ltd.* (1993), 15 O.R. (3d) 661 and (1994), 20 O.R. (3d) 722 (Gen. Div.), aff'd. (1998), 40 O.R. (3d) 256 (C.A.).

²² *Toll v. Marjanovic* (2001), 39 R.P.R. (3d) 146 (Ont. S.C.J.); *Monson v. West Barrhaven Development Inc.*, [2000] O.J. No. 5209 (S.C.J.); *Picavet v. Salem Developments Ltd.*, [2000] O.J. No. 2806 (S.C.J.); *Konjevic v. Horvat Properties Ltd.* (1998), 40 O.R. (3d) 633 (C.A.); *Raymond v. Raymond Estate* 2008 SKQB 278; *401675 Alberta Limited v. Trail South Developments Inc.*, 2001 ABCA 274 leave to appeal ref'd. [2001] S.C.C.A. No. 602; *365733 Alberta Ltd. v. Tiberio*, 2008 ABCA 341.

²³ *Shapiro v. 1086891 Ontario Inc.*, [2006] O.J. No. 30 (S.C.J.); *Hunter's Square Developments Inc. v. 351658 Ontario Ltd.* (2002), 60 O.R. (3d) 264 at para. 45 (S.C.J.); *Domowicz v. Orsa Investments Ltd.* (1993), 15 O.R. (3d) 661 and (1994), 20 O.R. (3d) 722 (Gen. Div.), aff'd. (1998), 40 O.R. (3d) 256 (C.A.); *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338 (Ont. H.C.J.).

²⁴ *Yan v. Nadarajah*, 2017 ONCA 196; *Gillespie v. 1766998 Ontario Inc.*, 2014 ONSC 6952; *Nordlund Family Retreat Inc. v. Plominski*, 2014 ONCA 444; *Barrick Gold Corp. v. Goldcorp Inc.*, 2011 ONSC 3725; *Raymond v. Raymond Estate*, 2011 SKCA 58; *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.*, (2009), 97 O.R. (3d) 241 (C.A.); *Covlin v. Minhas*, 2009 ABQB 42, var'd 2009 ABCA 404 (redevelopment property); *2039903 Ontario Inc. v. Parktrail Estates Inc.*, [2008] O.J. No. 4725 (S.C.J.); *Minto v. Jones*, [2008] O.J. No. 3687 (S.C.J.); *Castledowns Law Office Management Ltd. v. 1131102 Alberta Ltd.*, [2007] A.J. No. 650 (Q.B.) (law office); *Canamed (Stamford) Ltd. v. Masterwood Doors Ltd.*, [2006] O.J. No. 802 (S.C.J.); *DeFranco v. Khatri*, [2005] O.J. No. 1890 (S.C.J.); *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.J.), aff'd. (2003), 63 O.R. (3d) 304 (C.A.), leave to appeal to S.C.C. ref'd. [2003] S.C.C.A. No. 145 (hotel site); *2475813 Nova Scotia Ltd. v. Lundrigan*, 2003 NSSC 48 (assembly of condominium units); *Taberner v. Ernest & Twins Development Inc.*, [2001] B.C.J. No. 429 (B.C.S.C.); *Jones v. TWS Developments Inc.*, [2001] O.J. No. 2358 (S.C.J.); *532782 B.C. Inc. v. Republic Financial Ltd.*, 2001 ABQB 581 (redevelopment properties); *Tropiano v. Stonevalley Estates Inc.*, (1997), 36 O.R. (3d) 92 (Gen. Div.); *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.* (1997), 36 O.R. (3d) 328 (S.C.J.) (big box store); *Fossum v. Visual Developments Ltd.*, [1997] A.J. No. 1255 (Q.B.); *Morsky v. Harris*, [1997] 6 W.W.R. 557 (Sask. Q.B.), rev'd. on different grounds [1988] 8 W.W.R. 340 (Sask. C.A.).

connected to the equitable remedy of rescission. A representation simpliciter is a statement of a past or present fact without the statement also being a promise.²⁵ Modern law recognizes, however, that a statement may be concurrently a promise and also a representation.

Equity provides the remedy for rescission for misrepresentations. The constituent elements for this remedy are:²⁶ (a) a false statement; (b) materiality, which is to say that the false statement must be of a type that would influence a contracting party's decision to enter into the contract; (c) the false and material statement must have induced the party to enter into the transaction; and (d) the innocent party must object before the closing of the transaction, unless the representation is fraudulent or an *error in substantialibus*. A fraudulent misrepresentation will support a claim for rescission both before and after closing.

For the purposes of the remedy of rescission, a negligent misrepresentation can be considered to be a kind of innocent misrepresentation in the sense that an innocent misrepresentation is contrasted to a fraudulent misrepresentation; it is innocent because it is not fraudulent. Similarly, a negligent misrepresentation is not a fraudulent statement and, in that sense, it is an innocent, albeit careless, statement.²⁷

If the misrepresentation is made fraudulently, then there is the tort claim for deceit or fraudulent misrepresentation. This is a claim for damages measured by the common law tort rules for damage quantification. The elements for the tort of deceit are: (a) a false statement by the defendant; (b) the defendant knowing that the statement is false or being indifferent to the statement's truth or falsity; (c) the defendant having an intent to deceive the plaintiff; (d) the false statement being subjectively material; (e) the false statement having induced the plaintiff to act; and (e) the plaintiff suffering damages.²⁸

If the misrepresentation is made negligently, there is the tort of negligent misrepresentation. The tort of negligent misrepresentation allows a damage claim to be made for non-fraudulent misrepresentations if there is a duty of care in making a statement. The elements of the tort of negligent misrepresentation are: (a) a duty of care based on a special relationship between the plaintiff and the defendant; (b) a false statement by the defendant; (c) the defendant being negligent

²⁵ *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Gen. Div.); varied and plaintiff granted leave to amend pleading (1993), 11 O.R. (3d) 224n (C.A.); *Foster Advertising Ltd. v. Keenberg* (1987), 35 D.L.R. (4th) 521 (Man. C.A.), leave to appeal to S.C.C. refused, [1987] 4 W.W.R. lxvi; *Reid v. Marr's Leisure Holding Inc.*, [1994] 7 W.W.R. 542 (Man. C.A.); *Jacks v. U & R Tax Services Ltd.* (1995), 33 C.P.C. (3d) 201 (Man. Q.B.).

²⁶ *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (C.A.); *Beer v. Townsgate I Ltd.* (1997), 36 O.R. (3d) 137 (C.A.); *Panzer v. Zeifman* (1978), 20 O.R. (2d) 502 (C.A.); *Olsen v. Poirier* (1978), 21 O.R. (2d) 642 (H.C.), aff'd (1980), 28 O.R. (2d) 744 (C.A.).

²⁷ It should be noted that it remains true today that a misrepresentation that is neither fraudulent nor negligent does not give rise to a claim for damages, unless it is also or concurrently a promise, in which case the liability would be contractual and not tortious.

²⁸ *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at p. 344; *Fiorillo v. Krispy Kreme Doughnuts, Inc.* (2010), 98 O.R. (3d) 103 at paras. 66-67 (S.C.J.); *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.* (1990), 78 Alta. L.R. (2d) 62 (Q.B.), aff'd (1992), 3 Alta. L.R. (3d) 124 (C.A.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.); *Wassilyn v. Rick Zeron Stables Inc.*, 2013 ONSC 127.

(breaching his or her duty of care) in making the false statement; (d) the plaintiff reasonably relying on the false statement;²⁹ and (e) the plaintiff suffering damages as a consequence.³⁰ Unlike the claim for rescission based on an innocent misrepresentation, the claim for damages for negligent misrepresentation is not affected by the closing of the transaction.

²⁹ A plaintiff must prove that the misrepresentation was material in the sense that it would be likely to influence the conduct of the plaintiff or would be likely to operate upon his judgment: *Humbruff v. Ontario Municipal Employees Retirement Board* (2006), 78 O.R. (3d) 561 at paras. 87-89 (C.A.); *Canada Trustco Mortgage Co. v. Bartlet & Richardes* (1996), 28 O.R. (3d) 768 at p. 773 (C.A.).

³⁰ *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 (H.L.).

Beatty et al. v. Wei et al.

Wei v. Beatty et al.

[Indexed as: Beatty v. Wei]

2017 ONSC 3478

Superior Court of Justice, Cavanagh J. June 5, 2017

Sale of land — Agreement of purchase and sale — Representations — Sellers representing in agreement of purchase and sale that to best of their knowledge property had never been used for growth or manufacture of illegal substances — Purchaser discovering before closing that property had previously housed marijuana grow operation — Sellers unaware of that fact when agreement of purchase and sale was made — Purchaser materially induced to enter into agreement of purchase and sale on strength of illegal substances clause — Sellers’ representation substantial and material — Agreement of purchase and sale void *ab initio* — Purchaser entitled to remedy of rescission and return of deposit.

The agreement of purchase and sale (“APS”) for a residential property provided that the sellers represented and warranted that to the best of their knowledge and belief, the property had not been used for the growth or manufacture of illegal substances. Before closing, the purchaser discovered that the property had housed a marijuana grow operation in 2004. The sellers were unaware of that fact when the APS was made. The purchaser refused to close and demanded the return of his deposit. The sellers refused to agree to the termination of the APS and brought an application for declarations that the APS was a firm and binding contract, that the purchaser had breached the APS and that the deposit had been forfeited. The purchaser applied for declarations that he was not required to complete the transaction, for the return of his deposit and for related relief.

Held, the purchaser’s application should be allowed; the sellers’ application should be dismissed.

The illegal substances clause was a representation which was a statement of a present fact, to the best of the sellers’ knowledge and belief, that was intended to be relied upon when made and upon which the purchaser was entitled to continue to rely, at least until closing, while the APS was an executory contract. The representation was substantial and material. The purchaser was materially induced to enter into the APS on the strength of the illegal substances clause. The APS was *void ab initio*. The purchaser was entitled to the remedy of rescission and to the return of his deposit.

Cases referred to

Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60, 178 D.L.R. (4th) 1, 247 N.R. 97, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, 39 C.P.C. (4th) 100, [2000] I.L.R. I-3741, 91 A.C.W.S. (3d) 796; *John Levy Holdings Inc. v. Cameron & Johnstone Ltd.*, [1993] O.J. No. 3183 (C.A.), affg [1992] O.J. No. 1592, 26 R.P.R. (2d) 130, 35 A.C.W.S. (3d) 134 (Gen. Div.); *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *McGrath v. MacLean* (1979), 22 O.R. (2d) 784, [1979] O.J. No. 4039, 95 D.L.R. (3d) 144, [1979] 1 A.C.W.S. 155 (C.A.); *Panzer v. Zeifman* (1978), 20 O.R. (2d) 502, [1978] O.J. No. 3456, 88 D.L.R. (3d) 131, [1978] 2 A.C.W.S. 327 (C.A.); *Petersen v. Matt*, [2014] O.J. No. 745, 2014 ONSC 896 (Div. Ct.); *Sevidal v. Chopra* (1987), 64 O.R. (2d) 169, [1987] O.J. No. 732, 41 C.C.L.T. 179, 2 C.E.L.R. (N.S.) 173, 45 R.P.R. 79, 5 A.C.W.S. (3d) 448 (H.C.J.); *Singh v. Trump*, [2016] O.J. No. 5285, 2016 ONCA 747, 76 R.P.R. (5th) 177, 408 D.L.R. (4th) 235, 62 B.L.R. (5th) 216, 271 A.C.W.S. (3d) 503; *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1991] O.J. No. 1787, 51 O.A.C. 321, 4 B.L.R. (2d) 220, 40 C.C.E.L. 262, 29 A.C.W.S. (3d) 622 (Div. Ct.)

Authorities referred to

Swan, Angela, and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis, 2012)

APPLICATIONS by the purchaser and sellers for relief in relation to an agreement of purchase and sale.

John Lo Faso and David Morawetz, for applicants.

Patrick Bakos, for respondent Zhong Wei.

Amanda Gibson, for respondent Re/Max Premier Inc.

Patrick Bakos, for applicant Zhong Wei.

John Lo Faso and David Morawetz, for respondents Jonathan Beatty and Jacqueline Beatty.

Amanda Gibson, for respondents Harold Balchand and Re/Max Premier Inc.

CAVANAGH J.: —

Introduction

[1] There are two applications before me that were heard together.

[2] The first application was brought by Jonathan Beatty and Jacqueline Beatty (the “sellers”), the sellers of a residential property municipally known as [number omitted] Stainforth Drive, Toronto (the “property”), against Zhong Wei (the “purchaser”), the purchaser of the property under an agreement of purchase and sale dated May 15, 2016 (the “APS”), and against Re/Max Premier Inc., the sellers’ agent, which holds a \$30,000 deposit (the “deposit”). The second application was brought by the purchaser against the sellers and against Harold Balchand and Re/Max Premier Inc., the sellers’ agents (together, the “agent”).

[3] Both applications are concerned with a particular provision in the APS. The APS includes Schedule A, which is attached to and forms part of the APS. Schedule A includes the following representation and warranty:

The Seller represents and warrants that during the time the Seller has owned the property, the use of the property and the buildings and structures thereon has not been for the growth or manufacture of any illegal substances, and that to the best of the Seller’s knowledge and belief, the use of the property and the buildings and structures thereon has never been for the growth or manufacture of illegal substances. This warranty shall survive and not merge on the completion of this transaction.

I will refer to this provision as the “illegal substances clause”.

[4] After the APS was made and before closing, the purchaser learned that in 2004 the property was used to grow marijuana. The purchaser’s lawyer notified the sellers’ lawyer of this discovery by letter dated July 8, 2016 which attached a letter dated June 27, 2016 from Toronto Police Service that confirmed that the property was used to produce marijuana and that the police attended at the property in 2004 and seized 265 marijuana plants.

[5] The purchaser's lawyer's letter advised the sellers' lawyer that the purchaser is not willing to complete the transaction. The purchaser demanded a return of his deposit. The sellers refused to agree to termination of the APS and they brought their application against the purchaser for remedies resulting from the refusal of the purchasers to complete the sale and purchase transaction.

[6] In order to mitigate their damages, the sellers sold the property to another purchaser. The purchase price was \$86,100 lower than the purchase price under the APS.

[7] The sellers apply for declarations that

- (a) the APS is a firm and binding contract;
- (b) the purchaser has breached the APS;
- (c) the deposit has been forfeited to the sellers;
- (d) the purchaser is liable to the sellers for damages for breaching the APS.

[8] The purchaser applies for declarations that

- (a) the purchaser is not required to complete the transaction contemplated by the APS;
- (b) alternatively, if the purchaser is required to do so, that the purchase price be adjusted to reflect a fair market value which takes into account that the property was previously used for a marijuana grow operation;
- (c) the sellers have breached the APS;
- (d) the sellers are liable to the purchaser for all damages suffered by the purchaser from the sellers' breach of the APS and an order directing a reference for determination of such damages or, alternatively, damages in the amount of \$250,000;
- (e) the purchaser is entitled to the return of the deposit;
- (f) the purchaser is entitled to termination of the APS resulting from the misrepresentations of the agent and that the agent is liable for the damages suffered by the purchaser resulting from such misrepresentations.

[9] The parties have agreed that

- (a) if I find that the purchaser breached the APS and that the sellers are entitled to damages, I should determine the

amount of such damages based upon the evidence filed on these applications;

- (b) if I find that the purchaser was not required to complete the APS, the purchaser is entitled to recover the deposit and his claims against the sellers and the agent for damages should be allowed to proceed as an action;
- (c) if I find that the purchaser (i) was required to complete the APS, (ii) is not liable to the sellers for damages, and (iii) is entitled to recover damages from the sellers and the agent, the applications should be converted to an action for determination of whether the purchaser is entitled to damages and, if so, in what amount.

[10] For the following reasons, I conclude that the purchaser is entitled to the remedy of rescission such that the APS is void *ab initio*.

Analysis

[11] The first question that arises on these applications is whether the purchaser is entitled to the remedy of rescission such that the APS is void *ab initio*. If the purchaser was entitled to elect not to complete the APS and to treat it as void *ab initio*, he is entitled to the return of the deposit and would not be liable to the sellers for breach of the APS.

[12] The sellers submit:

- (a) The statements made in the illegal substances clause were true when the representations and warranty were given because the sellers had absolutely no knowledge at the time the APS was signed that marijuana had ever been grown at the property.
- (b) The illegal substances clause did not place a duty upon the sellers to make inquiries to determine whether the property had ever been used to grow or manufacture illegal substances.
- (c) Information discovered after the date on which the representations and warranty were given on May 15, 2016 through the illegal substances clause is irrelevant and, if the parties had intended that the statements made in the illegal substances clause must be true as of the closing date, they needed to use clear language to reflect that intention, and they did not.

- (d) Therefore, there is no basis upon which the purchaser could have rescinded or otherwise validly refused to close the APS, and his refusal to do so was a breach of the APS.

[13] The purchaser submits:

- (a) The illegal substances clause is intended to protect a purchaser in exactly the situation in which the purchaser finds himself.
- (b) The illegal substances clause expressly provides that the warranty “shall survive and not merge on the completion of this transaction”, such that the statements made must be true as of the date of closing, and thereafter.
- (c) The sellers knew, at least before closing when they were so informed by the purchaser, that the property had been used to grow or manufacture marijuana in 2004 and, therefore, upon acquiring such knowledge, the sellers could no longer truthfully give the warranty and make the representations in the illegal substances clause.
- (d) The statement in the illegal substances clause that, to the best of the sellers’ knowledge and belief, the property has never been used for the growth of marijuana thereby became a misrepresentation, and the warranty was breached before closing, such that the purchaser was entitled to rescind the APS.

[14] In support of their submissions, the sellers rely upon a legal doctrine that, they submit, has been settled for hundreds of years. This doctrine is that when there is a valid contract for sale of land the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and the right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. The sellers submit that where there is a contract for the sale of land, if anything happens to the estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser: *Lysaght v. Edwards* (1876), 2 Ch. D. 499, at pp. 506-507. Therefore, on the basis of this doctrine, the sellers submit that after the APS, the risk of discovery that the property had previously been used for growing or manufacturing marijuana rested with the purchaser.

[15] I do not question the doctrine upon which the sellers rely. This doctrine is concerned with who should bear the risk of unforeseen events that occur between the date of an agreement of purchase and sale and the date for completion of the transaction. This doctrine is, however, subject to the contractual terms between the seller and the purchaser: *Lysaght*, at p. 506. This doctrine is, as well, subject to the law with respect to a seller's duty of disclosure of latent defects when there is a contract for the sale of land: *McGrath v. MacLean* (1979), 22 O.R. (2d) 784, [1979] O.J. No. 4039, 1979 CarswellOnt 1426 (C.A.), at paras. 13-15. It is also subject to the law concerning representations that materially induce a person to enter into a contract, including a representation that is incorporated into the contract.

[16] I will first address the legal effect of the illegal substances clause in the APS.

[17] The sellers submit that the illegal substances clause should not be interpreted to require that the statements made be true as of the date of closing and thereafter, but that such statements need only be true when made, on the date of the APS. The sellers point to other provisions in the APS (for example, clause 17 concerning residency, and the first paragraph of Schedule A concerning the working condition of chattels) where a representation and warranty was made that, by the express language thereof, was effective "on completion" or "on closing". The sellers submit that similar express language would need to have been included in the illegal substances clause in order for the statements to be required to be true as of the date of closing.

[18] The statement in the illegal substances clause that the property had never been used for the growth or manufacture of illegal substances was expressly made "to the best of the Seller's knowledge and belief". I accept that through the use of these words, the sellers did not warrant the absolute truth of the statement that the property has never been used for the growth or manufacture of illegal substances: *John Levy Holdings Inc. v. Cameron & Johnstone Ltd.*, [1992] O.J. No. 1592, 1992 CarswellOnt 602 (Gen. Div.), at para. 64, affd [1993] O.J. No. 3183, 1993 CarswellOnt 5613 (C.A.).

[19] In my view, however, there is an important distinction between a warranty and a representation when one considers a contractual provision such as this. A warranty is a contractual promise, usually made in the context of a sale, that the thing being sold has some particular quality: Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont. LexisNexis, 2012), at para. 8.2.2. In respect of the illegal substances clause, the qualifying words mean that there is no contractual

promise, or warranty, that the property has never been used for the growth of illegal substances. I accept the sellers' submission that, without clear language such as the words "on completion", or "on closing", to show that the parties intended that the content of the warranty could change with changing circumstances after the date of the APS when the warranty was given, the content of the warranty does not change. The warranty that survived completion of the transaction was the warranty that was given on the date of the APS.

[20] The statement in the illegal substances clause is, however, also a representation. The representation is that, to the best of the sellers' knowledge and belief, the use of the property has never been for the growth or manufacture of illegal substances. In my view, this representation is a statement of a present fact, to the best of the sellers' knowledge and belief, that was intended to be relied upon when made and one upon which the purchaser was entitled to continue to rely, at least until closing, while the APS was an executory contract.

[21] It is well settled that where a representation has been made in the *bona fide* belief that it is true, and the party who has made it discovers that it is untrue, such party cannot remain silent. Silence which follows a representation can found an action for misrepresentation where the silence continues after the representor learns that the representation is no longer true or was never true: *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1991] O.J. No. 1787, 1991 CarswellOnt 146 (Div. Ct.), at paras. 14-16. This principle applies even where a representation made at the time a contract is signed becomes untrue before or at the time of completion: *Sevidal v. Chopra* (1987), 64 O.R. (2d) 169, 1987 CarswellOnt 226 (H.C.J.), at paras. 90-95.

[22] Had the sellers, themselves, discovered after the date of the APS and before closing that the property had been used to grow marijuana, they would have been required to disclose to the purchaser that their representation, made to the best of their knowledge and belief when the APS was made, was not true. The purchaser's rights are not affected by the fact that he was the one who discovered this information and communicated it to the sellers. Upon acquiring knowledge that the property had been used to grow marijuana, the sellers could no longer honestly give the representation in the illegal substances clause.

[23] It is settled that rescission is available in the case of an executory contract where a material misrepresentation that was an inducement to enter into the contract is established. Rescission may be obtained on the basis of a non-fraudulent misrepresentation where the defendant has made a false statement

that was material and that induced the plaintiff to enter the contract, and where the innocent party has sought rescission before the closing of the transaction. After completion of the transaction, absent a finding of fraud, in the context of real estate transactions induced by misrepresentation, execution of the agreement has typically been held to constitute a barrier to rescission: *Singh v. Trump*, [2016] O.J. No. 5285, 2016 ONCA 747, at paras. 156-157; *Panzer v. Zeifman* (1978), 20 O.R. (2d) 502, [1978] O.J. No. 3456 (C.A.).

[24] In order for a misrepresentation that is a term of the contract to give the innocent party the option of rescinding the contract and having it declared void *ab initio*, the misrepresentation must be material, substantial or go to the root of the contract: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60, at paras. 44, 47. A statement is material if it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be part of the inducement, to enter into the contract. Even then, it would be open to the representor to show that the representee knew the truth before she entered into the contract, and therefore could not rely on the misstatements, or by showing that the representee did not rely upon the misstatements, whether she knew the facts or not: *Panzer*, at para. 20.

[25] On these applications, the purchaser provided affidavit evidence that he had no knowledge of the marijuana grow operation when he submitted his offer to purchase the property. He discovered that the property had been used to grow marijuana when his real estate agent so informed him after an Internet search in relation to the property. The purchaser's evidence is that he relied on the illegal substances clause when he entered into the APS as, he says, any purchaser would. He has given evidence that, as a father of two young children, he is extremely concerned about their safety if they were to live in this house, because the growth and manufacture of marijuana can lead to mould and other health risks. The purchaser appended to his affidavit published articles dealing with the health, safety and financial effects of a home with a former marijuana grow operation.

[26] The sellers provided evidence that since he and his wife bought the property in 2009 neither they, nor anyone else, has used the property to grow marijuana or produce any illegal drugs. The sellers have provided evidence that in the more than seven years they have resided at the property they have not seen any evidence of mould or any other indication that marijuana was previously grown at the property. The sellers's evidence is that Mr. Beatty's mother-in-law, who has severe asthma and is

very sensitive to air quality, has slept in the basement of the property on many occasions, without incident.

[27] I do not need to decide whether there is or is not any problem with mould or air quality, or any other health concern at the property. The evidence filed on these applications does not, in any event, allow me to do so. However, given that the illegal substances clause was expressly included in the APS by the sellers and, separately, by the purchaser (using a clause with identical language) I am able to conclude that the purchaser was materially induced to enter into the APS on the strength of the illegal substances clause, including the sellers' representation that to the best of their knowledge and belief, the use of the property has never been for the growth or manufacture of illegal substances. The fact that when the property was sold on the open market, with full disclosure of the information that it had been used for the growth of marijuana, the purchase price was almost \$87,000 less than the purchase price that the purchaser had agreed to in the APS, supports my conclusion that the sellers' representation was substantial and material.

[28] I therefore conclude that the purchaser is entitled to the remedy of rescission in respect of the APS and to treat it as void *ab initio*. The purchaser is entitled to the return of the deposit, and is not liable to the sellers for damages for breach of the APS.

[29] The purchaser has also submit that the sellers were in a better position to discover any former marijuana grow operation at the property and that they had the onus of showing that they could not have known of this fact, rather than the purchaser having to show that the sellers knew of the former marijuana grow operation. The purchasers cite *Peterson v. Matt*, [2014] O.J. No. 745, 2014 ONSC 896 (Div. Ct.) as authority for this proposition. The purchaser submit that the sellers made a representation as to the growth of illegal substances at the property with reckless disregard for the truth and, therefore, the sellers cannot meet their onus of showing that they could not possibly have known of the defect. The sellers dispute that they had an onus to undertake any investigations into whether the property had formerly been used to grow marijuana or any other illegal substance. The sellers rely upon the well-established principles in *McGrath*, at paras. 13-15.

[30] Given my conclusion that the purchaser is entitled to rescind the APS because, with the discovery that the property had formerly been used to grow marijuana, the material representation made in the illegal substances clause is not true, it is not necessary for me to decide whether the sellers breached an obligation to disclose a latent defect.

[31] The purchaser wishes to proceed with his claim for damages against the sellers and the agent, even if he is successful in obtaining an order for rescission of the APS. I did not hear submissions on whether he is able to do so as a matter of law, and I do not decide this question on these applications. I note that in *Guarantee Co.*, the Supreme Court of Canada addressed the question of the availability of damages where a contract has been declared void *ab initio* and wrote, at para. 47: “We express no opinion on the availability of damages in such cases”.

Disposition

[32] I therefore order that the sellers’ application is dismissed.

[33] On the purchaser’s application, I order and declare that

- (i) the purchaser is entitled to rescind the APS and treat it as void *ab initio*;
- (ii) the purchaser is entitled to the return of the deposit held by the agent, and the agent is directed to return the deposit, together with interest earned thereon, to the purchaser;
- (iii) the purchaser’s application against the sellers and the agent for damages shall be treated as an action and shall proceed to trial. I direct the parties to consult and provide the court with their proposal for directions for the action to be included in the formal order to be issued.

[34] If the parties are unable to resolve costs, the purchaser may make written submissions within 20 days (not to exceed five pages, excluding costs outline), and the sellers and the agent may make responding submissions within ten days thereafter (also not to exceed five pages).

Purchaser’s application allowed; sellers’ application dismissed.



15TH ANNUAL Real Estate Law Summit

Tendering

Silvana D'Alimonte
Blake, Cassels & Graydon LLP

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TENDERING

Silvana M. D'Alimonte*

I. Introduction: What to Do When the Deal Won't Close

Every real estate lawyer at one point or another has dealt with a party to a transaction who suggests, through conduct or otherwise, that it may not wish to or may be unable to close a transaction or otherwise perform its obligations when due. Lawyers in such situations will be faced with a number of potential courses of action. In order to preserve your client's rights, it may be necessary to prove that your client is ready, willing and able to perform its obligations under the agreement by tendering on the other party. By tendering, the innocent party shows that the failure of the transaction was not his or her fault. It should be underscored that tendering is essentially an evidentiary matter—you must provide sufficient evidence that your client was able to perform its obligations under the agreement of purchase and sale at the appointed time. This is done by the delivery and presentation of all required documentation (and funds, if acting for the purchaser, or keys, if acting for the vendor) upon the other party at the appointed time. In some instances, however, tendering may not be necessary because the other party's conduct amounts to an anticipatory breach. In others, your client may also not be able to perform its obligations when they become due. In such instances, which may be called a “dual breach”, different considerations will apply.

This article will review three key aspects of tendering. First, the article will examine the interaction between “tender” and “anticipatory breach.” Specifically, what conduct amounts to an anticipatory breach? What is the appropriate response to such conduct? And, what remedies are available to your client? Second, this article will explore what steps you should take to preserve your client's rights when neither party is able to close the transaction on time. Finally, the article will consider how electronic registration has affected the logistics of tendering.

* Blake, Cassels & Graydon LLP, Toronto, Ontario. April, 2018 (updated). I would like to gratefully acknowledge the able assistance of Karinne Coombes, former Student-at-Law, Blake, Cassels & Graydon LLP (who assisted with an earlier version of this paper) and Alannah Mozes, Student-at-Law, Blake, Cassels & Graydon LLP (who assisted with this update).

Always remember that tendering is an evidentiary matter, so care should be taken to ensure that proper documentation is provided to prove that your party was ready, willing and able to close the transaction. If there has been an anticipatory breach by the other party or if your client is unable to close, it is crucial to ensure that the proper steps are taken to preserve your client's position.

II. Anticipatory Breach and Its Interaction with Tendering

Fridman indicates that anticipatory breach “occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due.”¹ Stated another way, the renunciation of a contract may be express or implied. A party to a contract may state before the time for performance that he or she will not, or cannot, perform his or her obligations. This is tantamount to an express renunciation. On the other hand, a renunciation will be implied if the conduct of a party is such as to lead a reasonable person to the conclusion that he or she will not perform, or will not be able to perform, when the time for performance arises²—that is, that he or she no longer intends to be bound by the provisions of the contract.³

Not every express or implied intention not to perform will amount to a repudiation. To constitute a repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he or she is entitled under the contract.⁴ As stated in Perell and Engell:

A variety of modifiers have been used to describe the type of breach that constitutes a repudiation, and it is in this area that the analysis tends to merge or blend with the law associated with warranties, conditions or intermediate terms. The analysis blends because the legal consequences of a repudiation are the same as for a breach of a contract term classified as a condition. The common issue is whether the breach is of the sort that it ought to free or discharge

¹ GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 585.

² This sentence and the previous three sentences were quoted by Howland J.A. in *McCallum v Zivojinovic* (1977), 16 OR (2d) 721 [*McCallum*].

³ Hugh Beale, ed, *Chitty on Contracts*, 32nd ed (London, UK: Thomas Reuters, 2015) at para 24-018.

⁴ *Decro-Wall International S.A. v Practitioners in Marketing Ltd.*, [1971] 2 All ER 216 at 232 (CA).

the innocent party from its obligations to perform the contract. Such a breach has been described variously as a breach that goes to the root or heart or substance or foundation of the contract.⁵

Ultimately, it is a question of fact as to whether or not certain conduct amounts to a repudiation,⁶ and one has to consider the conduct in the context of the nature of the contract, the attendant circumstances and the motives for the intended repudiation. For example, in *Kearns v Rundall*,⁷ the failure of the purchaser to pay the deposit as and when required under the purchase agreement for a property amounted to a repudiation of the agreement. In contrast, in *Lee v OCCO Developments Ltd.*,⁸ the refusal of the vendor to deliver a transfer of title to real property because of the purchaser's refusal to pay goods and services tax was not considered a fundamental term giving rise to repudiation because the purchaser had substantially obtained the benefit of the contract (a tax-driven investment pursuant to which the purchaser had already obtained beneficial title to the property) at the date set for the delivery of the transfer. In *2071111 Ontario Inc. v Hirji*,⁹ an email from the parties' joint realtor, that stated the purchaser would not be closing the transaction on the agreed upon date did not constitute repudiation in the face of ongoing negotiations between the parties' lawyers to extend the closing date and in the absence of a demand by the sellers that the transaction was required to close on the original date as set out in the agreement.

2. The Interplay Between Tender and Anticipatory Breach: How to Respond When You Know the Other Party Will Not Close?

When it becomes apparent that the other party will be unwilling or unable to close the transaction according to its original terms, it is important to consider whether the conduct amounts to anticipatory breach. If it does, the innocent party will have two options: (i) accept the repudiation and sue for damages, or (ii) insist upon performance and tender upon the defaulting

⁵ Paul M Perell & Bruce H Engell, *Remedies and the Sale of Land*, 2d ed (Toronto: Butterworths, 1998) at 32 [Perell and Engell].

⁶ DM McRae, "Repudiation of Contracts in Canadian Law" (1978) 56 Can Bar Rev 233 at 235-238 [McRae].

⁷ [2006] OJ No 2507 (Ont Sup Ct J) [*Kearns*], affirming *460641 Ontario Ltd. v Weiss*, [1984] OJ No 865 (Ont HC). See also *1029865 B.C. Ltd. v 1007442 B.C. Ltd.*, 2017 BCSC 926, where the failure of the purchaser to pay a second deposit as and when required under the purchase agreement for a commercial property amounted to a repudiation of the agreement.

⁸ (1996), 5 RPR (3d) 203 (NBCA).

⁹ 2018 ONSC 291.

party in accordance with the original terms of the agreement.¹⁰ If the conduct does not amount to anticipatory breach, the non-defaulting party should be prepared to tender upon the defaulting party according to the terms of the agreement.

(a) Accept Repudiation

When faced with conduct that is of a sufficiently serious nature as to constitute repudiation, the innocent party must elect whether to “accept” the repudiation. If the innocent party accepts the repudiation, then the contract is considered to be at an end in the sense that the innocent party is released from the duty of future performance,¹¹ and the innocent party may immediately sue for damages for breach of contract or may sue for determination or cancellation of the contract.

A number of cases suggest that communication of the acceptance of a repudiation to the other party need not be by words if it can be reasonably inferred from all the circumstances.¹² Other cases suggest that the election is not complete until it is communicated to the other party.¹³ For example, Locke J. in *Canada Egg Products Ltd. v Canadian Doughnut Co.* stated that:

Where the promisee elects to treat the contract as at an end or, as it is sometimes described, to rescind the contract, his election is not complete until it is communicated to the other party, and this must be done within a reasonable time.¹⁴

Locke J. went on to state that no particular manner of communicating such election is required, and that service of a statement of claim claiming damages for anticipatory breach was sufficient notice of election to treat the contract as at an end. Given the uncertainty in the law, the prudent course for an innocent party who wishes to sue for damages for anticipatory breach would be to

¹⁰ See e.g., SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomas Reuters, 2017) at para 626 [Waddams].

¹¹ *Ibid* at para 628; *968703 Ontario Limited v Vernon*, [2002] OJ No 580 (Ont CA) at para 14.

¹² *American National Red Cross v Geddes Bros.*, [1920] 61 SCR 143; *Kamlee Construction Ltd. v Oakville (Town)* (1960), 26 DLR (2d) 166 (SCC). See also *Onni Development (Victoria Hill Nine) Corp. v Shahi*, 2015 BCSC 100 and *Harvey Kalles Real Estate Ltd. v Haji-Seyed-Abolghasem-Tehrani*, 2015 ONSC 4073; Waddams, *supra* note 10 has suggested that, “Where the party is silent or non-committal it is suggested that principles of estoppel should apply and the promisee should be precluded from asserting any right if, but only if, the promisor reasonably acts to the latter’s detriment in reliance on the promisee’s conduct” at para 629.

¹³ See, e.g., *Homestar Industrial Properties Ltd. v Philips* (1992), 27 RPR (2d) 48 (BCCA), cited with approval in *R.P.M. Investment Corp. v Lange*, 2017 ABQB 305.

¹⁴ *Canada Egg Products Ltd. v Canadian Doughnut Co.*, [1955] SCR 398 at para 48 [*Canada Egg Products*].

communicate acceptance of the breach clearly and unequivocally. Once acceptance of the breach has been communicated, it is irrevocable; the innocent party cannot subsequently change its mind and insist on performance.¹⁵

(b) Not Accept Repudiation

Instead of accepting the repudiation and treating the agreement as at an end, an innocent party may decline to accept the repudiation and insist on performance. In that case, the contract continues in force and neither party is relieved of its obligations under the agreement.¹⁶ Stated another way, in such a case the innocent party,

... keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous renunciation of it but also to take advantage of any supervening circumstance that would justify him in declining to complete it.¹⁷

There are many reasons to not immediately accept repudiation. Firstly, as stated above, it is a question of fact as to whether certain conduct amounts to repudiation. In other words, it is not always possible to anticipate or predict that certain behaviour or conduct would subsequently be treated by the courts as an anticipatory breach. Accordingly, it may be prudent to continue to insist on performance. Secondly, “in some cases the reasons communicated for repudiating (unavailability of financing, changes in markets) may be a bluff or may disappear, and the innocent party may be well advised (at least for the short term) to keep the pressure on by not immediately accepting, or by delaying the acceptance where other factors might reasonably influence the guilty party to reconsider.”¹⁸ Thirdly, the innocent party may wish to sue for specific performance.

3. Choice of Remedies

(a) Upon Accepting Repudiation

¹⁵ Waddams, *supra* note 10 at para 628.

¹⁶ *Semelhago v Paramadevan*, [1996] 2 SCR 415 [*Semelhago*].

¹⁷ *Cromwell v Morris* (1917), 34 DLR 305 (Alta App Div) at 307.

¹⁸ Theodore B Rotenberg & Howard D Gerson, “Thinking the Unthinkable: Will the Courts Penalize an Innocent Party for Refusing to Accept an Anticipatory Breach? And Other Revolutionary Thoughts gleaned from *Domicile Developments Inc. v. MacTavish*” (1999) 26 RPR (3d) 245 at 247 [Rotenberg and Gerson].

As has been stated above, if an innocent party accepts the repudiation of the contract, the innocent party may immediately sue for damages for breach of contract or may sue for determination or cancellation of the contract. As in any damages claim, the innocent party is obligated to mitigate its losses. If the innocent party is the purchaser, it has a right to a return of the deposit.¹⁹

(b) Upon Not Accepting Repudiation

If an innocent party does not accept the anticipatory breach, such party may immediately sue for a declaration that the contract is still valid and subsisting, and for a decree of specific performance, even before performance is due.²⁰ Such a decree of specific performance, however, does not accelerate the obligations of the repudiating party.²¹ If the innocent party only sues for specific performance (and not for damages at common law, in the alternative), this action will be treated as an affirmation of the contract, and to that extent, an election to enforce the contract.²²

An innocent party may wait for the date appointed for performance, and then upon the other party's failure to perform, commence (as is more common) an action for specific performance or, in the alternative, damages at common law for breach of contract. Provided that the alternative common law claim for damages is pleaded, the innocent party has not unequivocally affirmed the contract and has until the time of judgment to elect one or the other remedy.²³ An innocent party may also wait for the date appointed for performance, and then upon the other party's failure to perform, treat the contract as ended at that time and sue the other party for damages resulting from breach of contract.

4. Responding to an Anticipatory Breach: To Tender or Not to Tender?

If an innocent party elects not to accept an anticipatory breach of a contract, the contract remains alive for the benefit of both parties. This means that the innocent party remains subject

¹⁹ Perell and Engell, *supra*, note 5 at 33.

²⁰ *Kloepfer Wholesale Hardware and Automotive Co. v Roy*, [1952] 2 SCR 465.

²¹ *Ibid.*

²² *117577 Ontario Ltd. v Magna International Inc.* (2000), 50 OR (3d) 579 (Sup Ct J); *Dobson v Winton & Robbins Ltd.*, [1959] SCR 775 [*Dobson*].

²³ *Dobson, ibid.*

to all obligations under the contract and must be ready, willing and able to perform his or her side of the bargain before he or she can bring an action for the eventual breach of contract by the party that had previously repudiated the contract,²⁴ or before he or she can bring an action for specific performance.

(a) Anticipatory Breach and Tendering

The law is clear that where there has been an anticipatory breach of contract, the innocent party is not required to tender,²⁵ as “[t]he law does not require a nugatory and meaningless ritual to be carried out.”²⁶ Having said that, while the ritual of tender may not be required, the innocent party is still required to prove that it was ready, willing and able to close, and the strongest way to evidence this is by tendering. Thus, even though tendering is not required in cases of anticipatory breach, if in doubt, the safest course of action would be to effect a tender.

Once an innocent party tenders, it raises the opportunity for the other party to try to argue that the tender was defective. However, the party in breach cannot take advantage of those defects in tender for which it is responsible in some way. Such a defect was described as such in *McCallum v Zivojinovic*:

...the defect in the tender must be attributable to the conduct of the purchaser. It must arise from a condition which the purchaser has brought about so that it would be inequitable to permit him to rely upon it.²⁷

In *McCallum v Zivojinovic*, the tender was defective since the executed transfer of land did not contain the name and address of the transferee, or the amount of the consideration. Since the purchaser had failed to advise the vendor in this case as to how it was going to take title (notwithstanding requests for same from the vendor’s lawyer), the defect was attributable to the conduct of the purchaser.²⁸

²⁴ *McRae*, *supra* note 6 at 251.

²⁵ *McCallum*, *supra* note 2; *418658 Ontario Ltd. (c.o.b. Wycliffe Fairways of Woodbridge) v Raman*, [1984] OJ No 863 (Ont HC) [*Raman*]; *Ahern v Stapleford*, [1979] OJ No 60 (Ont HC) [*Ahern*]; *2054476 Ontario Inc. v 514052 Ontario Ltd.*, [2009] OJ No 279 (Ont Sup Ct J) at para 31; *Romanyszyn v Babyat*, 2017 ONSC 6421 at para 102.

²⁶ *Stewart v Ambrosino* (1977), 16 OR (2d) 221 (CA).

²⁷ *McCallum*, *supra* note 2 at 727.

²⁸ Other cases have demonstrated more leniency as to what defects in tender would be excused by a court in situations involving anticipatory breach. For example, in *Ahern*, *supra* note 25, the purchaser repudiated a contract

On the other hand, even if documentary tender is perfect, but the innocent party is not otherwise ready, willing and able to close, such party may not be able to successfully maintain an action for breach. In *418658 Ontario Ltd. (c.o.b. Wycliffe Fairways of Woodbridge) v Raman*,²⁹ the purchaser repudiated the contract by expressly indicating that he would need an extension of the closing date in order to be in funds. The vendor's lawyer prepared all necessary documents that would normally be tendered on closing, but the purchaser did not make himself available to be tendered upon. Subsequently, the vendor sued for breach of contract, and the purchaser counter-sued for the return of his deposit. The court dismissed the vendor's action for damages, and ordered the return of the deposit to the purchaser since the court found that the vendor (a house builder who had agreed to build a house for the purchaser) was not able to close because he had not substantially completed the house on the closing date.³⁰

(b) Obligation to Mitigate versus Not Accepting Repudiation

A similar case to *Raman* was decided by the Ontario Court of Appeal in 1999. In *Domicile Developments Inc. v MacTavish*,³¹ Domicile and MacTavish entered into an agreement of purchase and sale on February 1, 1995 pursuant to which MacTavish agreed to buy a semi-detached house in Ottawa for \$450,000 to be built by Domicile. MacTavish was obligated to close the transaction on September 15, 1995 if the house was substantially completed by that time.

In April, 1995, the purchaser repudiated the agreement when the purchaser's lawyer wrote to Domicile indicating that the purchaser did not intend to close the transaction and

for the purchase of real property prior to closing. The vendor tendered on closing, but failed to tender an executed transfer from the registered owner to the vendor (the property was registered in the name of someone other than the vendor). While there was no question that the tender was defective, the court held that the purchaser's earlier repudiation rendered it unnecessary to tender. What likely assisted the court in coming to this determination was that the registered owner of the property had approved the transfer to the vendor prior to closing, and that if required to do so, the vendor could have had the transfer from the registered owner on closing. In other words, for all intents and purposes, the vendor was ready, willing and able to close; as such, it would have been inequitable to allow the purchaser to be able to rely on this defect. See also *Kiefert v Morrison* (1976), 11 OR (2d) 731 (HC).

²⁹ *Raman*, *supra* note 25.

³⁰ See also *Kelowna Office Surplus Ltd. v Brueckner*, 2001 BCSC 400, where a plaintiff vendor was denied a claim for the deposit, interest and costs because it had not unequivocally accepted the purchaser's repudiation (in other words, the agreement continued in force) but had re-sold the property before the rescheduled closing date, and was thus unable to perform its obligations under the purchase agreement.

³¹ (1999), 45 OR (3d) 302 (CA) [*Domicile*].

requesting the return of the deposit. On two or three separate occasions before closing, the vendor's lawyer wrote to the purchaser's lawyer advising that Domicile did not accept MacTavish's repudiation and that Domicile remained ready, willing and able to perform its obligations. In other words, the agreement remained in full force and effect, equally binding on the vendor as on the purchaser. Prior to the closing date, Domicile issued a statement of claim seeking specific performance or, in the alternative, damages. Upon the closing date, Domicile was not ready to close because the house was not substantially completed, which raises the issue of whether a party not accepting repudiation is required to mitigate its damages (it also raises the issue of "dual breach", to be discussed below). As Laskin J.A. stated, "[b]ecause of the view I take of this case, I need not consider the difficult and important question whether in April 1995 Domicile should have taken reasonable steps to reduce its losses, instead of ignoring the repudiation and waiting for the closing date."³²

From the foregoing statement, it can be inferred that Laskin J.A. thought that Domicile should have accepted the repudiation and taken steps to mitigate its losses much sooner, instead of waiting for the closing date. The purchaser repudiated the contract shortly after the agreement was executed. Such repudiation was clear and unequivocal. As of the date of the repudiation, much of the house remained unbuilt and five months remained before the scheduled closing date. Had Domicile accepted the purchaser's repudiation in April, 1995, it might have been able to re-sell the property for a higher price than ultimately obtained (if it were able to have re-sold it before the market started declining in late 1995), and thus would have avoided unnecessary losses.

This suggestion (if we can take it as such) that Domicile, in the circumstances, should have accepted the repudiation is one that runs contrary to one of the pillars of the law of anticipatory breach that an innocent party, when faced with a repudiation, may elect whether or not to accept the repudiation. This pillar of the law was further shaken as a consequence of two Supreme Court of Canada decisions that reshaped another pillar of the law of specific performance.

³² *Ibid* at 306.

A party who is entitled to specific performance is entitled to elect damages in lieu thereof. However, at common law, every piece of real estate was historically considered to be unique. Accordingly, damages were considered to be an inadequate remedy, and an innocent party was generally entitled to specific performance.³³ However, in 1996, the Supreme Court of Canada's decision in *Semelhago v Paramadevan* qualified this principle. Sopinka J. held (although strictly *obiter*) that specific performance was no longer available "as a matter of course to a buyer of land absent evidence that the property was unique to the extent that its substitute would not be readily available."³⁴ Many cases have since relied on this declaration.³⁵ In order for a property to be considered unique, the unanimous Ontario Court of Appeal held in *John E. Dodge Holdings Ltd. v 805062 Ontario Ltd.*,³⁶ that:

... the person seeking the remedy of specific performance must show that the property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended.³⁷

In this case, the piece of commercial real estate in question offered "superior access, visibility, traffic patterns and location to each of the other sites that were under consideration"³⁸ and therefore could not be reasonably duplicated elsewhere. The *Semelhago* decision also directly affected the question of mitigation:

If a purchaser of land is not entitled to a decree of specific performance she will, in accordance with the general principles of mitigation, be expected to mitigate loss, for example by buying substitute land on a rising market. On the other hand if the purchaser is entitled to specific performance because the land is "unique", the question of mitigation will generally not arise, because it will be reasonable for the purchaser to insist on conveyance of the particular land in question.³⁹

³³ *Semelhago*, *supra* note 16 at para 14.

³⁴ *Ibid* at para 22.

³⁵ *Alberta New Home Warranty Program v Glenwood Homes Inc.*, 2009 ABQB 363 at para 11. See also *Kyriacopoulos v Fitzgerald*, [2009] OJ No 2424 (Ont Sup Ct J) at para 30; *Southcott Estates v Toronto Catholic District School Board*, 2012 SCC 51 at para 38 [*Southcott*]; *656340 N.B. Inc. v 059143 N.B. Inc.*, 2014 NBCA 46 at para 14; *Chai v Dabir*, 2015 ONSC 1327 at para 26.

³⁶ [2003] OJ No 350 (Ont CA).

³⁷ *Ibid* at para 39.

³⁸ *Ibid* at para 43.

³⁹ *Waddams*, *supra* note 10 at para 680.

In *Southcott Estates v Toronto Catholic District School Board*,⁴⁰ the Supreme Court of Canada clarified its position on whether a party seeking specific performance still has a duty to mitigate damages. In this case, Southcott Estates Inc., a single-purpose corporation created for the sole purpose of purchasing and developing properties for profit, sought to rely on its claim for specific performance to excuse itself from mitigating its losses when the vendor breached the agreement of purchase and sale. The Ontario Court of Appeal had concluded that Southcott unreasonably failed to take available steps to mitigate its loss and refused to award specific performance. On appeal at the Supreme Court of Canada, Karakatsanis J. stated that a plaintiff deprived of an investment property did not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance unless he could show that money was not a complete remedy because the land had a "peculiar and special value" to him. The land in this case was no more unique to Southcott than a singularly good investment and the unique qualities related solely to the profitability of the development for which damages were an adequate remedy.⁴¹

As a result, a party seeking specific performance has a duty to mitigate damages if there is no compelling reason why damages would not be appropriate. Applying this new standard to the earlier case of *Domicile*, it is hard to argue that *Domicile* should have been entitled to specific performance. Although the principle of mutuality dictates the reciprocity of remedies for a vendor and a purchaser, now that a purchaser's right to specific performance has been restricted, a vendor's right will be as well. Courts are usually reluctant to force a defaulting purchaser to buy a property that he or she does not want, and a vendor can usually be adequately compensated by way of a damages award.⁴² In such a case, *Domicile's* obligation to mitigate its losses would have paramouncy.

Accordingly, when faced with the decision of whether or not to accept a repudiation of a contract, the innocent party should also consider whether specific performance will likely be available to it. Although, as indicated above, it will likely be quite difficult for a vendor to argue

⁴⁰ *Southcott*, *supra* note 35.

⁴¹ *Ibid* at paras 40-41; for a similar result, see *Strategic Acquisition Corp v Starke Capital Corp*, 2017 ABCA 250.

⁴² Halsbury's Laws of Canada - Real Property (online), *Sale of Land*, "Remedies for Breach of Contract: Specific Performance: General" at HRP-230 "Nature of the remedy".

that it is entitled to specific performance, it may be able to do so if, for example, it had built a building to the purchaser's specifications, which thus is not readily suitable for any other purchaser. A purchaser may also, in certain circumstances, be able to argue that a certain property is unique, and thus damages are inadequate as a remedy. An innocent party should be highly confident that its claim for specific performance will be successful in order to safely forego mitigation efforts. If there is uncertainty as to whether specific performance may be available, choosing not to accept an anticipatory breach may mean that an innocent party's damages will be scrutinized to determine whether unnecessary losses could have been avoided by earlier efforts of mitigation.

III. Dual Breach: When Neither Party is Ready, Willing and Able to Close

As noted above, *Domicile* also raises the issue of “dual breach”, which arises when neither party to the transaction is able to close at the appointed time. The term “dual breach” may be slightly misleading as the actions of the parties after the closing date has passed will determine which party ultimately breaches the agreement.

Recall that *Domicile* did not accept the purchaser's repudiation and issued a statement of claim seeking specific performance or, in the alternative, damages. However, on September 15, 1995, the scheduled closing date, *Domicile* had not substantially completed the house, and neither party tendered. In the meantime, housing prices in Ottawa started to decline in late 1995 and early 1996. On February 21, 1996, *Domicile* agreed to sell the house to one of its shareholders for \$365,000—significantly lower than the \$450,000 the purchaser contracted to pay.

As is customary, the agreement of purchase and sale indicated that time was of the essence. The court held that since *Domicile* had not accepted *MacTavish*'s repudiation, the contract remained in existence, and time remained of the essence. In order for *Domicile* to have taken advantage of the “time of the essence” provision, it needed to be ready, willing and able to carry out the agreement. Clearly, *Domicile* was not ready to close on September 15, 1995. Neither was the purchaser. Relying on *King v Urban & Country Transport Ltd.*,⁴³ the court held

⁴³ (1973), 40 DLR (3d) 641 (Ont CA) [*King v Urban*].

that when neither party is ready to close on the closing date, (i) the agreement remains in effect, and (ii) either party may reinstate time of the essence by setting a new closing date and providing reasonable notice thereof to the other party. The court in *Domicile* held that a corollary to the foregoing second proposition (from *King v Urban*) is that a party who is not ready to close on the agreed date and who subsequently terminates the transaction without having set a new closing date and without having reinstated time of the essence will itself breach or repudiate the agreement.⁴⁴ Therefore, in failing to give MacTavish an opportunity to close the transaction after September 15, *Domicile* itself breached the agreement.⁴⁵ Commentators Theodore B. Rotenberg and Howard D. Gerson acknowledged this seemingly anomalous result:

This case vividly illustrates that...an undeserving purchaser who never intended to close is relieved of liability because the vendor tripped over his own shoelaces by not following the ritual of extending the closing date, even when following that ritual would have had no impact on the conduct of the purchaser. It also illustrates that if an adverse party is foolish or honest enough to repudiate an agreement clearly and unequivocally, it is usually in the interests of the innocent party to accept the repudiation instead of holding the other party to the agreement and creating the opportunity for the innocent party to trip over his own shoelaces.⁴⁶

Nonetheless, the decision in *Domicile* is consistent with the requirement that if an innocent party does not accept the other party's repudiation (thus keeping the contract alive), the innocent party must be capable of showing that it is ready, willing and able to perform its obligations under the contract before being entitled to its remedies against the defaulting party. *Domicile*, at any time before the scheduled date for completion, could have elected to accept the purchaser's repudiation and avoided the foregoing result. Having elected to keep the contract alive, it was bound by the terms of the contract (and the attendant risks for failing to comply with such terms).

Pursuant to *King v Urban*, the party seeking to have the agreement performed should establish a new closing date and provide reasonable notice to the other side of the new date, thus re-establishing that time is of the essence and holding the other party to its obligations under the

⁴⁴ *Domicile*, *supra* note 31.

⁴⁵ *Ibid* at 307.

⁴⁶ Rotenberg and Gerson, *supra* note 18.

contract.⁴⁷ The question then arises as to what constitutes reasonable notice. Although two days' notice was sufficient in *King v Urban*, the amount of notice will depend upon the situation.

This issue was subsequently considered in *Bates v Island Cove Development Ltd.*⁴⁸ In that case, Bates contracted to purchase a home to be constructed by the vendor, Island Cove. Under the agreement, Island Cove was able to extend the closing date by 120 days upon written notice. Although the house was only 37% completed on the closing date, Island Cove failed to exercise the extension clause of the agreement. The fact that the house was not substantially completed did not constitute a breach of the agreement, however, because Bates did not tender on the closing date. No effort was made by either party to amend the agreement. Progress on the house continued to be extremely slow, and a month after the original closing date, Bates' lawyer wrote to the vendor advising that Bates considered the agreement to be terminated and demanding that the deposit be returned. When the vendor resisted, Bates brought an action on the basis that he was ready, willing and able to close according to the terms of the agreement. The vendor claimed that the deposit did not have to be returned because Bates did not provide a new closing date prior to terminating the agreement. The court rejected Bates' argument that he was ready, willing and able to close on the closing date:

There is no conclusive evidence of available financing, investigation of title or completion of required documentation. There was no tender or offer to tender. The plaintiff simply assumed he was not required to close because the construction was so slow and deficient.⁴⁹

Since neither party attempted to establish a new date for closing, time ceased to be of the essence when the original closing date passed without either side completing its obligations. However, the court determined it would be unfair to require Bates to provide reasonable notice because it would be fatal to his claim for damages. The court therefore sought an equitable solution and found that a condition for the requirement to provide reasonable notice pursuant to *Domicile* was that the other party would have to be capable of being ready, willing and able to close the transaction upon notice. In *Island Cove*, even lengthy notice of 60 days would have been a futile

⁴⁷ Waddams, *supra* note 10 at para 603. See also *2329131 Ontario Inc. v Carlyle Development Corp.*, 2014 ONCA 132 at para 10.

⁴⁸ (2003) 18 RPR (4th) 129 [*Island Cove*].

⁴⁹ *Ibid* at para 13.

exercise due to the “cavalier attitude [of the vendor] about its contractual obligations, both before and after the original closing date.”⁵⁰ Given the failure of the vendor to meet many of its obligations and deadlines under the contract, there was no evidence that it would be ready, willing and able to close the deal within a reasonable time after the original closing date. Accordingly, Bates was not required to provide reasonable notice of a new closing date before repudiating the contract.

Although *Island Cove* illustrates that establishing a new closing date may not be required when the other party will not be able to close within a reasonable time of the original closing date, this step should only be taken with extreme caution after careful consideration. As *Domicile* and *King v Urban* show, a plaintiff who does not provide reasonable notice of a new closing date risks being denied damages. Recently, courts have applied these precedents to reinforce the significance of giving reasonable notice of a new closing date in order to hold the other party to its contractual obligations when the closing date has been pushed back multiple times.

For example, *Fritz v Stilinovic*⁵¹ involved a disputed agreement of purchase and sale between Elizabeth and Allan Fritz, as purchasers, and Elizabeth’s half-sister, Sophia Paton, and Elizabeth and Sophia’s mother, Katarina Stilinovic, as vendors. The parties entered into an agreement of purchase and sale of Sophia and Katarina’s property in Langley Township, B.C. on June 24, 2011 for \$800,000. However, no closing date was agreed to. Elizabeth testified that the parties understood the sale would not be completed until after the purchasers sold their duplex in Delta, B.C. Sophia, on the other hand, testified she expected the sale to be completed within a few months. The purchasers later requested more time to complete the sale, so the initial deposit was increased to \$50,000 in exchange for the vendors’ agreement to put off completion. In late 2011 or early 2012, the purchasers moved into the home with Katarina.

On June 7, 2013, the parties executed another agreement of purchase and sale, which again provided for a purchase price of \$800,000. The completion date was July 15, 2013, and the \$50,000 deposit already paid was to be credited against the purchase price. The agreement

⁵⁰ *Ibid* at paras 28-29.

⁵¹ 2016 BCSC 2328.

included a clause that stated time was of the essence. However, neither party was ready to close by July 15, 2013, so the contract remained in effect.

In late May, 2014, the purchasers sold their duplex in Delta and approached Sophia about closing the sale. Katarina sought to retain an interest in the property by not requiring the purchasers to pay the full purchase price under the agreement, so the purchasers had a lawyer draft a new agreement to this effect. This document contained a completion date of July 31, 2014 and a possession date of August 1, 2014. However, conflict later ensued between Elizabeth and Sophia and no one ended up executing the 2014 agreement prepared by the lawyer. In their claim for specific performance, the purchasers asserted that the presentation of the 2014 contract drafted by the lawyer contained a closing date which constituted the reestablishment of a closing date through reasonable notice. The British Columbia Superior Court disagreed, stating as follows:

The new contract contained many new terms. It was never executed by the plaintiffs or the defendants. If the plaintiffs wished to give reasonable notice of a new closing date, they should have done that. It did not take place.⁵²

Kelleher J. looked to the subsisting contract, which originally provided for a closing date of July 15, 2013, to inform the Court's decision about the purchaser's request for specific performance. However, Kelleher J. would not grant this equitable remedy prior to giving either the purchasers or the vendors an opportunity to give reasonable notice of a new closing date.

A recent decision of the Ontario Superior Court denied the defendant organization's and its trustees' claim to the plaintiffs' deposit money after it failed to set a new closing date or reinstate time as being of the essence. In *Sandhu v Sikh Lehar International Organization*,⁵³ the plaintiffs, as purchasers, and the defendants, as vendors, entered into an agreement of purchase and sale for a property with a closing date of July 10, 2014. Shortly after, the parties agreed to an amendment to the agreement that would extend the closing date to July 24, 2015, which was conditional on the purchasers' receiving financing. Two days before the new closing date, the parties agreed to further extend the closing date to August 31, 2015 due to delays in financing. On August 31, 2015, the parties met to discuss an additional closing extension. The purchasers

⁵² *Ibid* at para 47.

⁵³ 2017 ONSC 5680.

asserted that the parties agreed to extend the closing date to September 18, 2015, while the vendors asserted that they were only prepared to grant an extension for two weeks if all conditions were waived.

Among many issues in this complex transaction, the Ontario Superior Court had to determine whether time remained of the essence, pursuant to the “time limits” clause in the parties’ agreement. The analysis turned on two letters written by the vendors’ lawyer on August 31, 2015. In the first letter, the lawyer stated that one of the conditions required in order to grant the extension was that "Statement of Adjustment to remain the same and time to continue to be of the essence." However, in the second letter, the condition was removed when the vendors’ lawyer agreed that the extension would be "without conditions." As a result, time was no longer of the essence after August 31, 2015 and LeMay J. reinforced the importance of reinstating a new closing date in order to hold the other party to its obligations:

The legal significance of this conclusion is clear from the *Domicile* decision...Since time was no longer of the essence on September 18th, 2015, the Defendants had to set a further closing date and had to notify the Plaintiffs that the time of the essence clause had been reinstated before they could force a date for closing the transaction. They failed to take either step and, as a result, the Defendants cannot claim the Plaintiff's deposit as a result of the failure to close the transaction.⁵⁴

Moreover, neither party was prepared to close the transaction on September 18, 2015. The purchasers did not have financing and the vendors’ tender was deficient due to errors in connection with a construction lien, the statement of adjustments, and the undertakings. The legal effect of this was either one of two outcomes: either the parties attempt to reinstate time of the essence under the agreement, as noted in *Domicile*, or the transaction could be viewed as at an end and all of the monies paid under it would be returned.⁵⁵ Since neither party wanted to close the transaction, the monies paid by the purchasers to the vendors were ordered to be returned.

As evidenced by the foregoing cases, the legal principles derived from *Domicile* and *King v Urban* are still supported by recent case law. Where time is of the essence and neither party is ready to close on the agreed date, the agreement remains in effect and time is no longer of the

⁵⁴ *Ibid* at para 74.

⁵⁵ *Ibid* at para 116.

essence. Therefore, it is crucial to protect your client's interests to reinstate time of the essence by setting a new date for closing, providing reasonable notice thereof to the other party, and tendering upon the other party on the new date if the other party fails to perform on such date.⁵⁶

IV. Tendering in an Electronic Environment

Before discussing procedures for tendering in an “electronic environment”, this section will briefly review the law of tender in the “paper environment” in order to illustrate how electronic registration has affected tendering. It should be noted that, despite the changes to the practice of real estate law through the now near universal electronic registration and electronic means of communication, case law has made few references to the mechanics of tendering in the digital age.⁵⁷ As such, this section will predominantly consider how electronic registration has affected tendering in practice, with references to case law where applicable. One should always keep in mind that tendering remains an evidentiary matter, so despite electronic registration, you must be able to show that your client is ready, willing and able to close according to the terms of the agreement.

1. Tendering in the Traditional Paper Environment⁵⁸

What is Tender?

The law of tender is a combination of contract law (as between the parties as evidenced by their agreement) and common law. Tender is the act of offering to perform one's contractual obligations. By tendering, the innocent party shows that the failure of the transaction was not his or her fault. Tender provides the single best evidence of the tendering party being ready, willing

⁵⁶ Halsbury's Laws of Canada – Real Property (online), *Sale of Land*, “Interests and Obligations of Parties Pending Closure: Time and Tender: Time of the Essence Clause” at HRP-205 “Express or presumed”.

⁵⁷ Although not discussing in detail the process of tendering under the electronic system, the decision in *2054476 Ontario Inc. v 514052 Ontario Ltd.*, [2009] OJ No 279 (Ont Sup Ct J) underscores the fact that tendering, whether in the paper or electronic environment, remains an evidentiary matter and documentation is important to evidencing that a party is ready, willing and able to close (“I find that on the evidence that on December 10, 2004 the purchasers were in a position to tender on the vendor with respect to Deal 1. No complaint is made with respect to their documentation. This was sent as required to the vendor for the purpose of electronic registration. No funds were tendered, however, by the purchaser. I accept the evidence that the purchasers had the funds to close Deal 1 available.... I conclude that the purchaser was ready, willing and able to perform its obligations according to the terms of the agreement with respect to Deal 1” at para 25).

⁵⁸ The article by Edward M. Perlmutter, “Tender – Getting It Right” (1992) 1 Nat'l Real PLR 258, was of great assistance in its discussion of the law of tender and recommended procedures.

and able to complete the transaction in accordance with the terms of the agreement by delivery and presentation of all required documentation (and funds, if applicable) upon the other party.

What to Tender?

When acting for a vendor, tender must be made of all the documents (and funds, if any) that are required of the vendor to close. Lawyers should re-read the purchase agreement and the letter of requisitions to make sure that all required documents are available to be tendered. Registration documents should be in registrable form, and the transfer/deed of land should be engrossed in favour of the purchaser (as set out in the purchase agreement) or such other party as may be specified in any direction regarding title received by the vendor from the purchaser. Keys should be ready, and if the vendor is obligated under the purchase agreement to deliver title free and clear of all mortgages, the vendor may have to tender an executed discharge instead of a solicitor's undertaking to obtain a discharge.

When acting for a purchaser, tender must be made of the exact amount of closing funds. If the purchaser has not been provided with a statement of adjustments, then the purchaser's lawyer should prepare a statement of adjustments and try to complete it as much as possible based on the facts known to the purchaser's lawyer (there may be facts in the exclusive possession of the vendor, but a vendor will be hard-pressed to argue that it did not receive the right amount on the tender if the vendor has been unwilling to make these facts available to the purchaser). The purchase agreement should be reviewed to determine how the purchase funds are to be tendered. The standard OREA form of agreement of purchase and sale provides for payment with funds drawn on a lawyer's trust account in the form of a bank draft, certified cheque or wire transfer using the Large Value Transfer System. The purchase funds should be made payable to the vendor (as set out in the purchase agreement) or such other person(s) as may be specified in any direction regarding funds provided by the vendor to the purchaser. Tender must also be made of any required purchaser's closing documents (e.g., land transfer tax affidavit).

Whom to Tender Upon?

Tender must be made on the vendor or purchaser personally unless the purchase agreement provides otherwise. The OREA standard form of agreement of purchase and sale permits tender on each party's lawyer. If a time and place for closing is not specified in the purchase agreement, the tendering lawyer should send a letter appointing a convenient time and place (such as the other lawyer's office at a particular time) for completing the transaction and then attend there at that time in order to demonstrate the readiness, willingness and ability to close. If the other party fails to appear at the appointed time and place, then the tendering lawyer should try to tender on the party and document the efforts made to tender on the lawyer and party in question.

When to Tender?

Where time is made of the essence of the contract, it is necessary for tender to be made promptly on the precise date fixed for completion of the transaction. If the time of closing has not been specified in the purchase agreement (the OREA form says the agreement shall be completed by no later than 6:00 p.m.), then tender may be made until midnight on the day set for closing, even where documents tendered must be registered.⁵⁹ It is better practice, however, to tender within Registry Office hours to avoid an "after-hours" tender being contested on the basis that the interests of the party on whom tender was effected were prejudiced due to the inability of the tendered documents to be registered on the day they were tendered.

2. Tendering in an Electronic Environment

How the Electronic Environment Works

Under the electronic registry system, registration documents are prepared, approved and registered electronically. Registration documents such as the transfer/deed are prepared through the Teraview system and messaged to the other side for approval. Rather than having documents physically signed by clients, lawyers have clients sign acknowledgements and directions authorizing their lawyers to register documents electronically and confirming that they are bound by the terms of the documents. In many cases, lawyers enter into a document registration

⁵⁹ *Leung v Leung*, [1990] OJ No 2276 (Ont Ct J Gen Div); *Watchfield Developments Inc. v Oxford Elgin Developments Ltd.*, [1992] OJ No 1604 (Ont Ct J Gen Div).

agreement (DRA) that provides for the exchange in escrow of non-registration closing documents by facsimile (and increasingly also by electronic PDF files sent via email) between the lawyers pending the electronic registration of registration documents, and the exchange of funds and keys. Pursuant to the DRA, non-registration closing documents, keys and funds are exchanged in escrow, while the finalized registration documents are signed electronically for release and are registered electronically.

Validity of Electronic Documents, the Electronic Commerce Act and the Land Registration Reform Act, Part III

The statutory underpinnings are found in Part III of the *Land Registration Reform Act*, RSO 1990, c L.4 (“LRRA”) and the *Electronic Commerce Act*, SO 2000, c 17 (“ECA”). First, section 21 of the LRRA provides that “Despite section 2 of the *Statute of Frauds Act*, section 9 of the *Conveyancing and Law of Property Act* or a provision in any other statute or any rule of law, an electronic document is not required to be in writing or to be signed by the parties and has the same effect for all purposes as a document that is in writing and is signed by the parties.”⁶⁰ In other words, this gives legal effect to our electronic registration documents.

Second, the ECA gives electronic contracts, documents and signatures the same effect as their paper equivalents. If your client has a legal requirement to provide a person with a document in a specified non-electronic form, that requirement is satisfied if you deliver the document in an electronic form provided that the document: (i) is organized in the same or substantially the same way as the non-electronic form; (ii) is accessible by the other person so as to be useable for subsequent reference; and (iii) is capable of being retained by the other person. A facsimile or electronic PDF copy of a document clearly satisfies these three components. However, section 3(1) of the ECA provides that consent to accept an electronic document is

⁶⁰ Pursuant to the *Cutting Unnecessary Red Tape Act*, SO 2017, c 20, Schedule 9, s 6, section 21 of the LRRA was extended (the current language is reproduced above) to cover all electronic documents, not just those creating, transferring or otherwise disposing of an interest in land. This is significant for land surveyors, who are now allowed to register survey plans electronically. Explanatory Note to Bill 154, Cutting Unnecessary Red Tape Act, 2017, online:

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=5000&detailPage=bills_detail_the_bill.

Ministry of Economic Development and Growth, “Changes in the Cutting Unnecessary Red Tape Act, 2017”, *Government of Ontario* (2 November 2017), online: <https://news.ontario.ca/medg/en/2017/11/changes-in-the-cutting-unnecessary-red-tape-act-2017.html>

required—you cannot force someone to accept an electronic document. Accordingly, individuals retain the right to insist on receiving paper originals of documents. Express consent, however, is not always required, as the ECA provides that consent may be inferred from a person’s conduct if there are reasonable grounds to believe that the consent is genuine. So, for example, if in a purchase transaction, amendments to the purchase agreement have been effected by lawyers’ letter agreements delivered by facsimile or by an exchange of email correspondence, this could support a finding that there has been consent to transmission by facsimile or email.

There are limitations to the ECA, as it does not apply to: (i) negotiable instruments, such as cheques; and (ii) documents of title, except in the context of contracts for carriage of goods. S. 31(1)4 of the ECA formerly prevented the Act from applying to documents that create or transfer an interest in land. However, this subsection has since been repealed. Effective July 1, 2015, documents that create or transfer an interest in land, such as agreements of purchase and sale, leases and beneficial conveyances, may now be signed electronically, with statutory confirmation that the electronic documents satisfy the writing and signature requirements of the *Statute of Frauds*. Therefore, parties to a real estate transaction can copy or scan an original signature or use an electronic signature technology equipped with security features to ensure that the signature is attached to a document by the proper party. Despite this legislative change, some lawyers may still prefer physical execution of paper documents. However, electronic signature technology may be more practical when there is a large volume of routine documentation that requires execution.

Procedures for Tendering Electronically

Since it has altered the way in which documents are drafted, executed and registered, electronic registration affects both what and how to tender.

(a) Changes in what to tender

Since registration documents are prepared electronically, a vendor, for example, no longer tenders an executed transfer/deed of land. Instead, the vendor’s lawyer prepares the transfer electronically, “signs it” for completeness (which also allows for errors in the document to be corrected, since the system identifies errors which must be corrected before a document

may be signed for completeness), and sends a copy of such transfer to the purchaser's lawyer via the Teraview messaging system. If missing information is preventing the lawyer from signing the deed for completeness, the lawyer should make an effort to obtain the required information and complete the document as much as possible. A paper copy of the electronic deed should be delivered to the other party's lawyer. While at one time I considered it prudent for a printed copy of the fully executed acknowledgement and direction to be delivered to the other party's lawyer, this delivery may not be necessary since current practice under the electronic registration system does not involve delivery of this document on closing. If, however, there is an issue regarding the lawyer's authority to sign electronically on behalf of its client or if the document could not be signed for completeness because of missing information, a printed copy of the executed acknowledgement and direction should be delivered on the other party.

(b) Changes in How to Tender

As noted above, case law has made some reference to how tendering has been impacted by electronic registration and digital methods of demonstrating that a party is ready to close a transaction.⁶¹ For example, in *Kent v Kalyk*,⁶² a contract of purchase and sale of a condominium in British Columbia collapsed after personal issues prevented the vendors, who resided in Australia, from completing the sale on the agreed closing date of January 26, 2016. The purchaser insisted on the sale closing on the agreed upon date, and emailed the vendors' lawyer

⁶¹ Although the method of tendering was not central to the issues in this case, in *2068895 Ontario Inc. v Snyder*, 2011 ONSC 404, it was held that the vendors demonstrated that they were ready, willing and able to close the transaction by their tender on the appointed closing date, which involved faxing draft closing documents and electronically messaging the transfer to the purchaser's lawyer. The purchaser's lawyer acknowledged that he received copies of "tender-type documents" from the vendors' office on that day. ("The vendors were ready, willing and able to close the transactions. Their counsel prepared the appropriate closing documents using purchase prices that I have determined to be correct. The purchaser had waived its conditions, and confirmed its intention to proceed with the closing. In these circumstances, the purchaser's failure to close the transactions by tendering the purchase price on the appointed closing date constituted a breach of contract" at para 109.) However, in *2329131 Ontario Inc. v Carlyle Development Corp.*, 2013 ONSC 4876, it was held that the vendor did not make a proper tender via facsimile. In this case, the vendor's lawyer faxed 104 pages of tender documents to the purchaser's lawyer on the agreed closing date, but there were key documents missing and the fax was not completely transmitted. See also *Ehsaan v Zare*, [2017] OJ No 6567 (Ont Sup Ct J), where the court describes how the parties to the transaction used the electronic registration system and tendered closing documents via facsimile and courier. The vendors subsequently disputed the purchaser's tender due to drafting errors in the closing documents, which the court noted were minor omissions and defects that "could have and should have been accommodated by a reasonable extension of the closing date" (para 49).

⁶² 2017 BCSC 1074.

to advise that they were ready, willing and able to complete the transaction and expected the vendors to sign and return their documents via fax or email. The email also expressly stated that the transaction would close using the Land Title Office's Electronic Filing System. The vendors insisted on postponing the closing to February 18, 2016, and as such tendered the requisite documents on that date via email. At trial, the vendors argued that there was an implied term that extended the completion date, given the vendors' Australian residence, travel issues, and difficulty in obtaining a CRA clearance certificate. However, the British Columbia Supreme Court disagreed, reasoning as follows:

In this modern age with instant communication and Powers of Attorney, sales can be perfected at a distance. Indeed it can be seen in the letter of January 13, 2016 where the [purchaser's] solicitor stated the documents could be sent by fax or email and the original documents were not needed.⁶³

Due to widespread use of technology in legal transactions, it is not surprising that the lawyers in this case evidenced their clients' ability to close the transaction using electronic means. However, unless the purchase agreement specifically permits tender by facsimile or other electronic means or the lawyers agree to tender by facsimile or other electronic means, the counsel of perfection would be to continue to tender in person. There may be, however, a reasonable argument to be made in some circumstances that documents may be tendered by facsimile or other electronic transmission if the DRA has been signed or, even if the DRA has not been signed, tender by facsimile or other electronic transmission has been contemplated by and acknowledged and agreed to by the vendor and the purchaser in the purchase agreement—provided, of course, that the purchase agreement does not specifically require tender in person or prohibit tender by facsimile or other electronic means.⁶⁴ Uncertainty may persist, however, with what would constitute sufficient evidence or unequivocal proof that the client is in funds, and may depend on the facts of the case. In *2054476 Ontario Inc. v 514052 Ontario Ltd.*, for example, the court accepted a copy of a letter from a bank's solicitor confirming that the purchasers were in funds.⁶⁵ A typical form of DRA does not expressly contemplate the delivery

⁶³ *Ibid* at para 73.

⁶⁴ In *Bianchini v 1670948 Ontario Inc.*, 2016 ONSC 7367, the vendor's lawyer indicated that its client was ready, willing and able to complete the transaction by sending a letter by way of email attachment to the purchaser's lawyer, which attached copies of executed closing documents. The case did not comment on whether the lawyers agreed to this method of tendering in advance or if the purchase agreement stipulated that tendering by electronic means was permitted, but it seems probable that this was acceptable to both parties.

⁶⁵ *2054476 Ontario Inc. v 514052 Ontario Ltd.*, *supra* note 57 at paras 18, 25.

of funds by facsimile or other electronic transmission. This issue may be clarified in the future with case law confirming that, in most circumstances, a facsimile or pdf copy of a lawyer's certified trust cheque or bank draft would constitute sufficient evidence of being in funds. In cases where the balance due on closing is over \$25 million (and thus cannot be paid by certified cheque or bank draft), the tender of funds would need to be made by wire transfer to the vendor's solicitor's trust account, to be held strictly in accordance with the DRA, and to be immediately returned by wire transfer to the purchaser's solicitor if the vendor fails to close on the closing date. In the alternative (if the courts continue to adopt a more sensible approach, recognizing tender as primarily an evidentiary matter), and in the appropriate circumstances, evidence of funds could be established by delivery of a letter from the purchaser's lawyer confirming that the closing funds (in immediately available funds, i.e. funds that are not subject to a bank hold) are in the lawyer's trust account, and that the purchaser's lawyer has an irrevocable direction re funds (a copy of which is also tendered) from the purchaser authorizing its lawyer to release the funds to the vendor on closing.⁶⁶

Many agreements of purchase and sale now include specific "electronic" tender provisions (although they do not typically deal with what constitutes sufficient evidence of funds), such as:

An effective tender shall be deemed to have been validly made by either party (the "Tendering Party") upon the other party (the "Receiving Party") when the solicitor for the Tendering Party has: (i) delivered all applicable closing documents and/or the balance of the purchase price to the Receiving Party's solicitor in accordance with the provisions of this Agreement and the DRA; (ii) advised the solicitor for the Receiving Party, in writing, that the Tendering Party is ready, willing and able to complete the transaction in accordance with the terms and provisions of this Agreement; and (iii) has completed all steps required by Teraview in order to complete this transaction that can be performed or undertaken by the Tendering Party's solicitor without the cooperation or participation of the Receiving Party's solicitor, and specifically when the Tendering Party's solicitor has electronically "signed" the transfer/deed and any other closing document, if any, to be registered electronically for completeness and granted "access" to the Receiving Party's solicitor (but without the Tendering Party's solicitor releasing same for registration by the Receiving Party's solicitor).

In such situations, of course, the keys (if any) would need to have been previously delivered to the purchaser's lawyer in escrow pursuant to the DRA.

⁶⁶ For example, in *Kent v Kalyk*, *supra* note 63, the purchaser's lawyer emailed the vendor's lawyer stating as follows: "Upon return of the duly executed Seller Documents and upon written receipt of your undertakings as set out in our letter of January 13, 2016, we will close this transaction as set out in our letter of January 13, 2016 and we will direct deposit to your trust account the funds as set out in the Seller Statement of Adjustments."

Where tender is permitted by facsimile or other electronic transmission, tendering would take place as follows. Delivery by facsimile or other electronic transmission to the other party's lawyer of: (i) executed non-registration closing documents, (ii) paper copies of registration documents sent also by Teraview e-mail, and (iii) where the documents could not be signed for completeness, the client's executed acknowledgement and direction. These documents should be sent with a cover letter or email detailing the enclosures and advising that the registration documents will be "released" for registration upon the performance by the other party of its contractual obligations. Telephone the other side's lawyer before the transmission and have a witness evidence and confirm the facsimile transmission, or copy a witness on the email transmission (unless the specific electronic tender provisions in the purchase agreement do away with the requirement for a witness). As noted above, the tendering party's lawyer should message through Teraview the electronic documents signed for completeness (if possible). If acting for the purchaser, deliver by facsimile or other electronic transmission a copy of the bank draft or lawyer's certified trust cheque for the balance due on closing (or if the balance due on closing is over \$25 million, wire the closing funds to the vendor's lawyer's trust account, to be held in accordance with the DRA, and to be immediately returned by wire transfer to the purchaser's solicitor if the vendor fails to close on the closing date (or, if appropriate as discussed above, confirm that the purchaser's lawyer is in receipt of the closing funds, and deliver a copy of the purchaser's irrevocable direction re funds)). As a matter of evidence, so that both sides will know exactly what documents were tendered, arrange to have the lawyer who is tendered upon (assuming such lawyer is cooperative) initial the documents received by facsimile and send the documents back, as initialed, to the tendering lawyer by facsimile, or in the case of an email transmission, have the solicitor who is tendered upon send back a confirmatory email (with the attachments) confirming receipt of such documents.

In situations where the exchange of documents by facsimile or other electronic transmission is not permitted by the purchase agreement or by agreement of the parties, it will still be necessary to attend personally on the other lawyer with the documents as noted above. On any such personal attendance, the lawyer should bring his or her Teraview flash drive to be prepared to close in the event that the other party ends up being ready, willing and able to close and requires the release of electronic documents for registration, or if the electronic documents need to be amended for any reason. As with tendering in the "paper environment", it would be

prudent to bring a witness to take notes on what is tendered and what is said and to have the other party initial the documents tendered for evidentiary purposes.

V. Conclusion: Protecting Your Client's Interests

At the end of the day, when faced with a party that is unwilling or unable to close the transaction according to the terms of the agreement, it is incumbent on the lawyer to exercise his or her best judgment to consider the law of tender, in light of the circumstances, to determine what would constitute sufficient evidence that your client was ready, willing and able to perform his or her obligations under the agreement. When faced with potential anticipatory breach, a careful evaluation of the circumstances, the interests of your client, and the remedies available will be necessary to determine how best to respond. Where neither party is able to perform its obligations when they become due, but your client still desires to complete the transaction, be sure to take the appropriate steps to provide for a new closing date that provides a reasonable notice period to the other party. Despite the changes that electronic registration has made to the practice of real estate transactions, tendering remains at its heart an evidentiary matter.



15TH ANNUAL Real Estate Law Summit

More Owners, More (Potential) Problems: How to Avoid Disputes Between Co-owners and What to do When They Arise

Mark Dunn
Goodmans LLP

April 19, 2018

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Introduction¹

Ownership is a bundle of rights. Real estate owner(s) have the right to (among other things) use the property, profit from its use, exclude others from it, pledge it to secure loans and sell it. These rights can be shared by, or divided among, multiple people. This sharing or division, accomplished by agreement or operation of law, can have many benefits. But people can (and often do) disagree about who holds real property rights and how they should be exercised. These disagreements are more likely to occur, and less likely to be resolved, if the parties have not specified their rights and responsibilities in writing in advance.

This paper seeks to identify some of the difficulties that can occur when multiple people have – or claim to have – an interest in the same property. These difficulties are not confined to any segment of the real estate market. At one end of this spectrum, major real estate developers cooperate on the construction, development and sale of a property. At the other end, parents provide funds so that a young couple can afford to make a down-payment on their first home. At both ends of the spectrum, and in all of the space between, the parties are much better off spending time and money addressing potential issues when the property is purchased and before problems arise. Otherwise, they will have their rights governed by a series of complex – and potentially surprising – rules imposed by common law and equity.

This paper is divided into two parts. The first part addresses shared legal and beneficial ownership of property. Shared ownership is, of course, very common in the residential real estate market. Families routinely pool their resources to purchase property. As real estate prices have increased, co-ownership involving multiple families – or multiple branches or generations of the same family – has become a way for some buyers priced out of the housing market to gain

¹ The author gratefully acknowledges the assistance of Colleen Morawetz, student-at-law.

a foothold on the property ladder. In the commercial context, co-ownership allows multiple owners to spread the risk and capital requirements associated with property ownership between them. However, the law grants relatively few rights and imposes relatively few obligations on co-owners, and therefore parties are likely to benefit from an agreement that specifies their rights and obligations.

The second part of this paper addresses when legal ownership will be divided from beneficial ownership. This can happen if the parties specifically agree that a property will be held in trust. It can also occur without any express agreement between the parties. For example, parents who pay for some or all of a property legally owned by their independent adult children may become the beneficial owners of that property. If this is not what the parties intend, they should say so when the property is purchased. By understanding when and how beneficial interests are created, parties can make informed decisions about whether, when and how beneficial ownership is separated from legal title.

I. SHARED LEGAL AND BENEFICIAL OWNERSHIP

A. Joint Tenants and Tenants-in-Common

When two or more people are the legal and beneficial owners of the same property, they are either joint tenants or tenants in common.² The general presumption in Ontario is that co-owners are tenants in common.³ Owners who wish to take possession as joint tenants must acquire the

² Two additional forms of co-ownership at common law, tenancy by the entirety and co-parcenary, have been rendered obsolete in Ontario by statute: Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed (Aurora: Canada Law Book, 2006) [*Anger & Honsberger*] at s. 14:10.

³ Trustees are an exception to this Rule, and are deemed to be joint tenants. *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s.13(1) and (2); *Land Titles Act*, R.S.O. 1990, c. L.5, s. 62(3); see also *Anger & Honsberger*, *supra* note 2 at s. 14:20.10.

same rights in the same way (i.e., pursuant to the same document) at the same time.⁴ They must also indicate their intention on the conveyance document. As always, careless drafting can cause problems. Merely describing a joint tenancy but not using the term may result in a finding that the owners are tenants in common.⁵ Even if unsophisticated parties declare that they intend to hold property “jointly” they may not create a joint tenancy.⁶

One important difference between joint tenants and tenants in common is that when a joint tenant dies, his or her interest in the property passes automatically to the surviving tenant(s). The property does not form part of the deceased owner’s estate, which can reduce the administrative cost of transferring the property to the surviving tenant.⁷ However, the release of a deceased joint tenant’s interest to his or her co-tenant(s) may be treated as a deemed disposition for tax purposes.⁸

By contrast, when a tenant in common dies, his or her interests descend to his or her own heirs, with the same tax consequences as any other testamentary disposition.⁹

⁴ This requirement is sometimes referred to as the “four unities”: Unity of title (acquiring their estates from the same instrument, whether by will or deed), of interest (enjoying the same quality of estate, e.g., equitable or legal, in the same proportions), of possession (entitling them to the possession of the whole of the property, subject to their co-owners’ same rights), and of time (their interests vesting at the same moment). It is possible to create a tenancy that does not meet these requirements if the tenancy is created pursuant to the *Statute of Uses* or by will: *Anger & Honsberger, supra* note 2 at s. 14:20.10. See also, *Toronto-Dominion Bank v. Phillips* 2014 ONCA 613.

⁵ See *Anger & Honsberger, supra* note 2 at s. 14:20.10 for a discussion of case law on this point; see also *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 s. 14.

⁶ *Anger & Honsberger, supra* note 2 at s. 14:20.10, citing *Dupont, Re*, [1966] 2 O.R. 419 (Ont. H.C.J.).

⁷ *Ibid* at s. 14:20.20.

⁸ Martin Rochweg & Rahul Sharma, *Miller Thomson on Estate Planning*, vol. 1, (Thomson Reuters, 2014) (loose-leaf revision 2017) at s. 10.20.10.30 [*Miller Thomson on Estate Planning*].

⁹ *Ibid*, at s. 10.20.10.30.

As long as both owners are alive, tenants in common and joint tenants have similar rights. Among other things, both tenants in common and joint tenants own a share of an entire property and are entitled to use that property or profit from its use.¹⁰

B. Problems Among Co-Owners

Co-owners are partners, in the colloquial sense. They contribute their time and money towards a shared venture. But co-owners are not usually partners in the legal sense. And compared to partners, the law provides co-owners with relatively few rights and remedies.

As a starting point, co-owners do not owe any over-arching duty of fairness and good faith to each other. Neither joint tenants nor tenants in common owe each other fiduciary duties.¹¹ They are not automatically obligated to act competently, or even in good faith when managing the jointly owned property.¹² Thus, without a contract, a co-owner has little recourse if their co-owner behaves imprudently or inappropriately, other than an application for partition and sale (which is discussed below).

Similarly, co-owners do not have an automatic duty to pay for the repair and improvement of a property. If one owner voluntarily pays for the cost of repair or improvements to common property while ownership is shared, the costs can typically only be recovered when the property is sold.¹³

¹⁰ *Anger & Honsberger*, *supra* note 2 at s. 14:20.120. However, whether a joint tenancy can be severed through a joint tenant's unilateral intention, on the other hand, is the subject of some judicial and commentator debate.

¹¹ See e.g. *Knollys v. Alcock* (1800), 5 Ves. Jun. 648, 31 E.R. 785; *Anger & Honsberger*, *supra* note 2 at ss. 14:20.40 and 14:20.130.

¹² *Osachuk v. Osachuk* (1971), 18 D.L.R. (3d) 413 (Man. C.A.).

¹³ *Anger & Honsberger*, *supra* note 2 at 14:20.50, citing *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.); see also *Anger & Honsberger*, *supra* note 2 at 14:20.70, citing *Brickwood v. Young and Minister for Public Works of New South Wales*, [1905] 2 C.L.R. 387. Commentators have noted that upon partition, judicial orders may be

Thus, without a co-ownership agreement, a freeloading co-owner may prove unwilling or unable to pay for repairs and maintenance. The other owner(s) must either pay the necessary expenses on behalf of the freeloader (and wait until the property is sold to recover) or commence an application for partition or sale. This problem can be solved by an agreement requiring that owners contribute their share of the costs for the maintenance of the property. That share is usually based on the proportionate share that each co-owner has in the property.

Prompt payment can be encouraged by specifying a high interest rate or limiting the right of a defaulting co-owner to use the property, receive proceeds from it or participate in decision making until the default is cured.

In addition to whether an owner must pay for expenses, a well drafted co-ownership agreement should address how owners will approve expenditures. Again, the proportionate share that each co-owner has in the property can be the basis upon which these decisions are made. For instance, if one co-owner has a significant majority interest in the property, that co-owner may have the right to approve most of the expenses on its own. However, if the percentage ownership is divided more equally between the co-owners, the approval of all co-owners may be required.

In addition to clearly stating their rights, owners should consider how disputes about those rights will be resolved. In appropriate cases, an agreement to arbitrate disputes and an agreement that arbitrated disputes will proceed on an expedited schedule can ensure that disputes about the property are resolved quickly. That said, arbitration is not always appropriate and parties should consider (among other things) whether the amounts likely to be in dispute warrant paying both lawyers and an arbitrator.

flexibly tailored to the fact situation: “the court may make all allowances and should give such directions as well as give complete equity to the parties”: *Anger & Honsberger, supra* note 2 at 14:20.140.

Even without a co-ownership agreement, the law imposes some limits on what co-owners can do. If the property generates revenue, each owner is entitled to a share of that revenue equal to their proportionate ownership of the property. A co-owner who receives more than his or her fair share of revenue is liable to account to the other owners, and an action for an accounting can be commenced without selling the property.¹⁴ Thus, a co-owner expecting a disproportionate share of the revenue or sale proceeds generated by a property because he or she is managing the property (or for some other reason) must secure the agreement of the other co-owners.

As noted, a fundamental element of co-ownership is that all owners have the right to occupy the entire property. One owner cannot exclude another from the property, or part of the property.¹⁵ If co-owners plan to use or occupy different parts of the same property then they will need to enter into an agreement setting out this division.

That said, a co-owner's right to use and occupy a property is not unlimited. One owner cannot destroy or damage the property without the consent of its co-owners and, in appropriate cases, the court will intervene with an injunction to prevent proposed damage or destruction.¹⁶

C. Problems between co-owners and third parties

Creditors of joint tenants¹⁷ and tenants in common¹⁸ can look to the debtor's share of the property to satisfy his or her debts. If the parties are joint tenants, the joint tenancy is converted to a tenancy in common when a creditor takes steps to execute against one joint tenant's

¹⁴ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 122(2).

¹⁵ *Anger & Honsberger*, *supra* note 2 at ss. 14:30.70 and 14:30.100.

¹⁶ *Ibid* at s. 14:30.100.

¹⁷ *Sunglo Lumber Ltd. v. McKenna* (1974), 48 D.L.R. (3d) 154 (B.C.S.C.) [*Sunglo*]; *Sirois v. Breton*, 1967 CarswellOnt 162 (Co. Ct.) [*Sirois*]; *Royal & SunAlliance Insurance Co. v. Muir*, 2011 ONSC 2273 [*SunAlliance*].

¹⁸ *Anger & Honsberger*, *supra* note 2 at s. 14:30.100.

interest.¹⁹ The creditor can then enforce its judgment against the debtor's interest in the property. Although a creditor can only recover from the debtor's share of a property, the sale of the property will often impose significant hardship on the innocent co-owner(s).

Relatively little can be done at the outset of a co-ownership relationship to shield a debtor's interest in real property from seizure. Because of this, parties must consider carefully whether to purchase property with an owner who is, or may be, in financial trouble. For example, when spouses purchase property together and one of them has a substantially higher risk of insolvency (for example, because he or she owns a business and has given personal guarantees), it may be prudent that title be taken in the name of the other spouse. These arrangements provide some protection against creditors, as long as the arrangement is not meant to defeat or delay enforcement by creditors when it is made. However, it is possible that creditors will attack the arrangements as a fraudulent conveyance or seek to claim that the legal owner of the property holds some or all of the beneficial interest in it on resulting or constructive trust for the debtor (which is discussed below).

It is almost always unwise to respond to one owner's financial crisis by transferring ownership to the other owner, or a third party. A transfer made to defeat or delay creditors can be set aside under the *Fraudulent Conveyances Act*, particularly if (among other things) the consideration is inadequate, the property is transferred to a non-arm's length party, the seller is facing financial difficulties and has no other assets, the seller has few remaining assets after the transfer and/or

¹⁹ *Sunglo*, *supra* note 17; *Siriois*, *supra* note 17; *SunAlliance*, *supra* note 17.

the seller continues to enjoy the use of the property after the transfer.²⁰ Suspicious transfers can involve both the debtor and previously innocent co-owner in litigation.

In the commercial context, co-owners should carefully consider whether they intend to create a legal partnership. A partnership can exist without any explicit agreement between the partners, provided that the parties are carrying on business in common with a view to profit.²¹ A finding that co-owners are partners has important consequences: partners owe each other fiduciary duties and are jointly and severally liable for partnership debts. If they want to avoid this result, it should state explicitly in a co-ownership agreement that the co-owners are not partners. Such statements are not determinative, and should be supplemented if possible with other terms including a provision allowing co-owners to operate competing businesses (which is incompatible with the existence of a fiduciary duty)²² and delegate management to a property manager.

D. Indirect ownership: corporations, partnerships and trusts

Property owners can also choose to hold their interest indirectly. In such cases, the property is held by a company, partnership or trust and the ultimate beneficial owners hold shares, partnership interests or trust units in the entity that holds title. Depending on the size and complexity of the transaction, there may be many layers between the property and the ultimate beneficial owner.

²⁰ *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052 at para. 67.

²¹ *Partnerships Act*, RSO 1990, c P.5, s. 2.

²² Jeffrey H. Shore, “Real Estate Joint Ventures” (1 February 2011), Goodmans LLP, online: <<http://www.goodmans.ca/files/file/docs/Real%20Estate%20Joint%20Ventures%20and%20Conducting%20a%20Thorough%20Due%20Diligence%20for%20Real%20Estate%20Transactions.pdf>>.

The structure chosen for most real estate joint ventures is generally driven by tax consequences. Parties almost always choose the most tax effective structure, so that taxes will be minimized if all goes well and the property generates revenue and profits. But parties often fail to consider the rights and obligations their chosen structure will impose if all does not go well.

When parties own property through a corporation, partnership or trust, they have all of the rights and obligations that apply to any other corporation, partnership or trust. Although a detailed discussion of these rights and obligations is outside the scope of this paper, it is often worth considering whether indirect ownership is preferable to direct ownership from a legal and tax perspective and what (if any) modifications the parties should make to the legal regime that will govern their relationship.

E. Partition and Sale: Ending the Co-Ownership

If owners cannot co-exist, and cannot agree to an alternate mechanism to resolve disputes, then any owner may apply for partition or sale of the property pursuant to the *Partition Act*.²³ Such an application can be useful in appropriate circumstances, because it provides a way for owners to disengage from each other. But it is also a blunt instrument with sometimes undesirable results. It is important for owners to consider whether they should agree to an alternate termination mechanism more suited to their specific circumstances and expectations.

There are many reasons to provide a mechanism for resolving differences among co-owners without ending the co-ownership. For example, if one or more co-owners are living in the property, selling to a third party and moving to a new property will often be undesirable (because of the disruption caused by the move) or impossible (because an owner's share of the sale proceeds will be insufficient to purchase a new property). In the commercial context, an action for partition and sale can hurt the value of the property if it is brought at an inopportune time, either because of the market or the state of the property.

Even leaving aside these factors, an action for partition or sale is a cumbersome way to solve problems. It requires that the party seeking partition or sale commence and successfully prosecute a court application. This process can consume significant time and resources, particularly if other owners oppose the application.

In the absence of an agreement between the parties, all co-owners are subject to having their property partitioned or sold. The presumptive remedy is a partition, which results in dividing the property between the co-tenants. However, if a sale is more advantageous to the parties or the

²³ R.S.O. 1990, c. P. 4. See also: *Anger & Honsberger*, *supra* note 2 at s. 14:20.140; *Settled Estates Act*, R.S.O. 1990, c. S.7, s 18(2); *Davis v Davis*, [1954] 1 D.L.R. 827 (Ont. C.A.); *Garfella Apartments Inc. v. Chouduri*, 2010 ONSC 3413 [*Garfella*] at para. 20.

land is not suitable for partition then a sale will be ordered.²⁴ The existing owners have the right to participate in that sale, but are not entitled to a right of first refusal or other preferential treatment.²⁵

A party that opposes partition and sale bears a heavy onus. Absent a contractual agreement to the contrary, every co-owner is presumptively entitled to an Order either partitioning the property (i.e., dividing it between the owners) or requiring that the property be sold and the proceeds divided among the co-owners. If the other owner(s) seek to maintain the status quo and prevent a partition or sale, they must prove that the application for partition is malicious, oppressive, vexatious or will cause hardship amounting to oppression.²⁶ Evidence that the timing of the proposed sale is poor and that a better price can be obtained by waiting is not sufficient.²⁷

Parties who contract out of their right to partition and sale should replace that right with an alternate exit mechanism. Such a mechanism can, for example, take the form of a “shotgun” clause that allows one side to set a price for the property and require the other to buy or sell at that price to the co-owner that exercises the shotgun.²⁸ Alternatively, the parties can agree in advance to a process for the sale of the property that does not require court intervention (for example, specifying how a real estate agent will be selected and who will instruct that agent) and when that process can be invoked by the parties.

²⁴ *Garfella, ibid; De Felice v. 1095195 Ontario Ltd.*, 2013 ONSC 1 [*De Felice*] at paras. 108-111.

²⁵ *De Felice, ibid.*

²⁶ *Ibid*, at para. 50.

²⁷ *Canadian Imperial Bank of Commerce v. Mulholland Construction Inc.*, 1998 CarswellOnt 340.

²⁸ Donald J. Donahue, Peter D. Quinn & Danny C. Grandilli, *Real Estate Practice in Ontario*, 7th ed. (Markham, ON: LexisNexis, 2011) at p. 87.

II. DIVIDING LEGAL AND BENEFICIAL OWNERSHIP

The previous section discusses what happens when parties share legal and beneficial ownership. This section deals with how legal ownership can be separated from beneficial ownership, and the practical consequences of that separation. The simplest example of this is when one party (the legal owner) agrees to hold a property in trust for another (the beneficial owner). The beneficial owner is entitled to the benefits of the property, but the legal owner is registered on title.

One important difference between legal and beneficial ownership is that there is no easy and reliable way to identify the beneficial owner of a property. In some circumstances, the law will separate legal and beneficial ownership in the absence of an express agreement between the parties. Accordingly, whenever a trust is intended — or may be imposed — the parties will benefit from a clear agreement that specifies the rights and obligations of all involved.

A. Purchase Money Resulting Trusts

A purchase money resulting trust can arise without an express agreement between the parties when one person pays for some or all of the property but another person is the legal owner of that property.

When one person pays for a property that another legally owns, it is generally presumed that a person who pays for some or all of a property meant to be – and is – the beneficial owner of it.²⁹

The presumption of resulting trust can be rebutted by the legal owner if he or she proves that the purchase moneys contributor intended a gift, loan, or fulfillment of some other obligation.³⁰

²⁹ *Rascal Trucking Ltd. v. Nishi*, 2013 SCC 33 at para. 1.

³⁰ See e.g., *ibid* at para. 40, where the nature of the relationship between parties led the Supreme Court to the inference that the contributor had advanced purchase moneys in fulfilment of a moral obligation. Therefore, the presumption of the purchase money resulting trust was rebutted.

Intention at the time of the contribution is determinative, and courts are understandably wary of self-serving after-the-fact evidence about what the parties intended.³¹

An important exception to the presumption of a resulting trust occurs when the legal owner of a property is a dependent child and the payor is the legal owner's parent.³² In such cases, "presumption of advancement" applies, and is presumed to gift the funds. In this case, it is the paying parent who must prove a gift was not intended. The presumption of advancement does not apply to payments made for the benefit of independent adult children.³³ Nor does it apply between spouses.

When a purchase money resulting trust arises, the beneficial interest conferred is proportionate to the contribution to the purchase price.³⁴ Thus, a titleholder who received half of the purchase money from a third party presumptively holds half of his or her legal interest in trust for that party. If property values increase, the payor can be entitled to much more than he or she originally paid.

The difficulties that can be created by the doctrine of resulting trust can be illustrated by the simple example used in the introduction. If a parent provides funds so their independent adult child can purchase a home, the parent's contribution can be characterized as: (i) a gift, in which case the parent is entitled to nothing; (ii) a loan, in which case the parent is entitled to be repaid; or (iii) neither a gift nor a loan, in which case the parent is entitled to beneficial ownership of the property in proportion to its contribution. If the parties do not specify the nature of the payment

³¹ *Ibid* at para. 2.

³² *Pecore v Pecore*, 2007 SCC 17 at paras. 27-41.

³³ *Ibid.*, at paras. 36-38.

³⁴ *Ibid* at para. 1; see also *Hamilton v Hamilton*, [1996] O.J. No. 2634 (Ont. C.A.) at para. 39; *Sampath v Deopersad*, 2017 ONSC 7055 at para. 76; and *Kavanagh v Shils*, 2015 ONSC 5815 at para. 136.

when it is made, there is a risk that complex and expensive litigation will be required to ascertain the parties' intentions long after the fact.³⁵

B. Constructive Trust

The doctrine of constructive trust can divide legal and beneficial ownership without the consent (or even the knowledge) of the legal owner. In Canada, constructive trusts fall into two overlapping categories. First, a constructive trust may be imposed to remedy unjust enrichment, even if there is no wrongdoing.³⁶ Second, a constructive trust may be imposed to remedy conduct contrary to good conscience, including fraud and breach of fiduciary duty.³⁷

C. Unjust Enrichment and Proprietary Remedies

The test for unjust enrichment is well established: one party must be enriched, the other must be deprived and there must be no "juristic reason" to justify the transfer of wealth.³⁸ Unjust enrichment will not always give rise to a constructive trust – there must be a "sufficiently direct connection" between the enrichment and the property.³⁹

In the real estate context, constructive trusts are most common when unmarried couples occupy a property owned by one of them. If one partner has had considerable impact on the value of the family property through his or her unpaid labour and a monetary fee-for-service award would both demean and misrepresent the nature of his or her work then that partner may be entitled to an interest in the property that is proportionate to his or her contribution.⁴⁰

³⁵ See for example: *Milionis v. Rivas*, 2017 ONSC 5001; and *Greco v. Frano*, 2015 ONSC 7217.

³⁶ *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 [*Soulos*] at para. 20.

³⁷ *Ibid* at para. 32.

³⁸ *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

³⁹ *Peter v Beblow*, [1993] 1 S.C.R. 980 at para. 35.

⁴⁰ *Ibid*.

As with resulting trusts, clarity about what (if any) beneficial interest the person not registered on title will have in a property can help parties avoid expensive and difficult disputes if the relationship breaks down.

D. Constructive Trusts and Wrongful Activity

Constructive trusts can also generally be imposed to remedy wrongful acts to “hold persons in different situations to high standards of trust and probity.”⁴¹ Thus, a person who takes funds through fraud or breach of fiduciary duty and uses the funds to purchase a property may be found to hold the property in trust for their victim. If a co-owner or purchaser knows, or ought to know, about the wrongful conduct then their interest in the property may also be at risk.⁴²

Because of this, and at the risk of stating the obvious, it is a terrible idea to co-own real property (or other property) with a rogue or fraudster.

E. Proprietary Estoppel

Finally, proprietary estoppel could allow for an individual to obtain an interest in land if he or she was promised an interest and relied on the promise to his or her detriment. A claim for proprietary estoppel requires that the claimant establish: first, there must have been a “representation or assurance on the basis of which the claimant expects to enjoy a right or benefit over property”; and, second, that he or she reasonably relied on the expectation and experienced a detriment as a result of that reliance. Together, these inquiries determine whether an equity arises.⁴³

⁴¹ *Soulos, supra* note 36 at para. 17.

⁴² Among other things, the previously innocent party may be liable for knowing receipt of trust funds or assisting with the breach of fiduciary duty. There is also a risk that the knowledge will defeat a claim to be a *bona fide* purchaser for value without notice.

⁴³ *Cowper-Smith v. Morgan*, 2017 SCC 61 at paras. 21-23.

Proprietary estoppel is relatively new (having been clarified by the Supreme Court in December 2017) and the test for it is not well developed. To avoid this uncertainty, a party making or relying on promises relating to property should reduce both the promise and the consequence of it to a written agreement.

F. *Bona Fide* Purchasers for Value Without Notice

As equitable interests, beneficial ownership rights are outranked by good legal title. Thus, a *bona fide* purchaser will receive the property free and clear of all encumbrances, and the equitable owner's proprietary interest will be eliminated. This is because Ontario's land titles system relies on a "curtain" and "mirror" principle. The "curtain" draws a line at which potential purchasers can rely on apparent good title, with the registered title "mirroring" legal and equitable entitlements.⁴⁴

In practice, therefore, most property purchasers need not be concerned about constructive and resulting trusts as long as they do not have notice of them. But real or alleged beneficial interests can cause significant problems for vendors.

Because trusts can be extinguished by the sale of a property, beneficial owners can seek to preserve the property until their claim can be determined. The most common preservation mechanism is a Certificate of Pending Litigation ("CPL"). Once a CPL is registered on title (which can only be done pursuant to a court order), anyone purchasing or encumbering the property is deemed to have notice of the claim that it records. Since a purchaser who has notice of a constructive or resulting trust will take title subject to that trust,⁴⁵ a CPL relating to a

⁴⁴ *Durrani v. Augie*, [2000] O.J. No. 2960 (S.C.J.) at paras. 40-42, cited with approval in *Lawrence v. Wright* (2007), 84 O.R. (3d) 94 (C.A.) at para. 62.

⁴⁵ *Black v. Owen*, 2012 ONSC 400 (Div. Ct.).

potential constructive or resulting trust claim will usually make it impossible to sell the relevant property until the claim is determined.

Even if no CPL is registered, vendors may consider disclosing any known proprietary interests in the land to avoid a finding of the vendor's liability on another basis, including fraudulent misrepresentation, equitable fraud, or bad faith.⁴⁶

Conclusion

This paper has identified multiple risks associated with sharing or dividing legal and beneficial ownership of a property. Virtually all of these risks can be reduced if the parties enter into an agreement in advance stating what their rights will be. The problem is that parties usually do not want to spend the time and money required to address potential problems before they arise. But addressing problems after they arise will invariably require exponentially more time and money. Fixing rights and obligations in a clear agreement is almost always a worthwhile investment, and one that all co-owners should seriously consider.

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⁴⁶ See *Outaouais Synergist Inc. v. Keenan*, 2013 ONCA 526, where the finding that the vendor's solicitor was not liable hinged on the fact that the non-disclosed recovery clause that attached to the land in question was not an "encumbrance". In this fact situation, the general proposition that a vendor is under no general duty to disclose defects relating to title or to quality, apart from an express contract, applies. However, this is a fine line that a prudent solicitor likely would not want to walk, since the court found that the vendors in this case "may have been nibbling at the edges of the 'honest fair-dealing' concept" (para. 88).

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Miller Thomson on Estate Planning

Chapter 10 — TAXATION OF REAL ESTATE AND INVESTMENTS

10.20 — REAL PROPERTY

10.20.10 — Basic Concepts

10.20.10.30 — Joint Tenancy versus Tenants-in-Common

10.20.10.30 — Joint Tenancy versus Tenants-in-Common

Understanding the differences between holding real property as a joint tenant or tenant-in-common is important in many aspects of estate planning. At common law, a joint tenancy is a type of property ownership where two or more individuals enjoy an undivided and identical interest in property. Importantly for estate planning, where property is held in joint tenancy, each of the tenants enjoys a right of survivorship. Thus, when one tenant dies his or her interest in the land is extinguished and, assuming a joint tenancy with two tenants, the other tenant becomes the sole owner of the real property. As discussed in detail later in this chapter, since the property passes to the surviving joint tenant automatically on death, probate fees can be avoided.

However, holding property as joint tenants will not impact the deemed disposition of the property for a deceased taxpayer under paragraph 70(5)(a) of the ITA. Any joint tenant interest passing to the surviving joint tenant will still be subject to paragraph 70(5)(a) resulting in a deemed disposition at FMV to the deceased. The portion received by the surviving joint tenant will be deemed to have been acquired at FMV.⁴ Further, if a taxpayer owns 50 percent of a real estate property as a joint tenant with an arm's length party, the taxpayer will have no option to leave his or her interest in the real estate to his or her spouse since the decedent's interest passes automatically to the surviving joint tenant.

In a tenant-in-common situation, each person owns his or her interest in the property independent of the other owners of the property. There is no right of survivorship and the portion owned by the decedent passes to his or her estate as opposed to passing to the surviving owners of the property. Therefore, the decedent can decide to leave his or her share in the property to pre-determined beneficiaries. For example, if a taxpayer owns 50 percent of a real estate property as a tenant-in-common with an arm's length party, the taxpayer can leave his or her 50 percent interest to his or her spouse. There will be no tax liability on death as under subsection 70(6) of the ITA, any transfer by a Canadian resident to the taxpayer's Canadian resident spouse or common law partner is not subject to the deemed disposition rules under subsection 70(5). However, since there is no right of survivorship, a property held as tenants-in-common may be subject to probate fees on the transfer from the estate to the beneficiaries.

FOOTNOTES

⁴ See Ruling 2004-0101971E5, "Disp. of Interest in Property — Joint Ownership", at para. 6.

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PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:10 TYPES OF CO-OWNERSHIP

§14:10 TYPES OF CO-OWNERSHIP

A person who is sole owner of an estate is said to hold it in "severalty", that is, in a state of separation, because the owner holds it in their own right with no one having any interest jointly with the owner.

There may be co-owners of any estate or interest in land, whether present or future. The two main classes of co-ownership are:

(a) "joint tenancy", in which the co-owners, called "joint tenants", have identical interests in that they take undivided possession of the same property under the same instrument for the same interest which, unless the instrument is a conveyance under the *Statute of Uses*¹ or a will, vests in them at the same time, and the survivor of them takes the entirety; and

(b) "tenancy in common", in which the co-owners, called "tenants in common", have undivided possession of the property, but their interests need not otherwise be identical and the interest of each descends to their own heirs.

At common law, there were two further classes of joint estate, now both obsolete due to statutory amendments. The third class of joint estate was called "coparcenary", in which several persons took property by the same title by descent, and the fourth class was called "tenancy by the entireties", an estate together held by husband and wife during their coverture.

FOOTNOTES

¹ 27 Hen. 8, c. 10 (1535).

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PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.10 General

§14:20.10 General

A joint tenancy arises by the act of the person who creates the estate. It is distinguished by what are known as the four unities:

- (1) "unity of title", whereby all joint tenants must take under the same instrument;
- (2) "unity of interest", whereby the interest of each joint tenant must be identical in nature, extent and duration;
- (3) "unity of possession", whereby each joint tenant is entitled to undivided seisin or possession of the whole of the property and none holds any part separately to the exclusion of the others; and
- (4) "unity of time", whereby, at common law, the interest of each joint tenant must vest at the same time.¹

The interests of joint tenants may, however, vest at different times if the joint tenancy is created by conveyance under the *Statute of Uses*^{1a} or by devise by will.² However, a remainder which is to vest in members of a class only upon the attainment of a specified age cannot be a joint tenancy.³

Since the estate of each joint tenant must be the same in nature, there can be no joint tenancy between the holder of a freehold and the holder of a term of years or between the holder of a freehold in possession and the person entitled to a freehold in reversion.⁴ Although the interests of joint tenants must be the same in duration, one of the tenants may have an additional several estate. Thus, in the case of a grant to A and B for their lives, remainder to the heirs of A, A and B have a joint tenancy for their lives and A has the remainder in fee simple.

In the case of a limitation to two persons and the survivor of them in fee simple, the reference to the survivor makes a joint tenancy for their lives with a contingent remainder in fee simple to the survivor of them.⁵ Joint tenants were said by Littleton to be seised *per mie et per tout*, or in other words "each joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately".⁶

At common law, if land were granted or devised to two or more persons for the same estate, whether freehold or otherwise, without words indicating how those persons were to take, it was presumed that they took as joint tenants.⁷ Thus, if the limitation to them was for their lives, they took as joint tenants for their joint lives and, if the limitation were to them in fee simple or for a term of years, they took as joint tenants in fee simple or as joint lessees. It did not matter, in the case of a will, whether the gift was specific or residuary,⁸ whether direct or by way of trust,⁹ whether to next of kin,¹⁰ relatives,¹¹

issue,¹² personal representatives,¹³ children,¹⁴ family¹⁵ or parents and children.¹⁶ However, the common law rule that persons took as joint tenants, unless the contrary intention was shown, has been reversed by provincial statutes.

If it is desired to limit any estate as a joint tenancy by conveyance or devise, this should be specifically provided. In practice one frequently finds the expression "as joint tenants and not as tenants in common" but the latter negative words are superfluous.

In Ontario, s. 13 of the *Conveyancing and Law of Property Act*¹⁷ provides:

13(1) Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.

(2) This section applies notwithstanding that one of such persons is the spouse of another of them.

The question of whether an intention to take as joint tenants sufficiently appears on the face of the letters patent, assurance or will has caused much difficulty. For example, where a testator devised land to A and B "jointly" it was held that a joint tenancy was created, but where the testator devised land to C "and C's family" it was held that C and C's children took as tenants in common.¹⁸ Yet in a subsequent case a devise to A and B "jointly and individually" was held not to create a joint tenancy.¹⁹ A devise to A and B "to their joint and absolute use" was held to create a joint tenancy.²⁰ It was relevant in this case that the will had been drafted by a lawyer who could be expected to understand the technical meaning to the use of the word "joint." Likewise, where a devise to A and B "to be owned by them jointly" was likely drawn up by a lawyer, it may be presumed that the word "jointly" was being used in its technical legal sense to mean "joint tenants".²¹ However, where there was evidence that a devise had been drafted without the assistance of a lawyer and it appeared that the testatrix had not used the word "jointly" in any "technical legal sense", a devise to A and B "jointly" was held to create a tenancy in common only.²² A devise to A and B "jointly, and if they decide to sell the property, each of them is to have an equal share in the proceeds of the said sale" created a tenancy in common.²³ If the grantees are described as joint tenants they will take as joint tenants even where the only reference in the deed to joint tenancy is to be found in the description of the grantees.²⁴ Similarly, where the reference to joint tenancy was found in the *habendum*, a joint tenancy was created.²⁵

It has been decided that an agreement of purchase and sale is not an assurance within the meaning of s. 13 of the Ontario *Conveyancing and Law of Property Act* and thus the section is not applicable. Where the purchasers were husband and wife and the agreement was silent as to the capacity or interest that they were acquiring, the court concluded that the surviving wife took the entirety as the surviving tenant of the entirety.²⁶ Provisions similar to the Ontario statute are found in other provinces.²⁷

Equity raises a presumption, quite apart from s. 13, in favour of tenancy in common with respect to partnership property since the right of survivorship has no place in business. However, notwithstanding the equitable presumption, it is still open for the partners to agree that lands will be held in joint tenancy.²⁸ It is not clear that this equitable presumption applies in Ontario. One 1915 decision found that lands held as partnership property are held in joint tenancy and are not affected by s. 13.²⁹ However, an Ontario

case decided in 1999 and without any reference to the earlier 1915 decision held that even though the partnership property in question had been originally acquired by the partners as joint tenants, "partnership property is presumed in equity to be held by the partners as tenants in common regardless of how legal title is held".³⁰

Although joint ownership can arise by way of promissory estoppel³¹ or by application of the doctrines of resulting or constructive trusts,³² on the face of s. 13, one would presume that the form of joint ownership so arising would be tenancy in common as opposed to joint tenancy.

In Ontario, the *Estates Administration Act*³³ provides that, where real property becomes vested under the Act in two or more persons beneficially entitled under the Act, they take as tenants in common in proportion to their respective interests unless, in the case of a devise, they take otherwise under the provisions of the will of the deceased. The common law rule prevails, however, in the case of executors and trustees who hold as joint tenants because they are excluded from the foregoing provisions of s. 13 of the *Conveyancing and Law of Property Act*.³⁴ The *Land Titles Act*³⁵ also provides that, where two or more owners are described as trustees, the property shall be held to be vested in them as joint tenants unless the contrary is expressly stated. Executors and trustees are left as joint tenants for the sake of convenience because, under the rule of survivorship that applies to joint tenancies, the trusts can thus be carried out by the survivors or the last survivor and, in case of the death of the latter, a conveyance of the trust estate can be made by their heir or personal representative to new trustees.

No provision similar to the foregoing provision of the Ontario *Estates Administration Act*³⁶ appears to have been made in the other provinces but it is provided in New Brunswick and Nova Scotia that every estate vested in trustees or executors as such is held by them in joint tenancy.³⁷ Also, the trustee legislation in Alberta, British Columbia, Manitoba, and Saskatchewan provides that where an instrument under which a new trustee is appointed to perform a trust contains a declaration by the appointer to the effect that any estate or interest in land subject to the trust shall vest in the persons who by virtue of such instrument are the trustees for performing the trust, that declaration without a conveyance or assignment operates to vest the estate or interest in those persons as joint tenants for the purposes of the trust, and where an instrument under which a retiring trustee is discharged contains such a declaration by the retiring and continuing trustees, the declaration operates to vest the estate or interest in the continuing trustees as joint tenants for the purposes of the trust.³⁸

At common law, if two or more persons having no title entered into possession of property in such circumstances as to give them a possessory title under the *Statute of Limitations*, they took as joint tenants³⁹ unless the circumstances showed that they had separate interests, as where persons beneficially entitled as tenants in common acquired the legal estate by possession, in which case they took it as tenants in common,⁴⁰ although if some so entered into possession to the exclusion of the others, they acquired the legal estate in their own shares as tenants in common and in the shares of the others as joint tenants.⁴¹ This acquisition of title by disseisin of the true owner applied where persons in possession under a lawful title remained in possession after the title came to an end, in which case they became joint tenants.⁴² In Ontario, however, by s. 14 of the *Conveyancing and Law of Property Act*,⁴³ where two or more persons acquire land by possession, they are to be considered as holding as tenants in common and not as joint tenants. Similar provision does not appear to have been made in the other provinces.

There are special cases in which the court will declare an estate to be a tenancy in common notwithstanding that documents do not provide for several interests. For example, if purchasers of a property provide the purchase money in unequal shares, they may be declared to be tenants in common notwithstanding the form of conveyance to them.⁴⁴ Parol evidence of the circumstances and subsequent dealings is admissible to prove the intent of the parties to hold as tenants in common⁴⁵ although apparently statements of the parties are not admissible.⁴⁶ On the other hand, if the document indicates on its face the intent to hold as tenants in common, payment by the tenants in equal shares does not change an interest into a joint tenancy.⁴⁷ Where a husband and wife purchased land, both signing the agreement, and the wife as well as the husband binding herself to the covenants including the covenant to pay, the husband paying the full purchase price, it was held that the husband, by making his wife a party to the purchase, must be presumed to have made her a gift by way of advancement, that there was no presumption of a resulting trust and that they took as tenants in common.⁴⁸ Provisions for children in marriage settlements are, if possible, construed as tenancies in common.⁴⁹

FOOTNOTES

¹ Cited in *Hunt Estate v. Hunt Estate* (2016), [18 E.T.R. \(4th\) 6](#) (Sask. C.A.).

^{1a} 27 Hen. 8, c. 10 (1535); *Earl of Sussex v. Temple* (1698), 1 Ld. Raym. 310, 91 E.R. 1102; *Stratton v. Best* (1787), 2 Bro. C.C. 233, 29 E.R. 130; *Hales v. Risley* (1673), Pollex. 369 at p. 373, 86 E.R. 578; *Doe d. Hallen v. Ironmonger* (1803), 3 East 533, 102 E.R. 701.

² *Oates d. Hatterley v. Jackson* (1742), 2 Str. 1172, 93 E.R. 1107; *Kenworthy v. Ward* (1853), 11 Hare 196, 68 E.R. 1245; *Morgan v. Britten* (1871), L.R. 13 Eq. 28; *Binning v. Binning*, [1895] W.N. 116 (C.A.).

³ *Woodgate v. Unwin* (1831), 4 Sim. 129, 58 E.R. 50; *Hand v. North* (1863), 10 Jur. N.S. 7.

⁴ Co. Litt. 188a.

⁵ *Wiscot's Case*; *Giles v. Wiscot* (1599), 2 Co. Rep. 60b, 76 E.R. 555. And see Co. Litt. 191a; *Van Grutten v. Foxwell*, [1897] A.C. 658 (H.L.), at p. 678.

⁶ Co. Litt. 186a.

⁷ *Morley v. Bird* (1798), 3 Ves. Jun. 628, 30 E.R. 1192.

⁸ *Morley v. Bird*, *supra*, footnote 7; *Crooke v. De Vandes* (1803), 9 Ves. Jun. 197, 32 E.R. 577; *Walmsley v. Foxhall* (1863), 1 De G.J. & S. 451, 46 E.R. 179 (C.A.).

⁹ *Aston v. Smallman* (1706), 2 Vern. 556, 23 E.R. 961; *Bustard v. Saunders* (1843), 7 Beav. 92, 49 E.R. 998.

¹⁰ *Withy v. Mangles* (1843), 10 Cl. & Fin. 215, 8 E.R. 724; *Lucas v. Bandreth (No. 2)* (1860), 28 Beav. 274, 54 E.R. 371; *Baker v. Gibson* (1849), 12 Beav. 101, 50 E.R. 998.

¹¹ *Eagles v. Le Breton* (1873), L.R. 15 Eq. 148.

¹² *Hill v. Nalder* (1852), 17 Jur. 224; *Hobgen v. Neale* (1870), L.R. 11 Eq. 48.

¹³ *Walker v. Marquis of Camden* (1848), 16 Sim. 329, 60 E.R. 900; *Stockdale v. Nicholson* (1867), L.R. 4 Eq. 359.

¹⁴ *Oates d. Hatterley v. Jackson* (1742), 2 Str. 1172, 93 E.R. 1107; *Binning v. Binning*, [1895] W.N. 116 (C.A.).

¹⁵ *Burt v. Hellyar* (1872), L.R. 14 Eq. 160; *Wood v. Wood* (1843), 3 Hare 65, 67 E.R. 298; *Gregory v. Smith* (1852), 9 Hare 708, 68 E.R. 698.

¹⁶ *Mason v. Clarke* (1853), 17 Beav. 126, 51 E.R. 980; *Armstrong v. Armstrong* (1869), L.R. 7 Eq. 518.

¹⁷ R.S.O. 1990, c. C.34.

¹⁸ *Re Quebec* (1929), [37 O.W.N. 271](#) (H.C.J.).

¹⁹ *Re Dupont* (1966), [57 D.L.R. \(2d\) 109](#) (Ont. H.C.J.).

²⁰ *Re MacGregor Estate* (2001), [191 N.S.R. \(2d\) 194](#) (S.C.).

²¹ See [Rafuse v. Borne](#) (1996), [157 N.S.R. \(2d\) 118](#) (S.C.), at para. 35.

²² [Sellon v. Huston Estate](#) (1991), [107 N.S.R. \(2d\) 6](#) (S.C.). See also [Re White](#) (1987), [38 D.L.R. \(4th\) 631](#) (Ont. H.C.J.).

²³ [McEwen v. Ewers](#), [\[1946\] 3 D.L.R. 494](#) (Ont. H.C.J.).

²⁴ [Steeves v. Haslam House](#) (1975), [57 D.L.R. \(3d\) 357](#) (Ont. H.C.J.).

²⁵ [Humeniuk v. Humeniuk](#) (1970), [13 D.L.R. \(3d\) 417](#) (Ont. H.C.J.).

²⁶ [Campbell v. Sovereign Securities & Holding Co. Ltd.](#) (1958), [13 D.L.R. \(2d\) 195](#) (Ont. H.C.J.), affd [16 D.L.R. \(2d\) 606](#) (C.A.). It is unlikely that a tenancy by the entirety can still exist, in view of s. 64(1), (2) and (3) of the *Family Law Act*, R.S.O. 1990, c. F.3, which provides:

64(1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.

(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.

For a subsequent consideration of this case see [Demaiter v. Link](#) (1973), [36 D.L.R. \(3d\) 164](#) (Ont. H.C.J.). For an example of the opposite conclusion, viz., that a tenancy by the entirety does not survive married women's property legislation, see *Registrar-General N.S.W. v. Wood* (1926), 39 C.L.R. 46 (Aust. H.C.). See also the *Law of Property Act*, R.S.A. 2000, c. L-7, ss. 5-6.

²⁷ *Law of Property Act*, R.S.A. 2000, c. L-7, ss. 5, 6 and 8; *Property Law Act*, R.S.B.C. 1996, c. 377, ss. 11 and 12; *Law of Property Act*, R.S.M. 1987, c. L90 (C.C.S.M., c. L90), s. 15; *Property Act*, R.S.N.B. 1973, c. P-19, s. 20; *Real Property Act*, R.S.N.S. 1989, c. 385, s. 5(1); *Tenants in Common Act*, R.S.N.W.T. 1988, c. T-1, s. 1; *Tenants in Common Act*, R.S.Y. 2002, c. 216, s. 1.

²⁸ [Re Sterenchuk Estate; Western Trust Co. v. Demchuk](#) (1958), [16 D.L.R. \(2d\) 505](#) (Alta. S.C. App. Div.).

²⁹ [Harris v. Wood](#) (1915), [7 O.W.N. 611](#) (H.C.). Followed reluctantly in [Hegeman v. Rogers](#) (1971), [21 D.L.R. \(3d\) 272](#) (Ont. H.C.J.). Also followed in [Higgins v. Orion Insurance Co.](#) (1981), [135 D.L.R. \(3d\) 29](#) (Ont. H.C.J.), revd but not on this issue [17 D.L.R. \(4th\) 90](#) (C.A.).

³⁰ [Agro Estate v. Agro \(Guardian of\)](#) (1999), [26 E.T.R. \(2d\) 314](#) (Ont. S.C.J), at para. 39.

³¹ [Stanley v. Stanley](#) (1960), [23 D.L.R. \(2d\) 620](#) (Alta. S.C.), affd [36 D.L.R. \(2d\) 443](#) (C.A.), leave to appeal to S.C.C. granted but action subsequently settled [40 W.W.R. 181](#).

³² [Rathwell v. Rathwell](#) (1978), [83 D.L.R. \(3d\) 289](#) (S.C.C.). And see the discussion on matrimonial property in ch. 15, *infra*.

³³ R.S.O. 1990, c. E.22, s. 14.

³⁴ R.S.O. 1990, c. C.34, s. 13(1) and (2).

³⁵ R.S.O. 1990, c. L.5, s. 62(3).

³⁶ R.S.O. 1990, c. E.22, s. 14.

³⁷ *Property Act*, R.S.N.B. 1973, c. P-19, s. 20; *Real Property Act*, R.S.N.S. 1989 c. 385, s. 5(1).

³⁸ *Trustee Act*, R.S.A. 2000, c. T-8, s. 17(1) and (2); *Trustee Act*, R.S.B.C. 1996, c. 464, s. 29(1) and (2); *Trustee Act*, R.S.M. 1987, c. T160 (C.C.S.M., c. T160), s. 13(1) and (2).

³⁹ *Ward v. Ward* (1871), 6 Ch. App. 789; *Bolling v. Hobday* (1882), 31 W.R. 9.

⁴⁰ *MacCormack v. Courtney*, [1895] 2 I.R. 97; *Marten v. Kearney* (1903), 36 I.L.T. 117.

⁴¹ *Smith v. Savage*, [1906] 1 I.R. 469.

⁴² [Myers v. Ruport](#) (1904), [8 O.L.R. 668](#) (C.A.).

⁴³ R.S.O. 1990, c. C.34.

⁴⁴ *Robinson v. Preston* (1858), 4 K. & J. 505, 70 E.R. 211. See also [Lemoine v. Smashnuk](#), [2008 ABQB 193](#). In [Christensen v. Leigh](#) (2009), [6 Alta. L.R. \(5th\) 160](#) (Q.B.), the Alberta Court of Queen's Bench held that in spite of the form of conveyance, which stated that the parties held as joint tenants,

they did not hold as such because they had not provided equal shares in purchasing the property, nor did both have unity of possession. The principles in *Lemoine v. Smashnuk*, *supra*, were applied in [Klein v. Wolbeck](#), [2016] 7 W.W.R. 99 (Alta. Q.B.), but in the result the court found that there was an intention to establish a joint tenancy.

⁴⁵ *Harrison v. Barton* (1860), 1 J. & H. 287, 70 E.R. 756; *Palmer v. Rich*, [1897] 1 Ch. 134 at p. 143.

⁴⁶ *Harrison v. Barton*, *supra*, footnote 45.

⁴⁷ *Fleming v. Fleming* (1855), 5 I. Ch. R. 129.

⁴⁸ *Re Jay* (1925), 28 O.W.N. 214 (H.C.); *Kearney v. Kearney* (1969), 10 D.L.R. (3d) 138 (Ont. C.A.). For an example of the presumption of advancement operating in such circumstances where the person claiming sole ownership stands *in loco parentis*, see *Young v. Young* (1958), 15 D.L.R. (2d) 138 (B.C.C.A.). In Ontario the presumption of advancement between spouses has been abolished by s. 14 of the *Family Law Act*, R.S.O. 1990, c. F.3, but has been retained between parent and minor children: see *Pecore v. Pecore* (2007), 279 D.L.R. (4th) 513 (S.C.C.), and §11:50.20(b).

⁴⁹ *Taggart v. Taggart* (1803), 1 Sch. & Lef. 84 at p. 88; *Rigden v. Vallier* (1751), 3 Atk. 731, 26 E.R. 1219; *Marryat v. Townly* (1748), 1 Ves. Sen. 102, 97 E.R. 918; *Re Bellasis' Trust* (1871), L.R. 12 Eq. 218; *Mayn v. Mayn* (1867), L.R. 5 Eq. 150; *Liddard v. Liddard* (1860), 28 Beav. 266, 54 E.R. 368.

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PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.20 Right of Survivorship

§14:20.20 Right of Survivorship

The most important incident of a joint tenancy is the right of survivorship, called, since ancient times, the "*jus accrescendi*", the right of surviving joint tenants to have their undivided interests progressively increased by the deaths of other joint tenants, although the survivors continue as joint tenants, the last survivor taking the entirety.¹ This feature of a joint tenancy is the natural consequence of the other incidents of complete unity of title, interest and possession, the interests of joint tenants not only being equal but being one and the same, their combined interests forming one estate. A joint tenancy can be severed and turned into a tenancy in common but, while a joint tenancy continues, all joint tenants have a concurrent interest, no one having a share separate from the others. Hence, if one dies, no person can claim their share by descent because, between such person and the surviving joint tenants, there could not be unity of title or unity of time of vesting and no one can have the right to a separate interest in any part of the property. When one joint tenant dies, there is no gap in the seisin or possession of the survivors or any partial divesting of their interests. The interest of the one who dies is simply extinguished and accrues to the survivors who thus have an increased share of the rents and profits of the property and an increased share on severance of the joint tenancy. If no severance occurs, the last survivor takes the entire estate that was originally created as a joint tenancy, whatever the estate may be. It does not follow, however, that the right of survivorship is of equal value to joint tenants. If, for instance, a joint tenancy is limited to A and B for the life of A, A would take as survivor if B dies first but, if A dies first, nothing is left for B.² By reason of the rule of survivorship, the widow of a joint tenant who was survived by another joint tenant had no dower in the property,³ although a widow of a tenant in common was entitled to dower.⁴

At common law, there can be no joint tenancy between a corporation and an individual or between the Crown and a private person because neither the corporation nor the Crown can die so that the individual could never take as survivor. Also a grant to a corporation is a grant to it and its successors, whereas a grant to an individual is a grant to that individual and their heirs, so that there can never be the blending of interest that is necessary to a joint tenancy. The two consequently take as tenants in common.⁵

In England, however, by statute,⁶ bodies corporate are put on the same footing as individuals. In Ontario, the *Conveyancing and Law of Property Act*⁷ provides that a body corporate is capable of holding in joint tenancy as if it were an individual and, where a body corporate and an individual or two or more corporate bodies become entitled to property in circumstances which, had the body corporate been an individual, would have created a joint tenancy, they are entitled to hold the property as joint tenants provided the holding by the body corporate is subject to the same conditions and restrictions as attach to the holding of property by a body corporate in severalty and, on the dissolution of the

body corporate, the property devolves on the other joint tenant. Similar provision is made in Alberta,⁸ British Columbia,⁹ Manitoba¹⁰ and Saskatchewan.¹¹

A conflict of principles arises when one joint tenant murders a fellow joint tenant. On the one hand the principle of survivorship compels the conclusion that the victim's share held in joint tenancy devolves upon the murderer by survivorship while, on the other hand, the principle that a wrongdoer is not to benefit from a wrongful act compels the conclusion that the murderer is not to receive the beneficial interest of the victim. To resolve this conflict the court has decided that the victim's share does devolve upon the murderer by right of survivorship but that a constructive trust immediately arises whereby the murderer holds the victim's share as trustee for their estate.¹² However, the murderer's undivided own interest is not forfeited to the victim's estate.¹³

In reaching this result, it is obvious that, in theory in any event, the murderer has benefited to the extent that the murderer's own interest is no longer subject to the right of survivorship. In effect the imposition of the constructive trust "severs"¹⁴ the joint tenancy. However, the courts have accepted this result on the basis that the imposition of the trust interferes less with the rights acquired by the parties and yet does not do violence to the rule of public policy.¹⁵

Complications arise in the application of the trust when one joint tenant murders one of several joint tenants. In that case it has been held that the beneficiary of the trust is the surviving and innocent joint tenant or tenants.¹⁶ It is important to note that if one joint tenant kills their fellow joint tenant but is found to be not guilty of murder by reason of insanity there is no conflict in the principles as set out here and therefore the living joint tenant takes the property by right of survivorship.¹⁷

FOOTNOTES

¹ Co. Litt. 191a; 2 Bl. Comm. 183.

² Co. Litt. 181b.

³ *Haskill v. Fraser* (1862), 12 U.C.C.P. 383.

⁴ *Ham v. Ham* (1857), 14 U.C.Q.B. 497. Dower has been abolished in all the common law provinces. See §6:40.10, *supra*.

⁵ *Law Guarantee and Trust Society, Ltd. v. Governor and Co. of Bank of England* (1890), 24 Q.B.D. 406.

⁶ *Bodies Corporate (Joint Tenancy) Act*, 62 & 63 Vict., c. 20 (1899).

⁷ R.S.O. 1990, c. C.34, s. 43(1) and (2).

⁸ *Companies Act*, R.S.A. 2000, c. C-21, s. 9(2), (3) and (4).

⁹ *Business Corporations Act*, S.B.C. 2002, c. 57, s. 31.

¹⁰ *Law of Property Act*, R.S.M. 1987, c. L90 (C.C.S.M., c. L90), s. 16(1) and (2).

¹¹ *Companies Act*, R.S.S. 1978, c. C-23, s. 34(1), (2) and (3).

¹² *Schobelt v. Barber* (1966), [60 D.L.R. \(2d\) 519](#) (Ont. H.C.J.); *Re Gore* (1971), [23 D.L.R. \(3d\) 534](#) (Ont. H.C.J.); *Re Pechar*; *Re Grbic*, [1969] N.Z.L.R. 574; *Singh Estate v. Bajrangie-Singh* (1999), [29 E.T.R. \(2d\) 302](#) (Ont. S.C.J.); *Doyle Estate v. Doyle* (2013), [397 N.B.R. \(2d\) 387](#) (Prob. Ct.).

¹³ *Re Dreger* (1976), [69 D.L.R. \(3d\) 47](#) (Ont. H.C.J.).

¹⁴ *Kemp v. Public Curator of Queensland*, [1969] Qd. R. 145 (S.C.); *Novak v. Gatién, Hildebrande and Procter* (1975), [25 R.F.L. 397](#) (Man. Q.B.), at para. 9.

¹⁵ *Schobelt v. Barber*, *supra*, footnote 12. See also *Doyle Estate v. Doyle* (2013), [397 N.B.R. \(2d\) 387](#) (Prob. Ct.).

¹⁶ *Rasmanis v. Jurewitsch*, [1970] 1 N.S.W.R. 650.

¹⁷ *Manitoba (Public Trustee) v. LeClerc* (1981), [123 D.L.R. \(3d\) 650](#) (Man. Q.B.).

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PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.30 Release of Interest

§14:20.30 Release of Interest

Since each joint tenant is seised of the whole estate, the proper method to be followed by one who wishes to vest their interest in the other joint tenants is for this person to release the interest to the others¹ and not grant it to them, although a grant will be construed as a release passing the interest.²

If a joint tenant releases their interest to the other joint tenant or tenants, the release does not operate to pass the estate but to extinguish it and the estate then rests exclusively in the other joint tenant or tenants so as to enlarge their interests which they continue to hold as joint tenants under their original title to the whole. However, if there are three joint tenants and one releases their interest to only one of the others, the release operates to pass the estate to the releasee,³ giving the latter a fresh title to that undivided share, so that the release operates as a severance of that share which will then be held by the releasee and the other tenant as tenants in common, the other two undivided shares continuing to be held by them as joint tenants.⁴

In order for a release, or conveyance, to be effective it must be clear that the releasing joint tenant intends to release their interest. A release for a temporary purpose, with no intention to abandon the interest, will not result in abandonment.⁵

FOOTNOTES

¹ Co. Litt. 9b.

² *Eustace v. Scawen* (1624), Cro. Jac. 696, 79 E.R. 604; *Chester v. Willan* (1670), 2 Wms. Saund. 96, 85 E.R. 768.

³ *Chester v. Willan*, *supra*, footnote 2.

⁴ Littleton's Tenures, ss. 304 and 312.

⁵ [*O'Bertos v. O'Bertos*, \[1975\] 2 W.W.R. 86](#) (Sask. Q.B.).

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Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.40 No Fiduciary Relation between Joint Tenants

§14:20.40 No Fiduciary Relation between Joint Tenants

There is no fiduciary relation between joint tenants or tenants in common as between themselves so as to make them subject to the disabilities or liabilities attaching to such a relation¹ and the mere fact that one co-tenant has been allowed to receive the rents, pay interest and taxes and manage the property generally does not create a fiduciary relation.²

FOOTNOTES

¹ *Kennedy v. De Trafford*, [1897] A.C. 180 (H.L.).

² *Fleet v. Fleet* (1925), [28 O.W.N. 193](#) (S.C. App. Div.).

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Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.50 Accounting between Joint Tenants

§14:20.50 Accounting between Joint Tenants

At common law, there could be no action of account by one joint tenant or tenant in common against another who had occupied the whole property unless the non-occupying co-tenant had appointed the occupying tenant as their bailiff, so as to make the occupying co-tenant liable to account in that capacity.¹ In a court of equity, however, one joint tenant or tenant in common was liable to account in an action by the other co-owners.²

By the Imperial statute of 1705,³ a joint tenant or tenant in common was made liable to account to co-tenants as bailiff if they received more than their just share but not otherwise. It was held that an action of account lay against the co-tenant under the Act whether the co-tenant was in sole occupation or was in receipt of the rents.⁴ It has been held that:

(a) a joint tenant receives more than their just share within the meaning of the statute if they receive money or something else given or paid by another which the co-tenants are entitled to simply by being co-tenants and, if the amount which they receive or keep is more than a proportionate interest as such tenant;

(b) the co-tenant does not receive more than their just share within the meaning of the statute if the co-tenant merely has the sole enjoyment of the property even though by the employment of their own industry and capital the co-tenant makes a profit by the enjoyment and takes the whole of such profit; and

(c) in an action of account, proof of such enjoyment and receipt of the whole profits is not evidence of the occupying co-tenant being bailiff within the meaning of the statute, nor presumptive evidence of the occupying co-tenant having received more than their just share.⁵

It has also been held that:

(a) the account extends only to whatever was paid or given by the tenants or occupants of the common property to one co-owner in excess of their just share or proportion and that the co-tenant does not receive more than their just share merely by having the whole enjoyment of the property where there was no exclusion or ouster of their co-tenants; and

(b) the co-tenant was not answerable for any profit made out of the property by the use of their industry and capital in tilling and manuring the land or by herding and grazing cattle, or for cutting down trees of suitable age and growth or other acts of waste, or for cutting and taking away a crop of hay, the produce of the property.⁶

No liability arises because of one joint tenant's wilful default in failing to rent the premises.⁷

In Ontario, the *Courts of Justice Act*⁸ provides that an action for an accounting may be

brought by a joint tenant or tenant in common, or their personal representative, against a co-tenant for receiving more than the co-tenant's just share. Similar provision is made in Manitoba.⁹ Similar express provision does not appear to have been made in the other provinces in which, therefore, the Imperial statute would seem to be in force.¹¹

A joint tenant cannot compel the others to contribute to the cost of repairs.¹² In a partition action, however, a co-tenant may be allowed sums properly spent on substantial repairs and improvements¹³ and may be charged with excess rents and profits received¹⁴ and, if the co-tenant has been in sole occupation, the co-tenant may be charged with an occupation rent.¹⁵ As each co-tenant is entitled to enter upon the whole property, one who has solely occupied the property is not liable to the others for occupation rent. If the occupying co-tenant performs acts amounting to exclusion of the others, the court may appoint a receiver. If the occupying co-tenant actually receives rent, an account will be ordered. If a joint tenant or tenant in common has been in sole occupation and makes repairs or improvements, they are not entitled to be repaid for them unless they submit to an occupation rent and accounts for the profits received from occupation.¹⁶

Many of the cases involving an accounting arise when husband and wife own the property as joint tenants. Because of the marital relationship and the possible existence of a gift, the cases must be read with some care.¹⁷ However, certain general principles with respect to accounting for mortgage payments can be stated. First, joint tenants are equally responsible for mortgage payments and, apart from a special agreement, each must accept responsibility for their share of the payments.¹⁸ Second, if one joint tenant mortgages their interest in order to acquire the property, the mortgage only extends to their interest.¹⁹ If the parties make some special agreement as to mortgage payments, that agreement in the normal course will be honoured.²⁰ Finally, where both joint tenants sign a mortgage in the absence of a special agreement, both are equally entitled to the proceeds of the mortgage.²¹

In British Columbia there is special legislation which permits the court to order that a joint tenant or tenant in common, who pays more than this proportionate share of, *inter alia*, mortgage payments, taxes, insurance premiums, rent, interest, repairs, purchase money instalment, or required payment is to have a lien on the property.²²

FOOTNOTES

¹ Co. Litt. 186a, 200b; *Pulteney v. Warren* (1801), 2 Ves. Jun. 73, 31 E.R. 944; *Wheeler v. Horne* (1740), Willes 208, 125 E.R. 1135; [Gregory v. Connolly](#) (1850), [7 U.C.Q.B. 500](#).

² *Strelly v. Winson* (1685), 1 Vern. 297, 23 E.R. 480; *Leake v. Cordeaux* (1856), 4 W.R. 806 (Ch.).

³ *Administration of Justice Act*, 4 & 5 Anne, c. 16 (1705) (*Statute of Anne*), s. 27.

⁴ *Eason v. Henderson* (1848), 12 Q.B. 986, 116 E.R. 1140, revd 17 Q.B. 701, 117 E.R. 1451 *sub nom. Henderson v. Eason*.

⁵ *Supra* (appeal).

⁶ *Re Kirkpatrick; Kirkpatrick v. Stevenson* (1883), [3 O.R. 361](#) (H.C.J.), citing *Eason v. Henderson, supra*, footnote 4 (appeal); *Nash v. McKay* (1868), [15 Gr. 247](#); *Martyn v. Knowllys* (1799), 8 T.R. 145, 101 E.R. 1313; *Rice v. George* (1873), [20 Gr. 221](#); *Griffies v. Griffies* (1863), 8 L.T. 758; *Jacobs v. Seward* (1869), L.R. 4 C.P. 328.

⁷ *Osachuk v. Osachuk* (1971), [18 D.L.R. \(3d\) 413](#) (Man. C.A.).

⁸ R.S.O. 1990, c. C.43, s. 122(2).

⁹ *Court of Queen's Bench Act*, S.M. 1988-89, c. 4 (C.C.S.M., c. C280), s. 68(2). There was a similar provision in the British Columbia *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 71 providing for an action for account against the personal representative of the joint tenant or tenant in common. Section 150 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 provides generally for proceedings by and against the estate and was intended to carry forward the principle in s. 71.

¹¹ See also provisions respecting the granting of equitable relief in *Judicature Act*, R.S.A. 2000, c. J-2, s. 16 (1), (2), (3) and (4); *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 26; *Judicature Act*, R.S.N.S. 1989, c. 240, s. 41; *Judicature Act*, R.S.N.L. 1990, c. J-4, ss. 90-93.

¹² *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.).

¹³ *Leigh v. Dickeson, supra*, footnote 12; *Swan v. Swan* (1820), 8 Price 518, 146 E.R. 1281; *Pascoe v. Swan* (1859), 27 Beav. 508, 54 E.R. 201.

¹⁴ *Hyde v. Hindly* (1794), 2 Cox. 408, 30 E.R. 188; *Lorimer v. Lorimer* (1820), 5 Madd. 363, 56 E.R. 934.

¹⁵ *Turner v. Morgan* (1803), 8 Ves. Jun. 143 at p. 145, 32 E.R. 307; *Teasdale v. Sanderson* (1864), 33 Beav. 534, 55 E.R. 476; *Bernard v. Bernard* (1987), 12 B.C.L.R. (3d) 75 (S.C.), *supp. reasons* [7 A.C.W.S. \(3d\) 296](#) (S.C.); *Edwards v. Edwards*, [1997] B.C.J. No. 1858 (QL) (S.C.).

¹⁶ [Rice v. George](#) (1873), [20 Gr. 221 at pp. 222, 226](#); [Irvine v. Irvine](#) (1959), [67 Man. R. 238](#) (Q.B.). As to accounts in partition actions, see §§14:20.130, 14:20.140, 14:30.130 and 14:30.140, *infra*.

¹⁷ See, for example, [Morrison v. Guaranty Trust Co. of Canada](#) (1972), [28 D.L.R. \(3d\) 458](#) (Ont. H.C.J.); and [McCrea v. Berman](#) (1984), [30 Man. R. \(2d\) 41](#) (Q.B.).

¹⁸ [Irvine v. Irvine](#), *supra*, footnote 16.

¹⁹ [Vermette v. Vermette](#) (1974), [45 D.L.R. \(3d\) 313](#) (Man. C.A.).

²⁰ [Shore v. Shore](#) (1975), [63 D.L.R. \(3d\) 354](#) (B.C.S.C.).

²¹ [Porter v. Porter](#) (1974), [14 R.F.L. 146](#) (Ont. H.C.J.).

²² [Property Law Act](#), R.S.B.C. 1996, c. 377, ss. 13, 14; [Re Brook and Brook](#) (1969), [6 D.L.R. \(3d\) 92](#) (B.C.S.C.); [Bernard v. Bernard](#), *supra*, footnote 15.

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Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.70 Acts Enuring to the Common Benefit of Joint Tenants

§14:20.70 Acts Enuring to the Common Benefit of Joint Tenants

Since each joint tenant is seised *per mie et per tout*, the estate of joint tenants is one entire estate. Hence, every act done by one joint tenant for their own benefit and the benefit of the others enures to the benefit of all and one cannot prejudice the estate of the others.¹ On this principle of complete unity, it follows that a payment of rent to one joint tenant is a payment to all and that, as regards third parties, delivery of possession to one joint tenant is delivery to all. At common law, possession by one co-owner was possession by all² but, in regard to limitations of actions, by the *Real Property Limitation Act, 1833*,³ possession by co-owners became separate so that, where a husband who was entitled to one moiety remained in uninterrupted possession of the entire property without acknowledging the title of the heir of his deceased wife who was entitled to the other moiety, the heir's claim was barred by the statute.⁴

In Ontario under the *Real Property Limitations Act*⁵ where any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common has or have been in possession or receipt of the entirety or more than their undivided share or shares of the land, or of the profits thereof, or of the rent for their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by the last-mentioned person or persons or any of them. The effect of the statute is illustrated in *Harris v. Mudie*,⁶ where one of several tenants in common entered upon the land and dispossessed a trespasser. It was held that this tenant was, in respect of the co-tenants, in possession simply as a stranger would be and his possession did not enure to the benefit of the co-tenants but, since he so acted by virtue of a legal estate, the act in that respect enured to the benefit of the co-tenants so as to give a fresh starting point for the statute to begin to run against them. Similar provisions are found in Newfoundland and Labrador, Nova Scotia and Prince Edward Island.⁷

In Nova Scotia it was held that, as between co-owners, the exclusive possession of one is to be regarded as adverse to the others and such possession for the period fixed by the *Statute of Limitations* is an absolute bar to the right of partition.⁸

As between spouses who hold as joint tenants, courts have been reluctant to find the necessary *animus* to support a claim of adverse possession.⁹

The British Columbia *Limitation Act*¹⁰ expressly precludes the adverse possessor from gaining any right or title to lands taken by adverse possession. Lands registered under land titles are not subject to the application of the concept of adverse possession.¹¹

A co-owner who voluntarily makes improvements to common property may only recover compensation for money expended on a partition or sale in lieu of partition or on other judicial proceedings for a distribution of the common property among the co-owners.¹² The co-owner cannot recover while the property is held in common but the cost of improvements creates an equity that attaches to the land so that on partition the co-owner can recover their expenditure. The equity attaches to the land and passes with it to a purchaser of the co-owner's interest, who may recover the expense of improvement made by their predecessor.¹³ The equity may attach in the case of land held by tenants in common or by joint tenancy, but there may be a problem under joint tenancy where the tenant making the improvements dies prior to partition and their interest in the property dies.¹⁴

The compensation for improvements has been stated to be the amount of increase in the value of the property by the improvement¹⁵ but it may be limited to a maximum of the actual cost of the improvement.¹⁶

FOOTNOTES

¹ *Tooker's Case; Rud v. Tooker* (1601), 2 Co. Rep. 66b, 76 E.R. 567.

² *Ford v. Lord Grey* (1703), 6 Mod. 44, 87 E.R. 807; *Doe d. Thorn v. Phillips* (1832), 3 B. & Ad. 753, 110 E.R. 275.

³ 3 & 4 Will. 4, c. 27 (1833).

⁴ *Ex parte Hasell; Re Manchester Gas Act* (1839), 3 Y. & C. Ex. 617, 160 E.R. 848.

⁵ R.S.O. 1990, c. L.15, s. 11. See also §29:60.220; *Tolosnak v. Tolosnak* (1957), 10 D.L.R. (2d) 186 (Ont. H.C.J.).

⁶ (1882), 7 O.A.R. 414; *Hartley v. Maycock* (1897), 28 O.R. 508 (H.C.J.).

⁷ *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 20; *Real Property Limitations Act*, R.S.N.S. 1989, c. 258, s. 15; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, s. 34.

⁸ *McDonald v. Rudderham* (1921), 56 D.L.R. 589 (N.S.S.C.).

⁹ [Krause v. Happy](#) (1960), [24 D.L.R. \(2d\) 310](#) (Ont. C.A.); [Gibbins v. Gibbins](#) (1977), [18 O.R. \(2d\) 45](#) (Ont. H.C.J.), affd [92 D.L.R. \(3d\) 285](#) (Div. Ct.); [Strong v. Colby](#) (1978), [87 D.L.R. \(3d\) 589](#) (Ont. H.C.J.); [Cormier v. Cormier](#) (1989), [102 N.B.R. \(2d\) 13](#) (C.A.); [Gorman v. Gorman](#) (1998), [110 O.A.C. 87](#).

¹⁰ S.B.C. 2012, c. 13, s. 28.

¹¹ For a discussion of this topic, see ch. 29.

¹² [Leigh v. Dickeson](#) (1884), 15 Q.B.D. 60 (C.A.); [McMahon v. Public Curator of Queensland and McMahon](#), [1952] St. R. Qd. 197 (S.C.); [Brickwood v. Young and Minister for Public Works of New South Wales](#), [1905] 2 C.L.R. 387; [Ruptash v. Zawick](#) (1956), [2 D.L.R. \(2d\) 145](#) (S.C.C.).

¹³ [Brickwood v. Young and Minister for Public Works of New South Wales](#), *supra*, footnote 12.

¹⁴ [Re Byrne](#) (1906), 6 S.R.N.S.W. 532.

¹⁵ [Brickwood v. Young and Minister for Public Works of New South Wales](#), *supra*, footnote 12; [Noack v. Noack](#), [1959] V.R. 137 (S.C.).

¹⁶ [McMahon v. Public Curator of Queensland and McMahon](#), *supra*, footnote 12.

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Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.120 Severance of a Joint Tenancy

§14:20.120 Severance of a Joint Tenancy

A joint tenancy depends on the continuance of the three unities of title, interest and possession and the destruction of any of such unities severs the joint tenancy and creates a tenancy in common or several tenancies.¹ It is the right of a joint tenant to thus sever the joint tenancy. The unity of time of vesting only applies to the original creation of the joint tenancy and cannot, therefore, be affected by any subsequent act.

The unity of title is destroyed if one joint tenant assigns their share to a third person² or mortgages their share to a third person.³ If there were initially only two joint tenants such an act creates a tenancy in common between the assignee and the other joint tenant.⁴ If there were more than two joint tenants it creates a tenancy in common between the assignee and the others, although the latter as between themselves continue as joint tenants.⁵

A severance may be effected by one joint tenant executing and registering a conveyance to themselves.⁶ A severance may also occur when the sale proceeds of land held in joint tenancy are deposited into a joint account and then one of the two joint tenants transfers proceeds to herself and her husband, a third party.^{6a} It may also be effected by one joint tenant giving the property to a third person by a valid declaration of trust.⁷ It is necessary, of course, that the trust be completely constituted, thereby indicating an intention on the part of the joint tenant to divest themselves of their interest.

It has been decided that a mere agreement for sale by one joint tenant to a third party does not, in itself, effect a severance. Thus, where one joint tenant who entered into an agreement of purchase and sale died before the actual sale took place, the remaining joint tenant took by survivorship and the agreement became a charge upon the property.⁸ On the other hand, it has also been held that a severance is created once a conveyance is given. It is not necessary that the conveyance be registered to effect the severance even where the applicable recording statute requires that the conveyance be registered to be effective "except as against the person making the same".⁹

The Torrens or land titles legislation¹⁰ does not affect the normal common law incidences of a joint tenancy, one of which is the right to effect a severance by conveying one's share. A transfer under land titles legislation has the same effect as a deed under seal and does not have to be registered in order to sever the joint tenancy.¹¹ However, the legislation may have an effect on the right of a joint tenant to sever the joint tenancy by way of mortgage. The generally accepted view of a mortgage under the Torrens system is that a mortgage has effect only as security and does not operate as a transfer of the interest or estate charged. If that is the case, the unity of title is not destroyed by the giving of a

mortgage.¹²

A conveyance by one joint tenant to the other of an undivided half of the property puts an end to the joint tenancy. The parties then become tenants in common so that the survivor could devise by will the half that had not been conveyed.¹³

The filing of a writ of execution against the interest of one joint tenant does not in itself effect a severance. Although the joint tenant's estate is severable and their interest can be sold under execution, something more by way of action such as actual seizure or advertisement is required.¹⁴ It has been held that the registration of a judgment against the estate of one joint tenant does not sever the joint tenancy. The owner of the registered judgment has only a charge on the land but that does not constitute an enforceable contract to alienate, which might operate as a severance.¹⁵ The four unities remain undisturbed until the lands are placed in execution by seizure with a view to sale.¹⁶ However, where a joint tenant makes an authorized assignment in bankruptcy, the assignment severs the joint tenancy and turns it into a tenancy in common.¹⁷

A grant from one of two joint tenants in fee simple to a third person for life severs the joint tenancy as the freehold is in the third person and the other joint tenant under different titles. In that case, they hold as tenants in common.¹⁸ However, the joint tenancy is only suspended and, if the grantee dies during the joint lives, the joint tenancy revives.¹⁹ If during the period of suspension the grantor or the other former joint tenant dies, the joint tenancy is permanently severed because there is no right of survivorship. For the right of survivorship to exist, the land must be held in joint tenancy at the time of the death of the person who dies first.²⁰

The effect of a lease, given by one joint tenant to a third party, on the joint tenancy, is not free from doubt. It has been suggested that a lease for years confers a right to possession which arises by separate title and that, thus, the lease effects a severance of the whole estate both before and after the lease.²¹ On the other hand, it has been suggested that the lease does not sever the joint tenancy.²² In *Clerk v. Clerk*²³ the court concluded that if one of two joint tenants in fee simple leases their share for a term of years, the lease does sever the joint tenancy and the lease is binding on the other joint tenant after the death of the lessor, whether or not the lessee enters into possession during the life of the lessor. Against it has been suggested that where one joint tenant leases their share to the other, the joint tenancy is severed.²⁴

In an unusual case,²⁵ three persons were joint tenants as devisees in trust with the power to lease to one of them. A lease was made under the power but it was held that the lease by a joint tenant to themselves could not effect a severance. However, the lease by the remaining two would sever the joint tenancy during the term of the lease.

Finally, where the joint tenancy is only for a term of years, a lease by one joint tenant for a term less than the residue severs the joint tenancy.²⁶

A second accepted method of severing a joint tenancy is by mutual wills agreed to between the joint tenants. Thus, where two joint tenants agreed to dispose of leasehold property by will and trust for each other for life and for their nieces after the death of the survivor, and the survivor later made a will disposing of the property in a different manner, it was held that the agreement between the joint tenants carried out by the making of the wills severed the joint tenancy, and the property had to be administered as

a tenancy in common.²⁷ The execution of mutual wills by joint tenants whereby the tenants agree to dispose of their interest severs the joint tenancy and converts it into a tenancy in common.²⁸ A disposition by one joint tenant under their will would not effect the severance as no common intention could be shown. The will does not take effect until the joint tenant's death at which time the other joint tenant's vested right of survivorship takes effect.²⁹ However, the execution of mutual wills by agreement does effect a severance.

Underlying the proposition that a joint tenancy may be severed by mutual wills is the principle that a joint tenancy may be severed by mutual agreement or by the conduct of the joint tenants. If joint tenants enter into a mutual agreement to hold as tenants in common the joint tenancy is severed.³⁰ Thus, where joint tenants agree to sell the property and to divide the proceeds between them, the joint tenancy is severed and the property then is held as a tenancy in common.³¹ Moreover, it is not necessary that the agreement to sell be carried through to the point of conveyance before the joint tenancy is severed.³² Thus, where a husband and wife entered into a separation agreement whereby both parties agreed that each was to have a one-half interest in any proceeds of the sale of the property held as joint tenants, and where the husband gave the wife an irrevocable option to buy his interest, the joint tenancy was severed from that moment. The subsequent purchase by the parties of a second parcel as joint tenants did not alter the severance of the first parcel.³³ However, in *Tavenor Estate v. Tavenor*,^{33a} the Newfoundland Court of Appeal held that an agreement providing that the parties were to continue to have an "equal interest" in a holding company that had been held jointly did not affect a severance of the joint tenancy as the circumstances disclosed that the existing arrangement between the parties was to continue.

In order for a joint tenancy to be severed by conduct, the acts of the joint tenants must be such as to preclude the survivor from claiming an interest by survivorship.³⁴ In the matrimonial context, the mere fact that a couple is separated is insufficient to establish the severance; evidence of a clear intention is required.^{34a} When joint tenants by their conduct treat their interests as several, the joint tenancy is severed and it is not important that the joint tenants were unaware that their original interests were joint.³⁵ However, the mere fact that a trustee realizes part of an estate and pays the proceeds in certain proportions to the joint tenants does not sever the joint tenancy as to the rest of the estate that has not been received by the joint tenants.³⁶

A more difficult issue to resolve is whether a joint tenancy can be severed by the unilateral intention of one joint tenant. An attempt to sever a joint tenancy through a will is ineffective.^{36a} In *Re Draper's Conveyance; Nihan v. Porter*,³⁷ the court concluded that the issuance of a writ to commence a partition application was sufficient to sever a joint tenancy. The issuance of the writ indicated a clear unilateral intention on the part of one joint tenant to sever the joint tenancy. However, in *Nielson-Jones v. Fedden*,³⁸ the court concluded that a unilateral declaration by one joint tenant of an intention to sever is incapable in law of effectively severing a joint tenancy. It also concluded that a course of negotiations not resulting in a final agreement between the joint tenants will never constitute a course of dealing capable of effecting a severance. However, that latter case was overruled in *Burgess v. Rawnsley*,³⁹ where the court concluded that a course of dealing between two joint tenants whereby negotiations were carried on to sever the joint tenancy, even in the absence of any firm agreement, could result in a severance of the joint tenancy. In that case it was sufficient, if there were a course of dealing in which one of the parties made clear to the other the desire that the joint tenancy should be severed,

for a severance to result. Several Canadian cases illustrate this confusion. In [Rodrique v. Dufton](#)⁴⁰ the court concluded that a severance was not effected by the bringing of a partition application or by a unilateral declaration of an intent to sever. Similarly, in [Munroe v. Carlson](#)⁴¹ the court concluded that the bringing of a Partition Act application that was discontinued did not effect a severance.

However, in [Walters v. Walters](#)⁴² the court concluded that there was a course of dealing between the joint tenants that amounted to voluntary partition. In that case, the matrimonial home was held in joint tenancy. The parties separated and the wife commenced a divorce action, together with a motion under the *Partition Act*⁴³ and a motion under the *Married Women's Property Act*.⁴⁴ Thereafter, the parties began negotiations on the basis that the wife was entitled to an undivided one-half interest in the matrimonial home. Mutual offers to purchase were presented between the joint tenants. Before the hearing of the partition application, the husband died and the wife claimed entitlement to the whole of the matrimonial home. The court concluded that the husband and wife had established a course of dealing to sever the joint tenancy by mutual agreement. In reaching that conclusion the court expressly stated that it was not sufficient to rely on a unilateral intention.^{44a}

The unity of interest is destroyed so as to sever the joint tenancy if one of several joint tenants for life acquires the fee simple by purchase or descent.⁴⁵ Similarly, there is a severance of the joint tenancy if there is a life estate to A with remainder in fee simple to B and C as joint tenants and thereafter A grants their life estate to B. In that case, B holds the one undivided share in fee simple and the other undivided share for the life of A with remainder to C in fee. However, it is otherwise if A merely surrenders their life estate to B because the surrender inures to the benefit of both B and C and as the life estate merges with the fee B and C become joint tenants in fee simple and possession.⁴⁶ In a surrender, the smaller estate is given up to and merges in the greater estate.⁴⁷

It is worthwhile at this point to emphasize the distinction between the original limitation of a remainder in fee simple to one of several joint tenants for life and the subsequent acquisition of the fee by one to whom it was not originally limited. As indicated earlier,⁴⁸ one of several joint tenants may have an additional estate in severalty limited to them by the same instrument that created the joint tenancy, as in the case of a grant to A and B for their lives with the remainder to the heirs of A, in which case A and B have a joint tenancy for their lives and A has the remainder in fee simple.⁴⁹ It is only when the remainder or reversion in fee simple is not originally limited to a joint tenant for life but is otherwise subsequently acquired by them that this life estate is merged so as to sever the joint tenancy.

The unity of possession is destroyed and the joint tenancy severed if the property is partitioned by the joint tenants either by mutual agreement or by compulsion under statutory proceedings. At common law, the joint tenants could only partition by mutual agreement and none could compel the others to partition.⁵⁰

A statutory right to compel partition was conferred by the Imperial Statutes of Partition⁵¹ under which the court had no power to refuse partition or to order sale in lieu of partition but, by the Partition Acts,⁵² wide powers were conferred on the court to order sale in lieu of partition if the nature of the property and the interests of the parties made it desirable. It is not possible in this work to deal with all of the voluminous references in provincial statutes to real property and this is particularly true of the references to

powers of the courts, under provincial rules of practice and statutes, to deal with the property of persons who are not *sui juris* or are absentees or under disability of some nature. Therefore, with the exception of the following notations, further discussion of the topic of severance will be confined to partition by agreement and partition or sale by court order.

Under s. 18(2) of the Ontario *Settled Estates Act*⁵³ where two or more persons are entitled as joint tenants, tenants in common or coparceners, any of them may apply to the court to exercise the powers conferred by the Act.

It is also to be noted that where an application was made to the court on behalf of an infant, one of two joint tenants, to authorize a sale of the property and division of the proceeds between the infant and the adult joint tenant, the sale was sanctioned on the grounds that a sale was in the interest of both parties but upon the condition that the proceeds were to be paid into court to remain until the infant attained majority.⁵⁴

If land held by joint tenants is sold for taxes, any of them may redeem the property, it being unnecessary that all join in redeeming.⁵⁵ If one of several joint tenants purchases land at a tax sale without any prior agreement that the purchase is to be for their joint benefit and no fraud is involved, that joint tenant is entitled to hold the land for their sole benefit⁵⁶ and the rule is the same if they are one of several tenants in common.⁵⁷

FOOTNOTES

¹ 2 Bl. Comm. 195.

² *Partriche v. Powlet* (1740), 2 Atk. 54, 26 E.R. 430.

³ *York v. Stone* (1709), 1 Salkeld 158, 91 E.R. 146; *Re Pollard's Estate and South-Eastern Ry. Co's Acts* (1863), 3 De G.J. & S. 541, 46 E.R. 746; *Re Sharer*; *Abbott v. Sharer* (1912), 57 Sol. Jo. 60; [Canada Life Assurance Co. v. Kennedy](#) (1978), [89 D.L.R. \(3d\) 397](#) (Ont. C.A.).

⁴ *Partriche v. Powlet*, *supra*, footnote 2.

⁵ Littleton's Tenures, s. 294. See [Jansen v. Niels Estate](#), [2017 CarswellOnt 5545](#) (C.A.).

⁶ [Murdoch v. Barry](#) (1975), [64 D.L.R. \(3d\) 222](#) (Ont. H.C.J.); [Horne v. Evans](#) (1987), [39 D.L.R. \(4th\) 416](#) (Ont. C.A.), at p. 421: "Clearly a deed from a joint tenant to himself or herself destroys the unity of title essential to the continuance of a joint tenancy and operates to create a tenancy in common." See also [Bank of Montreal v. Bray](#) (1997), [36 O.R. \(3d\) 99](#) (C.A.), at p. 107. See also [Duschl](#)

[\(Attorney of\) v. Duschl Estate](#) (2008), [39 E.T.R. \(3d\) 229](#) (Ont. S.C.J.). But see [DeLong v. Lewis Estate](#) (2012), [321 N.S.R. \(2d\) 398](#) (S.C.), affirmed [2013 CarswellNS 424](#) (C.A.) (putting an invalid deed in the registry did not act to sever).

^{6a} [Zeligs Estate v. Janes](#) (2016), [402 D.L.R. \(4th\) 88](#) (B.C.C.A.).

⁷ [Re Mee](#) (1971), [23 D.L.R. \(3d\) 491](#) (B.C.C.A.).

⁸ [Foort v. Chapman](#) (1973), [37 D.L.R. \(3d\) 730](#) (B.C.S.C.). But see *Brown v. Raindle* (1796), 3 Ves. Jun. 256, 30 E.R. 998; *Partriche v. Powlet* (1740), 2 Atk. 54, 26 E.R. 430.

⁹ [Stonehouse v. British Columbia \(Attorney General\)](#) (1961), [31 D.L.R. \(2d\) 118](#) (S.C.C.); [Havlik v. Havlik Estate](#) (2000), [262 A.R. 88](#) sub nom. *Havlik v. Whitehouse* (Q.B.), affd [\[2002\] 1 W.W.R. 270](#) (C.A.), supp. reasons [\[2002\] 4 W.W.R. 420](#) (C.A.). See also H.R. Raney, "Commentary", 41 Can. Bar Rev. 272 (1963).

¹⁰ Such as the *Land Titles Act*, R.S.O. 1990, c. L.5.

¹¹ [Re Cameron](#) (1957), [11 D.L.R. \(2d\) 201](#) (Ont. H.C.J.). See also [Felske Estate v. Felske Estate](#), [\[2008\] 2 W.W.R. 154](#) sub nom. *Alberta (Public Trustee) v. Felske Estate* (Alta. Q.B.), affd [\[2009\] 11 W.W.R. 37](#) sub nom. *Alberta (Public Trustee) v. Felske Estate* (C.A.).

¹² *Lyons v. Lyons*, [1967] V.R. 169 (S.C.).

¹³ [Doe d. Eberts v. Montreuil](#) (1849), [6 U.C.Q.B. 515](#).

¹⁴ [Power v. Grace](#), [\[1932\] 2 D.L.R. 793](#) (Ont. C.A.); [Sirois v. Breton](#) (1967), [62 D.L.R. \(2d\) 366](#) (Co. Ct.); [Bank of Montreal v. Pawluk](#), [\[1991\] 5 W.W.R. 57](#) (Alta. Q.B.), affd [88 D.L.R. \(4th\) 570](#) (C.A.); [Maimets v. Williams](#) (1997), [11 R.P.R. \(3d\) 276](#) (Ont. C.A.); [Royal & SunAlliance Insurance Co. v. Muir](#) (2011), [9 R.P.R. \(5th\) 104](#) (Ont. S.C.J.); [Toronto-Dominion Bank v. Phillips](#) (2014), [376 D.L.R. \(4th\) 566](#) (Ont. C.A.) (debtors consented to order, authorizing payment to execution creditor which completed execution and severed joint tenancy).

¹⁵ [Re Young](#) (1968), [70 D.L.R. \(2d\) 594](#) (B.C.C.A.); [Maroukis v. Maroukis](#), [\[1984\] 2 S.C.R. 137](#) at p. 142.

¹⁶ [R. v. McDonald](#) (1969), [8 D.L.R. \(3d\) 666](#) (B.C.S.C.). For an example of the step necessary to sever, see [Sunglo Lumber Ltd. v. McKenna](#) (1974), [48 D.L.R. \(3d\) 154](#) (B.C.S.C.). See also *Royal & SunAlliance Insurance Co. v. Muir*, *supra*, footnote 14.

¹⁷ [Re White](#), [\[1928\] 1 D.L.R. 846](#) (Ont. S.C.); *Re Butler's Trusts*; *Hughes v. Anderson* (1888), 38 Ch. D. 286 (C.A.); [Re Chisick](#) (1968), [62 W.W.R. 586](#) (Man. C.A.); [Royal Bank of Canada v. Oliver \(Trustee of\)](#) (1991), [85 D.L.R. \(4th\) 122](#) (Sask. C.A.), leave to appeal to S.C.C. refused 88 D.L.R. (4th) vi.

¹⁸ Co. Litt. 191b.

¹⁹ Co. Litt., 193a; [Power v. Grace](#), [\[1932\] 2 D.L.R. 793](#) (Ont. C.A.).

²⁰ Co. Litt., 188a.

²¹ Megarry and Wade, p. 494.

²² Co. Litt. 185a. See also *Power v. Grace*, *supra*, footnote 19, at p. 796: ". . . a lease for years, by one of two joint-tenants in fee, of his share, does not sever the tenancy".

²³ (1694), 2 Vern. 323, 23 E.R. 809; [Sorensen v. Sorensen](#) (1976), [69 D.L.R. \(3d\) 326](#) (Alta. S.C.), *revd* on other grounds [90 D.L.R. \(3d\) 26](#) (C.A.).

²⁴ *Cowper v. Fletcher* (1865), 6 B. & S. 464 at p. 472, 122 E.R. 1267. But see *Sorensen v. Sorensen*, *supra*, footnote 23, where it was concluded that a lease to one of the joint tenants did not sever the joint tenancy.

²⁵ [Napier v. Williams](#), [1911] 1 Ch. 361.

²⁶ Co. Litt. 192a.

²⁷ *Re Wilford's Estate*; *Taylor v. Taylor* (1879), 11 Ch. D. 267; [Re Gillespie](#) (1968), [3 D.L.R. \(3d\) 317](#) (Ont. C.A.).

²⁸ *Heys Estate*; *Walker v. Gaskill*, [1914] 111 L.T. 941 at p. 942; [Szabo v. Boros](#) (1967), [64 D.L.R. \(2d\) 48](#) (B.C.C.A.); [Bryan v. Heath](#) (1979), [108 D.L.R. \(3d\) 245](#) (B.C.S.C.).

[29](#) 2 Cruise's *Digest of the Laws of England Respecting Real Property* (London: Butterworths, 1804), tit. 18, c. 2, s. 19.

[30](#) *Frewen v. Relfe* (1787), 2 Bro. C.C. 220, 29 E.R. 123; *Williams v. Hensman* (1861), 1 J. & H. 546, 70 E.R. 862; *Tompkins Estate v. Tompkins* (1992), [86 D.L.R. \(4th\) 759](#) (B.C.S.C.), affd [99 D.L.R. \(4th\) 193](#) (C.A.); *Pearlson Estate v. Pearlson* (2001), [41 E.T.R. \(2d\) 49](#) (B.C.S.C.), reasons as to costs [2001 BCSC 1569](#), affd [35 R.F.L. \(5th\) 433](#) (C.A.).

[31](#) *Schofield v. Graham* (1969), [6 D.L.R. \(3d\) 88](#) (Alta. S.C.).

[32](#) *Schofield v. Graham*, *supra*, footnote 31; *Ginn v. Armstrong* (1969), [3 D.L.R. \(3d\) 285](#) (B.C.S.C.); *Sampaio Estate v. Sampaio* (1992), [90 D.L.R. \(4th\) 122](#) (Ont. Ct. (Gen. Div.)); *Feinstein v. Ashford*, [2005 BCSC 1379](#); *Belbin Estate v. Belbin (Guardian of)* (2005), [247 Nfld. & P.E.I.R. 267](#) (Nfld. & Lab. S.C.T.D.); *Obradovic Estate v. Obradovic*, [2013 CarswellAlta 1461](#) (Q.B.); *Corbett Estate v. Corbett Estate* (2015), [\[2016\] 6 W.W.R. 578](#) (Man. Q.B.).

[33](#) *McKee v. National Trust Co.* (1975), [56 D.L.R. \(3d\) 190](#) (Ont. C.A.), revg [49 D.L.R. \(3d\) 689](#) (H.C.J.). See also *Walters v. Walters* (1979), [84 D.L.R. \(3d\) 416n](#) (Ont. C.A.); *Ginn v. Armstrong* (1969), [3 D.L.R. \(3d\) 285](#) (B.C.S.C.); *Jurevicius v. Jurevicius* (2011), [4 R.F.L. \(7th\) 403](#) (Ont. S.C.J.), add'l reasons re custody, access and costs [15 R.F.L. \(7th\) 122](#) (S.C.J.); *Hansen Estate v. Hansen* (2012), [347 D.L.R. \(4th\) 491](#) (Ont. C.A.).

[33a](#) (2008), [272 Nfld. & P.E.I.R. 299](#) (Nfld. & Lab. C.A.), affg [262 Nfld. & P.E.I.R. 1](#) (T.D.).

[34](#) *Re Wilks; Child v. Bulmer*, [1891] 3 Ch. 59; *Walker v. Dubord* (1992), [92 D.L.R. \(4th\) 257](#) (B.C.C.A.); *Berry Estate v. Berry* (2001), [90 B.C.L.R. \(3d\) 347](#) (S.C.). See also *Hansen Estate v. Hansen*, *supra*, footnote 33; *Jansen v. Niels Estate*, [2017 CarswellOnt 5545](#) (C.A.).

[34a](#) See *Re Walters* (1977), [79 D.L.R. \(3d\) 122](#) (Ont. H.C.), affirmed [84 D.L.R. \(3d\) 416 \(note\)](#) (C.A.); *Sampaio Estate v. Sampaio* (1992), [90 D.L.R. \(4th\) 122](#) (Ont. Ct. (Gen. Div.)); *Jurevicius v. Jurevicius* (2011), [4 R.F.L. \(7th\) 403](#) (Ont. S.C.J.), additional reasons [15 R.F.L. \(7th\) 122](#) (S.C.J.); *Su v. Lam* (2012), [77 E.T.R. \(3d\) 278](#) (Ont. S.C.J.); *MacNeil Estate v. Bower* (2016), [135 O.R. \(3d\) 90](#) (S.C.J.). See also *Siwak v. Siwak*, [\[2016\] 9 W.W.R. 61](#) (Man. Q.B.).

[35](#) *Williams v. Hensman*, *supra*, footnote 30.

[36](#) *Leak v. Macdowall* (1862), 32 Beav. 28, 55 E.R. 11.

[36a](#) *Felske Estate v. Felske Estate*, [2009] 11 W.W.R. 37 *sub nom. Alberta (Public Trustee) v. Felske Estate* (Alta. C.A.), affg [\[2008\] 2 W.W.R. 154](#) *sub nom. Alberta (Public Trustee) v. Felske Estate* (Q.B.).

[37](#) [1967] 3 All E.R. 853 (Ch.).

[38](#) [1974] 3 All E.R. 38 (Ch. Div.).

[39](#) [1975] 3 All E.R. 142 (C.A.); cited in *Chafe v. Hunter* (2013), (*sub nom. Re Hunter Estate*) [340 Nfld. & P.E.I.R. 317](#) (N.L. T.D.), affirmed [357 Nfld. & P.E.I.R. 324](#) (C.A.).

[40](#) (1976), [72 D.L.R. \(3d\) 16](#) (Ont. H.C.J.); *Walker v. Dubord* (1992), [92 D.L.R. \(4th\) 257](#) (B.C.C.A.); *O'Connor v. Lindsay* (1987), [51 Man. R. \(2d\) 65](#) (Q.B.); *Davison v. Davison Estate*, [2009 MBCA 100](#); *Gorski v. Gorski*, [\[2011\] 10 W.W.R. 386](#) (Man. Q.B.). And see *Thorsteinson v. Olson*, [\[2014\] 10 W.W.R. 768](#) (Sask. Q.B.), affd [\[2017\] 2 W.W.R. 11](#) (C.A.).

[41](#) (1975), [59 D.L.R. \(3d\) 763](#) (B.C.S.C.). See also *Sorensen v. Sorensen* (1976), [69 D.L.R. \(3d\) 326](#) (Alta. S.C.), revd on other grounds [90 D.L.R. \(3d\) 26](#) (C.A.).

[42](#) (1977), [79 D.L.R. \(3d\) 122](#) (Ont. H.C.J.), affd [84 D.L.R. \(3d\) 416n](#) (C.A.); followed in *Sampaio Estate v. Sampaio* (1992), [90 D.L.R. \(4th\) 122](#) (Ont. Ct. (Gen. Div.)). See also *Sowka v. Sowka* (2014), [54 R.F.L. \(7th\) 371](#) (Ont. S.C.J.).

[43](#) R.S.O. 1970, c. 338.

[44](#) R.S.O. 1970, c. 262.

[44a](#) But see *Tavenor Estate v. Tavenor* (2008), [272 Nfld. & P.E.I.R. 299](#) (Nfld. & Lab. C.A.), affg [262 Nfld. & P.E.I.R. 1](#) (S.C.).

[45](#) *Wiscot's Case; Giles v. Wiscot* (1599), 2 Co. Rep. 60b, 76 E.R. 555; Co. Litt. 152b.

[46](#) Co. Litt. 182b, 183a.

[47](#) 2 Bl. Comm. 326; Co. Litt. 336b, 50a.

[48](#) See §10:20.10, *supra*.

[49](#) 2 Bl. Comm. 181; *Wiscot's Case*; *Giles v. Wiscot*, *supra*, footnote 45.

[50](#) Littleton's Tenures, ss. 290, 318.

[51](#) 31 Hen. 8, c. 1 (1539); 32 Hen. 8, c. 32 (1540).

[52](#) 31 & 32 Vict., c. 40 (1868); 39 & 40 Vict., c. 17 (1876).

[53](#) R.S.O. 1990, c. S.7.

[54](#) *Re Laws* (1912), [6 D.L.R. 912](#) (Ont. H.C.J.).

[55](#) *Ray v. Kilgour* (1907), [9 O.W.R. 641](#) (Div. Ct.).

[56](#) *Janisse v. Stewart* (1925), [28 O.W.N. 446](#) (H.C.J.).

[57](#) *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (C.A.), affd [1897] A.C. 180 (H.L.).

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Anger & Honsberger Law of Real Property, Third Edition

PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.130 Joint Tenancy — Partition by Agreement

§14:20.130 Joint Tenancy — Partition by Agreement

Parties who are *sui juris* may agree to partition the property and the agreement is mutually enforceable by and against them and persons deriving title under them in an action for specific performance.¹ Land of any tenure, including leaseholds,² and all corporeal hereditaments and estates therein, including reversions and remainders³ and even mere expectancies,⁴ may be partitioned by agreement. Easements may usually be exercised by the separate owners if the dominant tenement is partitioned⁵ and, as against the servient tenement, the ordinary rule will apply that no greater right may be enjoyed than if there had been no division.⁶ The division into parts may be made by the parties themselves or by some person nominated by them and, in either case, the allotment of the parts among the parties may be determined by their choice, by lot or by the award of the nominated third party.⁷ Where the division is by a nominated third party, that person must be impartial and consider the interests of all parties.⁸ Where joint tenants in tail made an agreement for division of the property and thereafter enjoyed their allotments for 36 years, specific performance was ordered in an action then brought.⁹

In England, under the *Real Property Act* of 1845,¹⁰ a deed is necessary to effectuate a partition. In Ontario, under the *Conveyancing and Law of Property Act*,¹¹ a partition of "land" (defined in s. 1 to include messuages, tenements, corporeal or incorporeal hereditaments and any undivided share in land) is void at law unless made by deed. Similar provision is made in the *Property Act* of New Brunswick.¹² Equity will, however, enforce an agreement not made by deed if the agreement is capable of specific performance.¹³

FOOTNOTES

¹ *Knollys v. Alcock* (1800), 5 Ves. Jun. 648, 31 E.R. 785; *Pearson v. Lane* (1809), 17 Ves. Jun. 101, 34 E.R. 39; *Heaton v. Dearden* (1852), 16 Beav. 147, 51 E.R. 733; *Paine v. Ryder* (1857), 24 Beav. 151, 53 E.R. 314.

² *North v. Guinan* (1829), Beav. 342.

³ *Oakley v. Smith* (1759), Amb. 368, 27 E.R. 245.

⁴ *Beckley v. Newland* (1723), 2 P. Wms. 182, 24 E.R. 691; *Wethered v. Wethered* (1828), 2 Sim. 183, 57 E.R. 757.

⁵ *Newcomen v. Coulson* (1877), 5 Ch. D. 133 (C.A.), at p. 141. Adopted in *Locke v. Scharfe* (1958), 17 D.L.R. (2d) 51 (Ont. H.C.), at p. 57; *Golisky v. Romaniuk*, [1951] O.W.N. 401 (C.A.), at p. 403; and *Northern Agency Limited v. Army and Navy Department Store Limited*, [1939] 1 W.W.R. 21 (Alta. S.C. App. Div.), at p. 27.

⁶ *Menzies v. MacDonald* (1856), 2 Jur. N.S. 575 (H.L.).

⁷ Littleton's Tenures, 243, 244, 246. For an interesting case on this point, see *Cooper v. Deggan* (2003), 16 B.C.L.R. (4th) 248 (C.A.), affg with clarification as to costs 30 B.L.R. (3d) 99 (S.C.).

⁸ Co. Litt. 166b.

⁹ *Graham v. Graham* (1858), 6 Gr. 372.

¹⁰ 8 & 9 Vict., c. 106 (1845), s. 3.

¹¹ R.S.O. 1990, c. C.34, s. 9.

¹² R.S.N.B. 1973, c. P-19, s. 11(1).

¹³ *Walsh v. Lonsdale* (1882), 21 Ch. D. 9 (C.A.).

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Anger & Honsberger Law of Real Property, Third Edition

PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:20 JOINT TENANCY

§14:20.140 Joint Tenancy — Partition or Sale by Court Order

§14:20.140 Joint Tenancy — Partition or Sale by Court Order

In Ontario, provision is made by the *Partition Act*¹ for the partition or sale of land. The provisions may be summarized as follows. Land is defined to include lands, tenements and hereditaments and all estate and interests therein. All joint tenants, tenants in common, coparceners and other persons interested in land may be compelled to make partition or sale of the land or any part thereof, whether the estate is legal and equitable or equitable only. Any person interested in land, or the guardian of a minor entitled to the immediate possession of an estate therein, may take proceedings for the partition of land or for its sale under directions of the court if the court considers a sale to be more advantageous to the parties but, if the land is held in joint tenancy, tenancy in common or coparcenary by reason of a devise or intestacy, no proceedings may be taken until one year after the death of the testator or intestate in whom the land was vested. If any person interested in the land has not been heard of for three or more years and it is uncertain whether such person is living or dead, the court may, upon the application of anyone interested in the land, appoint a guardian to represent the absentee and those who, in the event of the absentee's death, would be entitled to their interest. The acts of such guardian are binding on all those represented by the guardian, including minors, as if they were done by the absentee or those persons. If proof of absence affords reasonable ground for believing the absentee to be dead, the court may, on the application of the guardian or of anyone interested in the estate represented by the guardian, deal with such estate or the proceeds thereof and order payment of the proceeds or the income thereof to the person who, if the absentee were dead, would be entitled thereto. In any action or proceeding for partition or sale in lieu of partition, if there is a life tenant who is a party, the court may determine whether the life estate should be sold or exempted from sale, having regard to the interests of all parties. If a sale including the life estate is ordered, all interest of the life tenant passes thereby, no conveyance or release by the life tenant to the purchaser is necessary and the purchaser is freed from all claims respecting the life estate whether it be in an undivided share or in the whole or any part of the premises sold. The court may also, out of the purchase money, direct payment to the life tenant of a gross sum deemed, on the principles applicable to life annuities, as sufficient satisfaction for the life estate, or may direct payment of an annual sum or of the income as seems just and, for that purpose, order investment of the purchase money or any part thereof as may be necessary. Partition or sale by the court is as effectual for partitioning or conveying the estate or interest of a minor or mentally incompetent person who is a party as of a person who is competent to act.

In British Columbia, the *Partition of Property Act*² provides that all joint tenants, tenants in common, coparceners and other persons interested in land may be compelled to make partition or sale of the land or any part thereof, whether the estate is legal or equitable or equitable only. The court may direct sale if half or more of the persons interested require a sale and distribution of the proceeds instead of division of the property.

The court may direct sale and distribution of the proceeds if it thinks this more beneficial to the parties interested by reason of the nature of the property, the number of parties interested, the disability of some, or other circumstance. The court may direct sale and distribution of the proceeds if one party requires this and the others do not undertake to purchase that party's share and, in the case of the undertaking, the court may order valuation.^{2a} Provision is also made for a request for sale or undertaking to purchase on behalf of persons under disability.

In Nova Scotia, the *Partition Act*³ provides that all persons holding land as joint tenants, coparceners or tenants in common may be compelled to have the land partitioned or to have it sold and the proceeds distributed among the persons entitled. Any one or more of such persons may bring such an action but the action must be by a person having an estate in possession, not by a person entitled only to a remainder or reversion.

The action is maintainable by a tenant or tenants for years against co-tenants as if all were tenants of a freehold, but no tenant for a term of years, unless at least 20 years remain unexpired, may maintain the action against a tenant of the freehold.

Unless it appears to the court that a sale is necessary, the court may appoint three commissioners to partition. Where the land cannot be divided without prejudice to the owners, or where a particular part is of greater value than the share of any party and cannot be divided without prejudice to the owners, the whole or part so incapable of division may be set off to any of the parties who will accept it upon payment by them to one or more of the others of such compensation as the commissioners determine.

The commissioners, instead of setting off the land or part may assign exclusive occupancy of the whole or part, as the case may be, to each of the parties alternately for specified times in proportion to their interests. Each such person is liable to the others for injury to the premises caused by their misconduct to the same extent as a tenant for years is liable to their landlord. Each such person may maintain an action for trespass as if this person held under a lease for the term of their exclusive occupancy. Where the land or part cannot be divided or any party, by reason of infancy, insanity or absence from the province, cannot accept such land incapable of division, the court may order sale.

In Prince Edward Island, the *Real Property Act*⁴ provides that all persons holding land as joint tenants, tenants in common or coparceners may be compelled to divide the land. Any one or more may apply by petition to the court for partition, the petition being maintainable only by one having an estate in possession and not by one only entitled in remainder or reversion. No tenant for a term of years, unless at least 20 years remain unexpired, may petition but, when two or more hold jointly or in common for a term of years, either may have their share divided from the others as if they all had been tenants of the freehold. Where premises cannot be divided without damage to the owners, or a part is of greater value than another party's share and cannot be divided without damage to the owners, the whole or part incapable of division may be set off to a party who will accept it, paying such sums as the court awards to make the partition just and equal. The court, instead of setting off the premises or part, may assign exclusive occupancy of the whole or part to each of the parties alternately for specified times in proportion to their interests. Each of such parties is liable to the others for injury to the property caused by misconduct as a tenant for years is liable to their landlord. Each such person may bring an action for trespass as if they held under a lease for the term of exclusive occupancy.

In New Brunswick partition may be ordered under the Rules of the Supreme Court.⁵ The court may order sale in lieu of partition where the court considers a beneficial partition to be difficult.

In Manitoba it has been held that partition is a matter of right under the *Law of Property Act*⁶ and that the court has no discretion to refuse a partition action brought by one co-tenant against another.⁷ However, in subsequent cases⁸ the courts have concluded that they have discretion to refuse partition, and partition will be refused if the granting of the order would be vexatious or oppressive or if the applicant has not met the requirements of equity.⁹

In Ontario the court has a discretion to grant or refuse partition or sale of lands jointly owned.¹⁰ The discretion will be exercised on the following principles:

- (1) A person who holds lands as a joint tenant, tenant in common or coparcenor has a *prima facie* right to partition or sale of them at any time.
- (2) There is a corresponding obligation on joint tenants (and others) to permit partition or sale.
- (3) The court should compel such partition or sale if no sufficient reason appears why such an order should not be made.¹¹

It has been held that if the application is vexatious or oppressive, sufficient reason is shown to refuse the order to partition or sell.¹² It has been held that the court can only refuse the order when the application is vexatious or oppressive.¹³ However, there is no doubt that subsequent cases referred to hereafter have greatly expanded the court's discretion. These decisions, arising in the context of matrimonial difficulties, are not uniform¹⁴ and must be read in light of subsequent statutory changes.¹⁵

In British Columbia the court has discretion to refuse partition but must have a good reason to do so.¹⁶ Although there is a *prima facie* right to partition, partition may be refused if the application is vexatious, malicious or oppressive.¹⁷ The word "oppressive" has been interpreted as meaning "economic oppression" as opposed to inconvenience or even hardship in some cases.¹⁸ However, other decisions have adopted a more liberal interpretation so as to include within it a serious hardship.¹⁹ In other instances the court has balanced equities to see if a sale would be oppressive in an objective sense,²⁰ and has gone so far as to conclude that the earlier limited discretion has been significantly expanded so as to include the test of relative hardship.²¹

In Newfoundland and Labrador, the courts have interpreted the legislation to leave the courts with the ability to refuse an application for partition should the interests of justice so require.^{21a}

As mentioned earlier, the courts in Ontario have accepted a broader discretion when deciding whether to order partition. Although courts in other Canadian jurisdictions have also been willing to exercise more discretion in this area,²² the issue appears to have come before the courts more often in Ontario and hence, reference to the Ontario cases may perhaps be more illustrative of any developing trend.²³

In *Silva v. Silva*,²⁴ the Ontario Court of Appeal held that the *Family Law Act* did not oust the jurisdiction of the *Partition Act* when dealing with jointly owned spousal property. However where substantial rights in relation to jointly owned property are likely to be jeopardized by an order for partition and sale, an application under the *Partition Act* should be deferred until the matter is decided under the *Family Law Act*.

In the past, courts would make a distinction between those cases where one of the joint tenants was a deserted spouse and where there was no desertion. In *Re Maskewycz and Maskewycz*,²⁵ the Ontario Court of Appeal concluded that a deserted husband had a right to remain in possession of the matrimonial home, a right corresponding to the right of a deserted wife.²⁶ In Ontario, the issue of the deserted spouse to remain in the matrimonial home has now been rendered academic by the *Family Law Act*.²⁷ Both spouses are given an equal right to possession that does not depend upon desertion and is not affected by ownership by one or other, or indeed both of the spouses. Section 19 of the Act states that both spouses have an equal right to possession of a matrimonial home. When only one of the spouses has an interest in the matrimonial home, the other spouse's right of possession is personal as against the first spouse and ends when the two cease to be spouses unless a separation agreement or court order provides otherwise.

It had been held as late as 1973 that on an application for partition or sale the court was bound to grant the order if the application was neither vexatious nor oppressive and if the applicant came to the court with clean hands.²⁸ However, several subsequent cases and even prior decisions indicate that the court's discretion is somewhat wider. Serious hardship on the spouse and particularly on the children of the marriage which would result from partition has been accepted as a legitimate ground for refusal of the order.²⁹ It is incumbent upon the party resisting partition to establish serious hardship,³⁰ and the court will consider not only hardship to the one side if partition is granted but also hardship to the other if it is refused.³¹ The test of relative hardship has been applied not only as between spouses but also as between one spouse and creditors of the other.³² Estoppel has also been used as an effective defence to an application for partition.³³

It is not possible to deal with the many cases that have arisen from time to time in regard to various fine points under the provisions of provincial rules of practice and statutes relating to partition. The task of determining which of them have continued application must be left to the readers in each province in the light of present rules. Several references, however, appear to be appropriate.

If only one of several co-tenants desires partition, a part may be allocated to such co-tenant and the residue held as before by the others jointly or in common.³⁴

Four distinct parcels of land in different townships belonging to 18 persons are not indivisible by nature like a home, mill or other property that cannot in its nature be divided.³⁵

Some courts have held that a life tenant is entitled to a partition and that, where there is a right to partition, there may be a right to a sale as the court may determine.³⁶ Another decision held that a sole life tenant had no status under the *Partition Act* of 1887 to apply for a sale of the estate and that, in the nature of things, no partition was possible as regards the life tenancy.³⁷

The court will not decree the partition of lands, the title to which is vested in the Crown, nor will it decree the sale of the lands at the instance of the representatives of the deceased locatee³⁸ but, where a locatee of Crown lands was an absentee for over seven years so as to be presumed to be dead and, of his four children, one son and a daughter had occupied the property exclusively for 14 years so as to obtain possessory title against the other two children, and where the son in possession had made improvements, it was held that the *Statute of Limitations* applied because the rights involved were merely private rights not affecting the pleasure or sovereignty of the Crown so that declaratory

relief might be given which would work practically the same as a partition, subject to the Crown being willing to act upon the judgment of the court, and that the Crown in making partition should recognize the son's rights to improvements.³⁹

An applicant for partition must be a person having a partitioning interest in land in the sense of being entitled to possession of their share, so that a person entitled to a legacy charged on land has no status to demand partition.⁴⁰ Partition will not be ordered until any honest dispute as to ownership is resolved.⁴¹

Although partition of an estate which is subject to a mortgage may be directed, if one of several co-tenants has mortgaged their undivided share, the mortgagee is a necessary party to partition proceedings in order to find the legal estate.⁴²

A purchaser from a joint tenant is entitled *prima facie* to partition of the resulting tenancy in common. It has been held that if the purchaser has acted in good faith, without malice, inconvenience to the other co-tenant is not a sufficient ground to refuse partition.⁴³

Sale as an alternative to partition will only be ordered where it is apparent that partition would not be advantageous to both parties.⁴⁴ The courts in Ontario have refused to order sale in circumstances where that would result in an unequal or unfair distribution or where income disparity between the parties is such that it is clear who will end up with the property.^{44a} The remedy is generally invoked when a co-tenant has no other means of realizing their interest.^{44b}

The general rule in accounting is that a joint tenant, unless ousted by a co-tenant, cannot sue the co-tenant for use and occupation but, if the joint tenancy is terminated by court order for partition or sale, the court may make all allowances and should give such directions as will give complete equity to the parties.⁴⁵ What is equitable depends on the circumstances of each case. If the occupying tenant claims for upkeep and repairs, the court, as a term of allowing the claim, usually requires the occupying tenant to submit to an allowance for use and occupation. If one tenant has made improvements that increases the selling value, the other tenant cannot take advantage of the increase without submitting to an allowance for the improvements and, if one tenant paid more than their share of encumbrances, this tenant is entitled to an allowance of the excess.⁴⁶ Thus, in an accounting on a partition application, the husband's share was turned over to his wife to satisfy maintenance arrears.⁴⁷ There is no jurisdiction on an accounting after the order of partition to deny the interest of one of the joint tenants. The matter becomes *res judicata* after the partition order.⁴⁸

When an account is taken, it is necessary to bear in mind the possibility of gift. Thus, where the husband and wife purchased a house as joint tenants and the husband freely made subsequent mortgage payments, the subsequent payments were treated as gifts from him to her and were not to be accounted for.⁴⁹ Similarly, where a wife discharged a mortgage on property held jointly with her husband, with the intention that the money advanced was to benefit both, the mortgage payment was not included in the accounting.⁵⁰

It is not possible in a book of this nature to discuss in detail the debit and credit items to be brought into account.⁵¹ However, it should be mentioned that it has been decided that where one joint tenant borrows money to purchase the property, they are entitled to repayment out of the proceeds of the sale of the property in priority to the other joint

tenant.⁵²

Although the general rule is that one joint tenant will not be restrained from committing waste at the instance of a co-tenant, the rule is different if a bill for partition of the estate has been filed.⁵³

FOOTNOTES

¹ R.S.O. 1990, c. P.4.

² R.S.B.C. 1996, c. 347, ss. 2(1), 6. See *Bradwell v. Scott* (2000), [235 W.A.C. 235](#) (B.C.C.A.); *Pelikan v. Quarry* (2006), [39 R.P.R. \(4th\) 237](#) (B.C.S.C.).

^{2a} *Ibid.*, s. 8. See *Rendle v. Stanhope Dairy Farm Ltd.* (2003), [22 B.C.L.R. \(4th\) 77](#) (S.C.); *Vantreight v. Vantreight* (2005), [13 B.L.R. \(4th\) 52](#) (B.C.S.C.); *Machin v. Rathbone* (2006), [42 R.P.R. \(4th\) 135](#) (B.C.S.C.). In Newfoundland and Labrador, see *Conveyancing Act*, R.S.N.L. 1990, c. C-34, ss. 53-55; and see *Hart v. Ripley* (2012), [331 Nfld. & P.E.I.R. 27](#) (N.L. T.D.); *Winter v. Royle* (2014), [354 Nfld. & P.E.I.R. 261](#) (N.L. T.D.).

³ R.S.N.S. 1989, c. 333, s. 4.

⁴ R.S.P.E.I. 1988, c. R-3, ss. 18-53.

⁵ *Rules of Court of New Brunswick*, N.B. Reg. 82-73, rule 67.02 under the *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 73.

⁶ R.S.M. 1987, c. L90 (C.C.S.M., c. L90), ss. 19-25.

⁷ *Szmando v. Szmando*, [\[1940\] 1 D.L.R. 222](#) (Man. K.B.).

⁸ *Steele v. Steele* (1960), [67 Man. R. 270](#) (Q.B.); *Shwabiuk v. Shwabiuk* (1965), [51 D.L.R. \(2d\) 361](#) (Man. Q.B.); *Fetterly v. Fetterly* (1965), [54 D.L.R. \(2d\) 435](#) (Man. Q.B.); *Krohn v. Krohn* (1987), [47 Man. R. \(2d\) 58](#) (Q.B.).

⁹ *Steele v. Steele*, *supra*, footnote 8; *Shwabiuk v. Shwabiuk*, *supra*, footnote 8; *Fetterley v. Fetterley*,

supra, footnote 8; [Simcoff v. Simcoff](#), [2009] 9 W.W.R. 248 (Man. C.A.), revg in part [2008] M.J. No. 299 (QL) (Q.B.).

¹⁰ [Re Hutcheson and Hutcheson](#), [1950] 2 D.L.R. 751 (Ont. C.A.); [Davis v. Davis](#), [1954] 1 D.L.R. 827 (Ont. C.A.); [Silva v. Silva](#) (1990), 75 D.L.R. (4th) 415 (Ont. C.A.); [Dibattista v. Menecola](#) (1990), 74 D.L.R. (4th) 569 (Ont. C.A.); [Shemish v. Benarzi](#) (2006), 27 E.T.R. (3d) 56 (Ont. S.C.J.). See also P.M. Perell, "A Partition Act Primer", 30 Adv. Q. 251 (2005); [Maynes v. Maynes](#), 2010 ONSC 2314.

¹¹ *Davis v. Davis*, *supra*, footnote 10.

¹² [Klakow v. Klakow](#) (1972), 7 R.F.L. 349 (Ont. H.C.J.); [Czarnick v. Zagora](#) (1972), 8 R.F.L. 259 (Ont. H.C.J.); [Mitchell v. Leach](#) (2015), 68 R.F.L. (7th) 398 (Ont. S.C.J.).

¹³ [Re Roblin & Roblin](#), [1960] O.R. 157 (H.C.J.). Hardship to a co-tenant does not permit the court to defer indefinitely a sale requested by the other co-tenant: [Aviado v. Goralczyk](#) (2004), 33 R.P.R. (4th) 227 (Ont. S.C.J.). See also [McCord v. Robinson](#) (2005), 33 R.P.R. (4th) 148 (Ont. S.C.J.); [Greenbanktree Power Corp. v. Coinamatic Canada Inc.](#) (2004), 193 O.A.C. 204, affg 69 O.R. (3d) 784 (S.C.J. (Div. Ct.)), affg 59 O.R. (3d) 449 (S.C.J.) (leave to appeal to S.C.C. granted January 29, 2004); [School of Dance \(Ottawa\) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre](#) (2009), 82 R.P.R. (4th) 43 (Ont. S.C.J.); [Garfella Apartments Inc. v. Chouduri](#) (2010), 321 D.L.R. (4th) 461 (Ont. S.C.J. (Div. Ct.)) (in the commercial conduct, oppressive conduct is the appropriate standard; oppression is to be assessed by examining the reasonable expectations of the parties); [First Capital \(Canholdings\) Corp. v. North American Property Group](#) (2010), 94 R.P.R. (4th) 131 (Ont. S.C.J.); [Paglia v. Favot](#), 2014 CarswellOnt 945 (S.C.J.), leave to appeal refused 2014 CarswellOnt 4863 (Div. Ct.); [Re Economopoulos](#) (2014), 378 D.L.R. (4th) 682 (Ont. C.A.).

¹⁴ [Carton v. Carton](#) (1975), 21 R.F.L. 366 (Ont. S.C.).

¹⁵ For example, the *Family Law Act*, R.S.O. 1990, c. F.3.

¹⁶ *Partition of Property Act*, R.S.B.C. 1996, c. 347, s. 6; [Evans v. Evans](#), [1951] 2 D.L.R. 221 (B.C.C.A.); [Harmeling v. Harmeling](#) (1978), 90 D.L.R. (3d) 208 (B.C.C.A.); [Pelikan v. Quarry](#) (2006), 39 R.P.R. (4th) 237 (B.C.S.C.); [Trimble v. Crow](#) (2006), 46 R.P.R. (4th) 90 (B.C.S.C.); [Lothrop v. Kline](#) (1957), 21 W.W.R. 333 (B.C.S.C.); [Hayes v. Schimpf](#) (2004), 24 R.P.R. (4th) 235 (B.C.S.C.), application by appellant for stay pending appeal and by respondents for security for costs in the appeal dismissed 2005 BCCA 413, affd 361 W.A.C. 48 (C.A.); [Bradwell v. Scott](#) (2000), 235 W.A.C. 235 (B.C.C.A.); [Martin v. Chidley](#), 2008 BCSC 329; [Sahlin v. Nature Trust of British Columbia Inc.](#), 2011 BCCA 157, affg 317 D.L.R. (4th) 26 (S.C.) (court held that there was a "good" reason not to order sale given longstanding connection of petitioner to the land); [Mowat v. Dudas](#) (2012), 33 B.C.L.R.

[\(5th\) 164](#) (S.C.); [Bindley Estate v. Quartermaine Holdings Ltd.](#), 2017 CarswellBC 1083 (S.C.); [Summer v. Mackenzie](#) (2016), [71 R.P.R. \(5th\) 335](#) (B.C.S.C.).

¹⁷ [Korolew v. Korolew](#) (1972), [7 R.F.L. 162](#) (B.C.S.C.); [Reitsma v. Reitsma](#), [\[1975\] 3 W.W.R. 281](#) (B.C.S.C.).

¹⁸ [Reitsma v. Reitsma](#), *supra*, footnote 17; [Kaplan v. Kaplan](#) (1974), [15 R.F.L. 239](#) (B.C.S.C.); [Van Engel v. Van Engel](#) (1973), [11 R.F.L. 303](#) (B.C.S.C.).

¹⁹ [Bergen v. Bergen](#) (1969), [68 W.W.R. 196](#) (B.C.S.C.). See also [Phillips v. Phillips](#) (1980), [24 B.C.L.R. 194](#) (C.A.); [Bradwell v. Scott](#) (2000), [235 W.A.C. 235](#) (B.C. C.A.); [Mowat v. Dudas](#) (2012), [33 B.C.L.R. \(5th\) 164](#) (S.C.).

²⁰ [Meadows v. Meadows](#) (1974) [17 R.F.L. 36](#) (B.C.S.C.).

²¹ [Fernandes v. Fernandes](#) (1975), [65 D.L.R. \(3d\) 684](#) (B.C.S.C.).

^{21a} [Hart v. Ripley](#) (2012), [331 Nfld. & P.E.I.R. 27](#) (N.L. T.D.) (in the commercial context, this discretion is limited to circumstances of malice, oppression and vexatious intent; in family circumstances, the discretion may be broader).

²² See, for example, [Kornacki v. Kornacki](#) (1975), [58 D.L.R. \(3d\) 159](#) (Alta. C.A.); [Kronenberger v. Kronenberger](#) (1977), [77 D.L.R. \(3d\) 571](#) (Alta. S.C.), amended [6 A.R. 491](#) (S.C.); [Melvin v. Melvin](#) (1975), [58 D.L.R. \(3d\) 98](#) (N.B.C.A.); [Fernandes v. Fernandes](#), *supra*, footnote 21.

²³ See particularly the review of Ontario decisions in [Melvin v. Melvin](#), *supra*, footnote 22. It must be remembered that there is still a *prima facie* right to partition: see [Bisson v. Luciani](#) (1982), [136 D.L.R. \(3d\) 287](#) (Ont. H.C.J.).

²⁴ (1990), [75 D.L.R. \(4th\) 415](#) (Ont. C.A.). Applied in [Cudmore v. Cudmore](#), [\[1997\] O.J. No. 847](#) (QL) (Gen. Div.).

²⁵ (1973), [44 D.L.R. \(3d\) 180](#) (Ont. C.A.). This decision reviews the law relating to matrimonial property prior to the passing of the *Family Law Reform Act, 1978*, S.O. 1978, c. 2 (now the *Family Law Act*, R.S.O. 1990, c. F.3).

²⁶ [Re Jollow and Jollow](#), [1955] 1 D.L.R. 601 (Ont. C.A.). See also [Hearty v. Hearty](#) (1970), 10 D.L.R. (3d) 732 (Ont. H.C.J.).

²⁷ R.S.O. 1990, c. F.3, s. 19. The effect of this statute on the respective rights of both spouses to real property *inter se* and vis-à-vis third parties is dealt with in detail in ch. 15.

²⁸ [Perkins v. Perkins](#) (1972), 31 D.L.R. (3d) 694 (Ont. H.C.J.).

²⁹ [McFadden v. McFadden](#) (1972), 5 R.F.L. 299 (Ont. Co. Ct.); [Verzin v. Verzin](#) (1974), 16 R.F.L. 94 (Ont. H.C.J.); [Lindenblatt v. Lindenblatt](#) (1974), 48 D.L.R. (3d) 494 (Ont. H.C.J.); [MacDonald v. MacDonald](#) (1973), 13 R.F.L. 248 (Ont. C.A.).

³⁰ [Cmajdalka v. Cmajdalka](#) (1973), 11 R.F.L. 302 (Ont. C.A.).

³¹ [MacDonald v. MacDonald](#) (1976), 73 D.L.R. (3d) 341 (Ont. Div. Ct.); [McKenzie \(Trustee of\) v. McKenzie](#), [2003] 7 W.W.R. 470 (Man. Q.B.), affd 252 D.L.R. (4th) 717 (C.A.); [Bailey v. Rhoden](#) (2008), 170 A.C.W.S. (3d) 653 (Ont. S.C.J.), supp. reasons re costs 169 A.C.W.S. (3d) 489 (S.C.J.), appeal allowed in part on other grounds 173 A.C.W.S. (3d) 943 (S.C.J. (Div. Ct.)).

³² [Yale v. MacMaster](#) (1974), 46 D.L.R. (3d) 167 (Ont. H.C.J.). See also [Montgomery v. Mercer](#) (2017), 94 R.F.L. (7th) 261 (P.E.I.C.A.).

³³ [Yale v. MacMaster](#), *supra*, footnote 32.

³⁴ [Devereux v. Kearns](#) (1886), 11 P.R. (Ont.) 452.

³⁵ [Re Dennie Applying for Partition](#) (1852), 10 U.C.Q.B. 104.

³⁶ [Lalor v. Lalor](#) (1883), 9 P.R. (Ont.) 455 (Ch. Div.); [Aho v. Kelly](#) (1998), 57 B.C.L.R. (3d) 369 (S.C.).

³⁷ [Fisken v. Ife](#) (1897), 28 O.R. 595 (Div. Ct.); [Rolston v. Rolston](#) (2016), 67 R.P.R. (5th) 66 (Ont. S.C.J.).

³⁸ [Abell v. Weir](#) (1877), 24 Gr. 464.

³⁹ [Pride v. Rodger](#) (1896), [27 O.R. 320](#) (H.C.J.).

⁴⁰ [Re Fidler and Seaman](#), [\[1948\] 2 D.L.R. 771](#) (Ont. H.C.J.); [Morrison v. Morrison](#) (1917), [34 D.L.R. 677](#) (Ont. S.C. App. Div.); [909403 Ontario Ltd. v. DiMichele](#) (2014), [95 E.T.R. \(3d\) 169](#) (Ont. C.A.).

⁴¹ [Blackhall v. Jardine](#), [\[1958\] O.W.N. 457](#) (C.A.); [Noel v. Noel](#) (1903), [2 O.W.R. 628](#); [Emberley v. Hans](#) (1991), [48 C.P.C. \(2d\) 212](#) (Ont. Ct. (Gen. Div.)); [Aperdev Investments Inc. v. Remer Holdings Inc.](#) (2006), [149 A.C.W.S. \(3d\) 710](#) (Ont. S.C.J.); [Nobis Investments Ltd. v. Atlantic Metal Spinning Co.](#), [\[1988\] O.J. No. 335](#) (QL) (C.A.); [Ames v. Bond](#) (1992), [39 R.F.L. \(3d\) 375](#) (Ont. C.A.); [Kulczycki v. Kulczycki](#), [\[1949\] O.W.N. 177](#) (C.A.); [Punit v. Punit](#) (2014), [43 R.F.L. \(7th\) 84](#) (Ont. Div. Ct.).

⁴² [McDougall v. McDougall](#) (1868), [14 Gr. 267](#).

⁴³ [McGeer v. Green and Westminster Mortgage Corp. Ltd.](#) (1960), [22 D.L.R. \(2d\) 775](#) (B.C.S.C.).

⁴⁴ [Cook v. Johnston](#), [\[1970\] 2 O.R. 1](#) (H.C.J.); followed in [Dibattista v. Menecola](#) (1990), [74 D.L.R. \(4th\) 569](#) (Ont. C.A.); [Finanders v. Finanders](#) (2005), [34 R.P.R. \(4th\) 295](#) (N.S.S.C.); [Zackariuk Estate v. Chepsiuk](#) (2005), [17 E.T.R. \(3d\) 100](#) (B.C.S.C.); [C.T.V. Diagnostics Inc. v. 2013871 Ontario Ltd.](#) (2006), [39 R.P.R. \(4th\) 60](#) (Ont. S.C.J.), affd [152 A.C.W.S. \(3d\) 341](#) (S.C.J. (Div. Ct.)); [Ponvert v. Wood](#) (2006), [146 A.C.W.S. \(3d\) 177](#) (Ont. S.C.J.); [Beckett v. Beckett](#) (2008), [169 A.C.W.S. \(3d\) 726](#) (Ont. S.C.J.); [McQuaid v. Underhill](#), [2014 CarswellNB 248](#) (Q.B.); [Comeau v. Comeau](#) (2015), [431 N.B.R. \(2d\) 385](#) (Q.B.).

^{44a} [Suddick v. Schwenger Estate](#) (2007), [52 R.P.R. \(4th\) 306](#) (Ont. S.C.J.), revd in accordance with minutes of settlement [69 R.P.R. \(4th\) 318](#) (S.C.J. (Div. Ct.)); [Garfella Apartments Inc. v. Chouduri](#) (2008), [76 R.P.R. \(4th\) 290](#) (Ont. S.C.J.), affd [2010 ONSC 3413](#) (Div. Ct.).

^{44b} [Shabinsky v. Cohen](#), [\[1983\] O.J. No. 1096](#) (QL) (Div. Ct.); [997897 Ontario Inc. v. 926260 Ontario Ltd.](#), [\[2001\] O.J. No. 3960](#) (QL) (S.C.J.).

⁴⁵ [Mastron v. Cotton](#), [\[1926\] 1 D.L.R. 767](#) (Ont. S.C. App. Div.); [Shore v. Shore](#) (1975), [63 D.L.R. \(3d\) 354](#) (B.C.S.C.); [Atkinson v. Caton](#), [\[2000\] B.C.J. No. 1604](#) (QL) (S.C.); [Re Kostiuk](#) (2002), [215 D.L.R. \(4th\) 78](#) (B.C.C.A.); [Dunn v. Vicars](#) (2008), [71 R.P.R. \(4th\) 305](#) (B.C.S.C.). See also [Osachuk v. Osachuk](#) (1971), [18 D.L.R. \(3d\) 413](#) (Man. C.A.); [Shumilak v. Shumilak](#), [2013 CarswellMan 86](#) (Q.B.). It is not necessary that there be an ouster when both joint tenants are spouses. The court has jurisdiction to charge occupation rent under the provisions of the *Family Law Act*, R.S.O. 1990, c. F.3. See [Diotallevi v. Diotallevi](#) (1982), [134 D.L.R. \(3d\) 477](#) (Ont. H.C.J.). See also [Hedrick v. Graham](#), [2012 CarswellBC 3674](#) (S.C.).

⁴⁶ [Mastron v. Cotton](#), *supra*, footnote 45.

⁴⁷ [Crystal v. Crystal](#) (1972), [32 D.L.R. \(3d\) 116](#) (Man. Q.B.), *affd* [38 D.L.R. \(3d\) 300](#) (C.A.).

⁴⁸ [Davis v. Davis](#), [\[1959\] O.W.N. 41](#) (H.C.J.).

⁴⁹ [Andrews v. Andrews](#) (1969), [7 D.L.R. \(3d\) 744](#) (B.C.S.C.).

⁵⁰ [Morrison v. Guaranty Trust Co. of Canada](#) (1972), [28 D.L.R. \(3d\) 458](#) (Ont. H.C.J.).

⁵¹ For such a discussion, see [Spatafora v. Spatafora](#), [\[1956\] O.W.N. 628](#) (H.C.J.).

⁵² [Brewin v. Ferguson](#) (1982), [134 D.L.R. \(3d\) 538](#) (Alta. Q.B.); [Aleksich v. Konradson](#), [\[1995\] 6 W.W.R. 268](#) (B.C.C.A.).

⁵³ [Lassert v. Salyerds](#) (1870), [17 Gr. 109](#).

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PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:30 TENANCY IN COMMON

§14:30.70 Mutual Rights of Tenants in Common

§14:30.70 Mutual Rights of Tenants in Common

In matters relating to the unity of possession, the incidents of a tenancy in common are similar to those of a joint tenancy. Like joint tenants, tenants in common hold *per mie et per tout*,¹ that is, they hold the whole and nothing separately, their occupation being undivided.

FOOTNOTES

¹ [Gunn v. Burgess](#) (1884), [5 O.R. 685](#) (H.C.J.), at p. 688; [Lasby v. Crewson](#) (1891), [21 O.R. 255](#) (H.C.J.), at p. 260.

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PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:30 TENANCY IN COMMON

§14:30.90 Accounting between Tenants in Common

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At common law there could be no action of account by one tenant in common against another who had occupied the whole property unless the absent tenant had appointed the latter as their bailiff so as to make the occupying tenant liable to account in that capacity. In equity, however, a tenant in common is liable to account in an action by the others and, by statute, a tenant in common who receives more than their share is made liable to account to co-tenants.¹

Mere occupation of the property by one of several tenants in common, if unaccompanied by exclusion of the other co-tenants, does not make them liable to the other tenants in common for rent.²

As each tenant in common is entitled to enter upon the whole property, one tenant in common is not liable to another for occupation rent but, if their acts amount to an exclusion of the other, the court may appoint a receiver and, if they receive rents, an account will be ordered. The occupying tenant is not entitled to repayment in regard to repairs and improvements in the property, however, unless they submit to an occupation rent and account for the profits they have received.³

One tenant in common who expends moneys in ordinary repairs has no right of action against a co-tenant for contribution.⁴ One tenant in common who has leased their interest to a co-tenant may recover from the latter use and occupation rent if the latter remains in occupation as tenant by sufferance after the expiration of the lease.⁵

A tenant in common in sole occupation is not entitled to be repaid for repairs and improvements unless they are charged an occupation rent,⁶ and a similar situation results where the tenant in sole occupation has been in occupation of part of the property.⁷ However, whether or not they are charged with an occupation rent, the tenant in sole occupation is entitled to an inquiry as to expenditures properly made in permanent improvements to the property during co-ownership and the inquiry should be reciprocal.⁸ If they are charged with occupation rent, the tenant in sole occupation is entitled to contribution from their co-tenant for taxes and water rates paid by the tenant in sole occupation.⁹

A tenant in common who holds possession of, manages, and receives the rent of common property which is subject to an encumbrance is entitled, when called to account by a co-tenant or co-tenants, to an allowance for advances properly and reasonably made by them for repairs, improvements and payments of principal and interest on the encumbrances, with interest from the time the advances are made. "There is a broad distinction between the cases of a co-tenant in actual sole occupation of the premises and

one in receipt of the whole rents and profits."¹⁰

No tenant in common is entitled to execute repairs or improvements upon the property held in common, so long as the property is enjoyed in common, and then to charge a co-tenant or co-tenants with the cost but, in a suit for partition, it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common. When it is decided to put an end to that state of things, it is then necessary to consider what was expended on improvements or repairs. The property has been increased in value by the improvements and repairs and, whether the property is divided or is sold by the decree of the court, one party cannot take the increase in value without making allowance for what has been expended in order to obtain that increased value. In fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value.¹¹

In a partition action, however, the right of a tenant in common to be paid for improvements made by them is restricted to improvements made after the tenancy in common commenced. Thus, where a tenant in common in remainder, by an agreement with the life tenant, went into possession and expended large sums on improvements during the life tenancy at the life tenant's request, it was held that he was not entitled in a partition action to the value of those improvements.¹²

In a partition action in a court of equity, an allowance for the value of improvements was always made.¹³

A tenant in common who takes proceedings for partition and an account from their co-tenant is entitled to such account if the applicant shows that the co-tenant received a greater share from the estate than that to which they were entitled. Thus, where one of several tenants in common had been in sole possession of a plaster bed and sold portions of the plaster, an account was ordered as to the receipts therefrom.¹⁴

A special note should be made of possession between parent and child. Where parent and child are tenants in common, usually possession of the parent is that of the child, but the presumption that the parent's possession was as bailiff or agent of the child's share is rebuttable. The relation of principal and agent may be dissolved by various circumstances but the attainment of majority by the child is not, in itself, sufficient to rebut the presumption referred to if there is no break in possession.¹⁵

FOOTNOTES

¹ See §14:20.50, *supra*.

² *M'Mahon v. Burchell* (1846), 2 Ph. 127, 41 E.R. 889; *Griffies v. Griffies* (1863), 8 L.T. 758. See also *Bates v. Martin* (1866), [12 Gr. 490](#).

³ *Rice v. George* (1873), [20 Gr. 221](#); *Osachuk v. Osachuk* (1971), [18 D.L.R. \(3d\) 413](#) (Man. C.A.);

Bernard v. Bernard (1987), 12 B.C.L.R. (3d) 75 (S.C.), supp. reasons [7 A.C.W.S. \(3d\) 296](#) (S.C.).

⁴ *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.).

⁵ *Leigh v. Dickeson*, *supra*, footnote 4; *Campbell v. Ives*, [1988] B.C.J. No. 71 (QL) (S.C.), affd [13 A.C.W.S. \(3d\) 227](#) (C.A.).

⁶ *Rice v. George*, *supra*, footnote 3.

⁷ *Teasdale v. Sanderson* (1864), 33 Beav. 534, 55 E.R. 476.

⁸ *Kenrick v. Mountsteven* (1899), 48 W.R. 141, 44 Sol. Jo. 44.

⁹ *Wuychik v. Majewski* (1920), [19 O.W.N. 207](#) (H.C.).

¹⁰ *Re Curry; Curry v. Curry* (1898), [25 O.A.R. 267 at p. 286](#), per Moss J.A.

¹¹ *Lasby v. Crewson* (1891), [21 O.R. 255](#) (H.C.J.), quoting Cotton L.J. in *Leigh v. Dickeson*, *supra*, footnote 4; *Vandongen v. Royal* (1990), [72 O.R. \(2d\) 533](#) (Dist. Ct.); *Warner v. Warner* (1998), [94 O.T.C. 146](#) (Gen. Div.).

¹² *Supra*.

¹³ *Handley v. Archibald* (1899), [30 S.C.R. 130 at p. 141](#); *Griffies v. Griffies* (1863), 8 L.T. 758.

¹⁴ *Curtis v. Coleman* (1875), [22 Gr. 561](#). See also §14:20.140, *supra*.

¹⁵ *Fry and Moore v. Speare* (1916), [30 D.L.R. 723](#) (Ont. S.C. App. Div.).

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PART V — CONCURRENT INTERESTS

Chapter 14 — CO-OWNERSHIP

§14:30 TENANCY IN COMMON

§14:30.100 Trespass and Waste by Tenants in Common

§14:30.100 Trespass and Waste by Tenants in Common

Since each tenant in common has an equal right of entry on every part of the property, one cannot bring an action against the other for trespass but, if one is ousted or denied the right of entry, they may take ejectment proceedings.¹ A demand of possession by one tenant in common and a refusal by the other, stating that they claimed the whole, is evidence of an ouster.²

The court will not restrict a tenant in common in the legitimate enjoyment of the estate because an undivided occupation is of the very essence of a tenancy in common and to interfere with that right would be to deny an essential quality of title. Therefore, a tenant in common is not entitled to an injunction where their co-tenant is exercising their rights in a legitimate manner. If a tenant in common desires relief, they must proceed by partition. Equitable waste will not be restrained but, if a tenant in common proceeds to destroy the common property, they will be restrained by injunction.³ It has been said that: "It is clear that a tenant in common has not an unlimited power to do as he will with the estate; for though the court is slow to interfere between tenants in common, yet where one commits any act amounting to destruction, he will be restrained". Hence, the digging of earth for bricks was restrained.⁴

FOOTNOTES

¹ *Murray v. Hall* (1849), 7 C.B. 441, 137 E.R. 175; *Elliott v. Smith* (1858), 3 N.S.R. 338 (S.C.); *Petrie v. Taylor* (1847), 3 U.C.Q.B. 457; *Wiggins v. White* (1836), 2 N.B.R. 179 (S.C.).

² *Doe d. Hellings v. Bird* (1809), 11 East 49, 103 E.R. 922; *Monro v. Toronto Ry. Co.* (1904), 9 O.L.R. 299 (C.A.).

³ *Dougall v. Foster* (1853), 4 Gr. 319.

⁴ *Dougall v. Foster*, *supra*, footnote 3, at p. 327, *per Spragge V.C.*; *Hole v. Thomas* (1802), 7 Ves. Jun. 589, 32 E.R. 237. For cases where a co-tenant has been restrained from committing

waste with respect to timber, see *Arthur v. Lamb* (1865), 2 Dr. & Sm. 428, 62 E.R. 683; *Pyat v. Winfield* (1730), Mosely 305, 25 E.R. 408; [*Proudfoot v. Bush; Bush v. Proudfoot* \(1859\), 7 Gr. 518](#); [*Christie v. Saunders* \(1851\), 2 Gr. 670](#). With respect to soil or quarries, see *Wilkinson v. Haygarth* (1847), 12 Q.B. 837, 116 E.R. 1085; [*Goodenow v. Farquhar* \(1873\), 19 Gr. 614](#). With respect to crops, see [*Brady v. Arnold* \(1868\), 19 U.C.C.P. 42](#); *Jacobs v. Seward* (1872), L.R. 5 H.L. 464. For a review of the statutory provisions with respect to waste, see §14:20.60, *supra*.

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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)

Most Recently Cited in: [Douglas v. Stan Fergusson Fuels Ltd.](#), 2018 ONCA 192, 2018 CarswellOnt 3550 | (Ont. C.A., Mar 9, 2018)

R.S.C. 1985, c. B-3, s. 67

s 67.

Currency

67.

67(1)Property of bankrupt

The property of a bankrupt divisible among his creditors shall not comprise

- (a) property held by the bankrupt in trust for any other person,
- (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
 - (b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
 - (b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
 - (b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

- (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
 - (i) is not subject to the operation of this Act, or
 - (ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
- (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Note:

S.C. 1997, c. 12, s. 59(2), provides as follows:

(2) Application

Subsection (1) [S.C. 1997, c. 12, s. 59(1), which re-enacted s. 67(1)(b) and enacted s. 67(1)(b.1)] applies to bankruptcies in respect of which proceedings are commenced after that subsection came into force [on April 30, 1998].

67(2) Deemed trusts

Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

67(3) Exceptions

Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Amendment History

1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32

Currency

Federal English Statutes reflect amendments current to March 7, 2018

Federal English Regulations are current to Gazette Vol. 152:5 (March 7, 2018)

Ontario Statutes
Conveyancing and Law of Property Act

Most Recently Cited in: *Oram v. Horlick*, 2014 NLTD(G) 14, 2014 CarswellNfld 244, 48 R.F.L. (7th) 318, 1085 A.P.R. 324, 349 Nfld. & P.E.I.R. 324, [2014] W.D.F.L. 4017, 244 A.C.W.S. (3d) 724 | (N.L. T.D., Jan 29, 2014)

R.S.O. 1990, c. C.34, s. 13

s 13.

Currency

13.

13(1) Effect of grants, devises, etc., to two or more

Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.

13(2) Spouses

This section applies notwithstanding that one of such persons is the spouse of another of them.

13(3) Definitions

In subsection (2),

"same-sex partner" [Repealed 2005, c. 5, s. 13(2).]

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage.

("conjoint")

Amendment History

1999, c. 6, s. 13(1), (2); 2005, c. 5, s. 13

Currency

Ontario Current to Gazette Vol. 151:09 (March 3, 2018)

[Ontario Statutes](#)
[Conveyancing and Law of Property Act](#)

Most Recently Cited in: [Windsor Family Credit Union Ltd. v. Windsor \(City\)](#), 2008 CarswellOnt 5941, 53 M.P.L.R. (4th) 202, 75 R.P.R. (4th) 259, 170 A.C.W.S. (3d) 419 | (Ont. S.C.J., Oct 6, 2008)

R.S.O. 1990, c. C.34, s. 9

s 9. Requirement of deed for certain interests

[Currency](#)

9.Requirement of deed for certain interests

A partition of land, an exchange of land, an assignment of a chattel interest in land, and a surrender in writing of land not being an interest that might by law have been created without writing, are void at law, unless made by deed.

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Ontario Statutes
Conveyancing and Law of Property Act

R.S.O. 1990, c. C.34, s. 14

s 14. Land acquired by possession by two or more

Currency

14.Land acquired by possession by two or more

Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants.

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Ontario Statutes
Conveyancing and Law of Property Act

R.S.O. 1990, c. C.34, s. 31

s 31. Waste between joint tenants and tenants in common

Currency

31. Waste between joint tenants and tenants in common

Tenants in common and joint tenants are liable to their co-tenants for waste, or, in the event of a partition, the part wasted may be assigned to the tenant committing the waste at the value thereof to be estimated as if no waste had been committed.

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Ontario Statutes
Courts of Justice Act
Part VII – Court Proceedings (ss. 95-148)
Procedural Matters

Most Recently Cited in: [Newstead v. Hachey](#), 2018 ONSC 1317, 2018 CarswellOnt 3167 | (Ont. S.C.J., Feb 26, 2018)

R.S.O. 1990, c. C.43, s. 122

S 122.

[Currency](#)

122.

122(1) Actions for accounting

Where an action for an accounting could have been brought against a person, the action may be brought against the person's personal representative.

122(2) Idem

An action for an accounting may be brought by a joint tenant or tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenant's just share.

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Ontario Statutes
Family Law Act
Part I – Family Property (ss. 4-16)

Most Recently Cited in: [Johnston v. Song](#), 2018 ONSC 1005, 2018 CarswellOnt 2145 | (Ont. S.C.J., Feb 12, 2018)

R.S.O. 1990, c. F.3, s. 14

s 14. Presumptions

Currency

14. Presumptions

The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

Amendment History

2005, c. 5, s. 27(3)

Currency

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Concordance References

Family Law Concordance 128, [Property rights consequent on marriage](#)

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Ontario Statutes
Land Titles Act
Part VI — Part Owners (ss. 60-65)

Most Recently Cited in: [1168760 Ontario Inc. c/o R&R Realty, Peter Clark & J.G. Rivard Limited v. 67006037 Canada Inc. & Denis Bertrand](#), 2017 ONSC 5149, 2017 CarswellOnt 15911, 284 A.C.W.S. (3d) 429 | (Ont. S.C.J., Sep 5, 2017)

R.S.O. 1990, c. L.5, s. 62

s 62.

Currency

62.

62(1) Trusts not to be entered

A notice of an express, implied or constructive trust shall not be entered on the register or received for registration.

62(2) Description of owner as a trustee

Describing the owner of freehold or leasehold land or of a charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall be deemed not to be a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge or the money secured by the charge, or otherwise, but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted.

62(3) Owners described as trustees to be joint tenants

Where two or more owners are described as trustees, the property shall be held to be vested in them as joint tenants unless the contrary is expressly stated.

62(4) Saving

Nothing in this section prevents the registration of a charge given for the purpose of securing bonds or debentures of a corporation, but the registration of such a charge is not a guarantee that the steps necessary to render the charge valid have been duly taken.

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Ontario Statutes
 Land Titles Act
 Part VII – Subsequent Registrations (ss. 66-139)
 General

Most Recently Cited in: [Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.](#), 2018 ONCA 253, 2018 CarswellOnt 3694 | (Ont. C.A., Mar 15, 2018)

R.S.O. 1990, c. L.5, s. 71

S 71.

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71.

71(1) Protection of unregistered estates

Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director of Titles.

Proposed Amendment — 71(1)

71(1) Protection of unregistered estates

Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director.

2012, c. 8, Sched. 28, s. 45 [Not in force at date of publication.]

71(1.1) Agreement of purchase and sale

An agreement of purchase and sale or an assignment of that agreement shall not be registered, but a person claiming an interest in registered land under that agreement may register a caution under this section on the terms specified by the Director of Titles.

Proposed Amendment — 71(1.1)

71(1.1) Agreement of purchase and sale

An agreement of purchase and sale or an assignment of that agreement shall not be registered, but a person claiming an interest in registered land under that agreement may register a caution under this section on the terms specified by the Director.

2012, c. 8, Sched. 28, s. 45 [Not in force at date of publication.]

71(2) Effect of registration

Where a notice, caution, inhibition or restriction is registered, every registered owner of the land and every person deriving title through the registered owner, excepting owners of encumbrances registered prior to the registration of such notice, caution, inhibition or restriction, shall be deemed to be affected with notice of any unregistered estate, right, interest or equity referred to therein.

Amendment History

1998, c. 18, Sched. E, s. 129

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Ontario Statutes
Partnerships Act
Nature of Partnership

R.S.O. 1990, c. P.5, s. 2

s 2. Partnership

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2.Partnership

Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.

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Ontario Statutes
Settled Estates Act

R.S.O. 1990, c. S.7, s. 18

s 18.

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18.

18(1) Who may apply for exercise of powers

Any of the persons authorized by section 32 to make a demise of a settled estate, and any person entitled to the possession or to the receipt of the rents and profits of a settled estate for any greater estate than the estate mentioned in that section and the assigns of any such person may apply to the court to exercise the powers conferred by this Act.

18(2) Where jointly entitled

Where two or more persons are entitled as tenants in common, joint tenants or coparceners, any or either of them may make the application.

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“More Owners, More (Potential) Problems: How to Avoid Disputes Between Co-owners and What to do when They Arise”

Mark Dunn

Goodmans LLP

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15TH ANNUAL Real Estate Law Summit

The Brave New World of Money: Wire Transfers, E-Transfers and Cryptocurrency

Tannis Waugh
Tannis A. Waugh Professional Corporation

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The Brave New World of Money: Wire Transfers, E-Transfers and Cryptocurrency

Presented for the Real Estate Summit, April 19, 2018

*By Tannis A. Waugh
Tannis A. Waugh Professional Corporation*

There are many technological innovations in the practice of real estate which have occurred over the last 10 years: the use of emailed electronic documents, increased use of direct deposits, a general willingness to go paperless both on the part of lenders and clients and automated software platforms. What is woefully lacking, however, is a modern and efficient payment system for real estate transactions.

Most of us are still using certified cheques and couriering them. With all that we can do at our desk in a brick and mortar space, or on a laptop if running a virtual office, how is it that we are still stuck in the mid 20th century when it comes to payments?

While payments are the last hanger-on of an antiquated era of what I refer to as “analogue practice,” revolutionary innovations are coming to payments that we can expect to see in the near future. In the interim, there are smaller innovations that may assist in creating a more efficient payments process.

Wire Transfers and the Large Value Transfer System (LVTS)

What is a wire transfer and why are we not using them more often?

As early as 2004, LawPro has been writing about the use of the LVTS in real estate transactions.¹

The LVTS operates differently than the system that we are all familiar with: the Automated Clearing Settlement System (ACSS) which is used for certified cheques, bank drafts and direct deposits. Real estate lawyers are using LVTS for the delivery of mortgage funds from many institutional lenders. These funds are irrevocable and guaranteed.² Practically speaking, this means that wire cannot be reversed and the funds, upon credit to the account, can be immediately disbursed without risk.³

So why is this not the standard in practice?

The LVTS system is not perfect. Any user issues with sending the wire can result in delays and while the benefit of the system is that it is supposed to be in real time or near real time,⁴ any user errors with the entering of data to send the wire can result in delays

¹ Lawyers' Professional Indemnity Company. (2004, December). *What is LVTS v. ACSS & why you should care?* Retrieved at <http://www.lawpro.ca/LawPRO/FundsHandling.pdf>

² Ibid. and Payments Canada. (2017). *Large Value Transfer System*. Retrieved at <https://www.payments.ca/about-us/our-systems-and-rules/large-value-transfer-system>

³ Ibid.

⁴ Ibid.

up to 48 hours and require manual assistance from the financial institutions which will result in a significant amount of time spent tracking down the wire.⁵

Cost: cost will vary from bank to bank but there will be a monthly charge for a commercial wire account and a per use charge.

With pricing for real estate legal services as competitive as it is, it is a hard sell to add another disbursement when the process of certified cheques may be working satisfactorily enough. This is even more significant when you consider that a commercial wire account will only be worth it if the volume of transactions justifies the cost.

Control: with a wire transfer, you cannot ensure that funds were paid directly to a seller and not a third party, that a mortgage was paid (beyond the personal undertaking to discharge) or any other registered claimant. This control issue is the same with direct deposits.

Resistance to change: there is no obligation on the part of another real estate lawyer to agree to a wire transfer through the LVTS in the absence of a contractual provision. While the recipient is not required to have a commercial wire account to receive one, it is prudent to expect resistance from anyone who is not familiar with them. Ironically, wire transfers to a recipient carry less risk than a certified cheque or bank draft but that does not delineate from the recipient's choice to accept a wire unless it is mandated in the contract.

⁵ Note: this is what my own bank, TD Canada Trust, advised me when I set up my wire account.

More and more standard OREA agreements contain the following language in their schedule “A” which will give the sender the authority for insisting on a wire transfer:

The Buyer agrees to pay the balance of the purchase price, subject to adjustments, in cash or by certified cheque or wire transfer using the Large Value Transfer System, to the Seller on the completion of this transaction.⁶

Financial Reporting Compliance and Wire Transfers

Under s. 10(c) of By-law 9 the sender has the authority to transfer funds out of a trust account through an electronic transfer which would cover either a wire transfer under LVTS or an e-transfer which is discussed below.⁷

Naturally, there are compliance obligations on the part of the lawyer when dealing with electronic transfers from trust which are laid out in s. 12 of By-law 9.

Under subsection 12(2), there is a two-step authentication process where one person with their own password is required to set up the payment and a second person with their own separate password is responsible for sending the transfer.⁸ This applies to both e-transfers and wires with the exception of closing funds which have their own process.⁹

⁶ Gargiulo, Sue. (2012, January 18). *And Then There Were Clauses*. Retrieved at <https://www.oreablog.com/index.php/and-then-there-were-clauses/>

⁷ Province of Ontario, Law Society of Ontario (formerly Law Society of Upper Canada), revised by-law 9, by-law concerning Financial Transactions and Records (2015, October 19), s. 10(c)

⁸ Province of Ontario, Law Society of Ontario (formerly Law Society of Upper Canada), revised by-law 9, by-law concerning Financial Transactions and Records (2015, October 19), s. 12(2)(1)

⁹ Law Society of Ontario (formerly Law Society of Upper Canada). (2010, June). *Real Estate Practice Guide for Lawyers*. Retrieved from <https://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491160>, p. 20

Logistically, the process in section 12 could be a problem because banks may not provide for separate controlled access for multiple individuals.

There is a further process for closing funds sent lawyer to lawyer in a real estate transaction which is reproduced in **Schedule “A”** and falls under S. 13 of By-law 9. This is a different process than the one outlined above and in S. 12 of By-Law 9.

Other Compliance Issues with Wire Transfers

What about the issue of control and addressing institutional mortgages, private mortgages and control over third party payouts?

These issues can be dealt with the same way we deal with them when we direct deposit funds on a transaction:

- a) Institutional mortgages can be addressed by personal undertakings and discharge statements;¹⁰
- b) Private mortgages can be addressed by a Document Registration Agreement if the Vendor’s lawyer has authority to discharge the mortgage¹¹ or a three-way Document Registration Agreement and two transfers in trust to two different lawyers; and

¹⁰ *Supra note 9* at 14.

¹¹

- c) And lastly, third party payouts can be addressed through an undertaking from the lawyer confirming that funds are being paid directly to the title holder and not a third party.

The ACSS System

The ACSS system is more familiar because it is the system that governs certified cheques and bank drafts.

Funds deposited in ACSS are not guaranteed as soon as you deposit them into your account, unlike wires. As a consequence, there is a risk to the lawyer that funds could be subject to return.¹²

Funds moving through the ACSS system require an additional layer of due diligence on the lawyer's part and are vulnerable to fraud. Because of this, real estate lawyers are tasked with determining what is appropriate due diligence.

A 2016 case from the Ontario Superior Court dealt with a fraudulent cheque deposited in a lawyer's trust account and subsequently advanced to a third party and contains some helpful guidance:

- Do not take a direction to advance funds from anyone who is not your client;

¹² Lawyers' Professional Indemnity Company. (2008). *Show me the money*. Retrieved from <https://www.practicepro.ca/wp-content/uploads/2017/06/2008-08-wire-transfer-benefits.pdf>

- Verify the source of the funds;
- Verify the identity of the person/entity who is providing the funds;
- Make diligent inquiries if funds are to be paid to third parties;
- Inspect the drafts or certified cheques; and
- Check to make sure funds have cleared.¹³

This was an extreme case of carelessness but it illustrates where the red flags of cheque fraud are and what requires further investigation.

Bank drafts and certified cheques cannot normally be charged back to the depositor unless the instrument has been materially altered or has a forged endorsement.¹⁴

Scanners

Banks are now using scanners to automatically deposit cheques at the teller instead of manually entering the cheques when deposited. This technology is now available to rent from most institutions so that your office can deposit cheques without physically going to the bank.

The scanners work within the confines of the ACSS system: the only difference is that you are depositing the cheques at your desk and are not required to attend at the bank.

¹³*Rogers v. Priyance Hospitality Inc.*, 2016 ONSC 7851 (ONSC). Retrieved from <https://www.canlii.org/en/on/onsc/doc/2016/2016onsc7851/2016onsc7851.html?searchUrlHash=AAAAAQAcCVJvZ2VycyBQcmI5YW5jZSB1b3NwaXRhbGl0eQAAAAAB&resultIndex=1>

¹⁴Lawyers' Professional Indemnity Company. (2008). *Show me the money*. Retrieved from <https://www.practicepro.ca/wp-content/uploads/2017/06/2008-08-wire-transfer-benefits.pdf>

Your bank will recommend a minimum time before the deposit will show up in your account as a deposited item and note: just because it shows up as a deposited item, does not mean it has cleared and is irrevocable.

The value of scanners is time: the time that you do not have to be at the bank waiting in line to make a deposit. The downside is the cost: you may require a scanner for both your general and your trust account to make the scanner use worth it for which there is a monthly cost that will vary from bank to bank.

E-Transfers and transfers between accounts

What is an e-transfer?

E-transfers are electronic payments through your bank account (usually through the Interac™ e-transfer system) for bank-to-bank transfers. They are not part of the LVTS system but the infrastructure is similar but on a smaller scale. Like LVTS wire transfers, they are irrevocable once they have been deposited.¹⁵

Where they differ from an LVTS wire, however, is that before the funds are deposited by the recipient, the sender can cancel the transfer at any time whereas the LVTS system does not require the recipient to accept the funds.

¹⁵ Interac.ca. (2018). *Interac e-Transfer Security*. Retrieved from <http://www.interac.ca/en/interac-ettransfer-security.html/>

Bank-to-bank e-transfers are not meant to be a replacement for LVTS wire transfers and will have a daily limit placed on them which will vary from bank to bank and account holders within the same bank. There is also a small fee per transfer to send money but not to receive it.

The easiest and most useful way of using an e-transfer is transferring funds from trust to general for both fees and land transfer tax within your own online banking system.

For compliance purposes, these are treated the same as bank-to-bank e-transfers and require you to maintain records of the form of the 9A which is reproduced in **Schedule “B.”** Further information on compliance of these records can be found in the Law Society of Ontario’s Bookkeeping Guide.¹⁶

Bank-to-bank e-transfers can be used in a multitude of useful ways from the payment of fees, small retainers, the reimbursement of client funds and for your own accounts payable.

Any time funds are being withdrawn from trust electronically, the form 9A will be required. No further compliance is required for funds coming into trust other than noting the method by which you received the funds as set out in s. 18(1) of By-Law 9 and further described in the Bookkeeping Guide.¹⁷

¹⁶ Law Society of Ontario. (2016, February 26). *Bookkeeping Guide for Lawyers*. Retrieved from <https://www.lsuc.on.ca/Bookkeeping-Guide-for-Lawyers/>

¹⁷ Ibid. and Province of Ontario, Law Society of Ontario (formerly Law Society of Upper Canada), revised by-law 9, by-law concerning Financial Transactions and Records (2015, October 19), s 18(1)

What is a cryptocurrency and how is it relevant to your practice?

Cryptocurrency has been associated with the dark web, criminality and hackers. Recently however, it has gained a lot of mainstream traction and has been reported on extensively by the media.

The most well-known cryptocurrency is bitcoin. In 2008, a collective or an individual who refers to him/her/themselves as Satoshi Nakamoto (the identity is shrouded in secrecy) published a white paper online touting a concept of wholly digital currency that could be transferred on a platform called the blockchain.¹⁸

The key difference between a blockchain transaction and any other kind of transaction other than cash is centralization: there is no central authority in a blockchain transaction. The verified and unalterable blockchain lives on all the computers that verified the algorithm in the first place doing away with the need for a central authority, i.e. a bank.

How does this work? Instead of maintaining proof of a transaction in a central location like one computer, a database or an organization, the proof of the transaction exists as exact copies on many computers world-wide.¹⁹

¹⁸ Tapscott, Don and Tapscott, Alex. Blockchain Revolution, 2016 Penguin Canada at page 5.

¹⁸ See also: Nakamoto, Satoshi. (undated). *Bitcoin: A Peer-to-Peer Electronic Cash System*. Retrieved from <https://bitcoin.org/bitcoin.pdf>

¹⁹ Author's note: Blockchain as a technological concept is difficult to grasp at first. Here are some helpful resources which explain blockchain:

- Tapscott, Don and Tapscott, Alex. Blockchain Revolution, 2016 Penguin Canada

Imagine a world where we could conduct business without a bank peer-to-peer.

How can bitcoin fit into your practice?

The Rules of Professional Conduct are clear: bitcoin is not a currency that can make it into your trust account (for now). Subsection 7(1) of By-law 9 pursuant to the *Law Society Act* confirmed that:

Subject to section 8, every licensee who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union...(etc.)²⁰

This means that until chartered banks, etc. allow deposits of cryptocurrencies (a paradox given the decentralized nature of the currency) or, the By-laws pursuant to the *Law Society Act* are updated to reflect the practical realities of a modern payments system, you will not be able to hold bitcoin in trust for your clients.

The volatility of bitcoin and the current outright prohibition on its deposit into a lawyer's trust account does not derogate for your ability to accept bitcoin for services rendered, however.

- IBM. (2018). *Understanding the fundamentals of IBM Blockchain*. Retrieved at <https://www.ibm.com/blockchain/what-is-blockchain.html>

²⁰ Province of Ontario, Law Society of Ontario (formerly Law Society of Upper Canada), revised by-law 9, by-law concerning Financial Transactions and Records (2015, October 19), s. 7(1).

All of the same rules apply to bitcoin or other cryptocurrencies that apply to Canadian currency: you will need to track it under s. 18 of By-law 9 and if it is not going in your general account (which it cannot because you are not able to deposit it into a bank) you will have to set up a separate general account in your accounting software to properly reconcile any payments in bitcoin (or multiple accounts for multiple cryptocurrencies).

There is a downside: the current payment ecosystem requires the following process to convert bitcoin into usable Canadian cash:

1. Client sends money to lawyer wallet to wallet;
2. Lawyer sends bitcoin to a currency converter to convert into Canadian dollars; and
3. Lawyer sends Canadian dollars to general account.

Aside from the inefficiency, there will also be costs associated with the conversion. The other option is to leave the funds in the cryptocurrency account (called a digital wallet) and conduct transactions accordingly only in bitcoin.

This, of course, raises issues of determination of value, identity of your client (as blockchain transactions are wholly anonymous) and taxation.²¹

These issues will only be addressed when the appropriate bodies employ the resources necessary for a modern regulatory framework. Until then, it is up to the individual lawyer

²¹ Gibillini, Nicole. (2018, March 2). *'Don't do it': Four things to know before buying real estate with bitcoin*. Retrieved from <https://www.bnn.ca/don-t-do-it-four-things-to-know-before-buying-real-estate-with-bitcoin-1.1015796>

to create their own cryptocurrency policy on the understanding that any risk associated with such payments is squarely on the shoulder of the lawyer.

How does bitcoin fit into a real estate transaction?

Early adopters are already contemplating its use as a currency in real estate transactions in Ontario.²² Paying for real estate in bitcoin, however, is a niche and not realistic for the average buyer.

Many newspaper articles claim that the first property purchased in bitcoin in the United States was a new construction townhouse in Austin but if you look at the terms of the transaction, this was really a case of a purchaser who had bitcoin and converted it to US dollars and purchased real estate at a fixed price in US dollars; it was not a true bitcoin transaction.²³

As of January 2018, there also was a vacant lot listed for sale in bitcoin in Victoria BC. While there was no confirmation that the property had sold, by the date of this paper, the seller's real estate agent recognized that there was an issue with the deposit because the real estate industry did not have a mechanism in place to deal with deposits in

²² Doherty, Brennan. (2018, March 2). *'Early adopter' sells his Mississauga condo in bitcoin*. Retrieved from <https://www.thestar.com/news/gta/2018/03/02/early-adopter-sells-his-mississauga-condo-in-bitcoin.html>

²³ Olick, Diana. (2017, October 16). *Bitcoin is finally buying into US real estate*. Retrieved from <https://www.cnn.com/2017/10/16/bitcoin-is-finally-buying-into-us-real-estate.html>

cryptocurrency. In this case, the seller opted for a cash deposit to address the lack of regulation and compliance issues.²⁴

There are many issues associated with buying real estate with cryptocurrency from the volatility of the currency, the logistics, the regulatory framework and the tax consequences, among others.²⁵

If the idea of purchasing real estate with cryptocurrency seems very science-fiction-eque, then it will also be surprising to find out that blockchain, the decentralized platform that bitcoin is based on, is not just for currency but has been used to transfer ownership of real property.

The first real estate transaction done on a blockchain platform was done in in 2017. It was done in Ukraine on the Ethereum blockchain platform through a company called Propy that facilitates real estate transactions on blockchain and with cryptocurrency.²⁶ Propy is a technology company that has created a marketplace with decentralized title registry and facilitated the transaction through a partnership with the government of Ukraine.²⁷

²⁴ CBC News. (2018, January 12). *Seller seeks buyer with bitcoin for Victoria property*. Retrieved from <http://www.cbc.ca/news/canada/british-columbia/bitcoin-cryptocurrency-real-estate-victoria-uplands-1.4484549>
²⁵ Gibillini, Nicole. (2018, March 2). *'Don't do it': Four things to know before buying real estate with bitcoin*. Retrieved from <https://www.bnn.ca/don-t-do-it-four-things-to-know-before-buying-real-estate-with-bitcoin-1.1015796>
²⁶ Cuthbertson, Anthony. (2017, October 12). *Blockchain Used to Sell Real Estate for the First Time*. Retrieved from <http://www.newsweek.com/blockchain-sell-real-estate-first-time-ethereum-682982>
²⁷ Propy Inc. (2018). *About Propy*. Retrieved at <https://propy.com/about>

The benefit and applicability of blockchain technology to facilitate real estate transactions is going to be more relevant where jurisdictions have antiquated land registry systems.²⁸

It is not over dramatic to say that we are on the precipice of a payment revolution. With the electronic tools available for payments, consumers are demanding technological solutions. Even if the fraud related concerns of delayed clearing did not exist, the ACSS process of physically certifying cheques does not make sense given the current technology that is available.

With the advent of payment innovations, there also needs to be a regulatory framework so that the consumer can take full advantage of it while knowing that their interests are being protected. The creation of a modern regulatory framework for payments is a unique opportunity for real estate lawyers to shape the future of real estate transactions in Ontario while managing risk and providing consumers what they want.

²⁸ See for example Spielman, Avi. (2016, September). *Blockchain: Digitally Rebuilding the Real Estate Industry*. Retrieved from http://dci.mit.edu/assets/papers/spielman_thesis.pdf

Schedule "A"

Excerpt from the LSO Bookkeeping Guide: *Disbursing Trust Funds*

and LSO Sample Form 9C

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Disbursing Trust Funds

It is important to have an audit trail, recording each step and preserving original and supporting documentation (source documents), for all transactions in a business, but especially if you handle client trust funds. A licensee of the Law Society who is permitted to handle trust funds must always initiate a trust disbursement and do so in writing, which then becomes part of the accounting records. Undischarged bankrupt licensees are not permitted to handle or have trust accounts in their names (section 2 of By-Law 9).

Section 9 of By-law 9 allows you to withdraw trust funds you are holding for a client for the following reasons *only*:

- to make a proper payment to or on behalf of the client
- to reimburse your firm for proper expenses incurred on behalf of the client
- to pay your firm fees for completed legal services for which you have sent a fee bill to the client
- to transfer funds to another trust account for a client
- to withdraw funds that according to By-Law 9 should not have been deposited to the trust account

You may disburse trust funds by cheque, bank draft and wiring funds through your bank. You may disburse trust funds by internet banking only if you follow the requirements of section 12 of By-Law 9. If you withdraw trust funds to pay your fees and/or disbursements, section 10 of By-Law 9 limits you to the follow methods: a cheque payable to you or your law firm, transfer to a non trust account in your or your firm's name, electronic transfer. Withdrawing trust funds in cash is risky and should only be done on the client's written instructions; but note that if you received fees, disbursements, expenses, or bail in cash, Section 6(e) of By-Law 9 requires that you make any refund of those payments in cash. You should always get a detailed receipt signed by the payee for any cash disbursement.

Do not disburse trust funds from an automated teller machine, as you will not have an adequate audit trail. Always check your clients' trust ledger to ensure you hold sufficient funds in trust for a particular client before disbursing funds for that client. You should confirm your financial institution's holding periods on funds to be sure cheques you have deposited from clients have cleared and will not be returned NSF (not sufficient funds).

1. Cheques vs Bank Drafts

You should be aware that cheques leave a better audit trail than bank drafts. Cashed cheques, including certified cheques, are your records and you must arrange for your financial institution to return them to you with your bank statements each month. Some financial institutions provide imaged cheques which are sent to your firm electronically. Bank drafts are the financial institution's records. Financial institutions do not usually retain their original records for the ten year time period that you are required to keep your bank records. Returned cheques confirm that the funds have cleared and have the endorsement details on the back. Your copy of a bank draft will not confirm any of this information and you may have to spend time and money to obtain a copy of the bank draft from your financial institution to prove payment.

If you have any doubts about the validity of a cheque, certified cheque, money order, bank draft, or other receipt to be deposited to your mixed trust account, you might want to consider

depositing it to a separate trust account; if the instrument does turn out to be fraudulent, your mixed trust account will not be affected. Be vigilant not disburse any trust funds until your financial institution can assure you that the funds have cleared. Different institutions have different clearing periods depending on the source of the funds. For time sensitive disbursements, consider the Large Value Transactions System: see the FAQs on the Canadian Payments association web site and LVTS article on the LawPRO website.

You must not issue trust cheques or bank drafts payable to “cash” or “bearer” (section 11 of By-law 9) and you should withdraw cash from the trust account only when necessary (e.g. refunds of fees, disbursements, expenses, or bail paid in cash as per section 6(e) of By-Law 9), or on the client’s written direction, and always obtain a detailed receipt for your audit trail.

2. Internet Trust Disbursements

If you disburse any funds by Internet banking, you must follow the procedure set out in section 12 of By-Law 9:

- complete a Form 9A for each client transaction (See the Appendices for a sample completed Form 9A)

(This Form must be signed by a person who has signing authority on your trust account. Except for exceptional circumstances, this must be a licensee of the Law Society who is entitled to hold trust funds.)

- one person using a password, enters the transfer data as set out in the Form 9A
- another person with a separate password, authorizes the transfer

(A sole practitioner without employees may both enter the data and authorize the transaction.)

- print the electronic confirmation of the transaction that must include:
 - i. your trust account number
 - ii. name, branch, and address of the account to which the funds have been transferred
 - iii. name of the account to which the funds have been transferred
 - iv. number of the account to which funds have been transferred
 - v. time and date the transaction details and authorization were received by your financial institution
 - vi. time and date the confirmation of the transaction is sent to you from the financial institution

(While this confirmation must be obtained by the end of the next banking day, realistically it may not be available unless it is printed immediately.)

- no later than the close of the second banking day after the transaction,
 - i. compare the Form 9A with the printed confirmation and verify that the money was withdrawn as specified in the Form 9A
 - ii. write the client name, client matter and any file number on the printed confirmation
 - iii. sign and date the printed confirmation.

Both the Form 9A and printed confirmation should be kept in numerical order by requisition number with your financial records. You may want to keep a copy in the client's file as well.

3. Internet Trust Disbursements for Real Estate Transactions

Section 13 of By-Law 9 has a specific procedure for electronically disbursing "closing funds", which are defined as "money necessary to complete or close a transaction in real estate". The procedure requires that you:

- complete and sign a Form 9C for each client transaction prior to the transfer (see the Appendices for a sample completed Form 9C) (*This Form must be signed by a person who has signing authority on your trust account.*)
- use an electronic transfer system that requires a password
- use an electronic transfer system that immediately produces a confirmation of the transfer
- print the confirmation which must have the following information:
 - i. the name of your account
 - ii. the number of your account
 - iii. the name of the account to which the closing funds are transferred
 - iv. the number of the account to which the closing funds are transferred
 - v. the date of the transfer

By 5:00 p.m. on the day after the transfer, you must compare the printed confirmation with the Form 9C and satisfy yourself that the transfer was completed in accordance with your directions in the Form 9C. You must then write the name of the client, the subject matter, and number of the file on the confirmation; then sign and date the confirmation. The Form 9C and confirmations should be kept in numerical order by requisition number with your accounting records. You may also want to keep copies in the client file. As noted above in the section on Cheques vs Bank Drafts, you might want to consider the LVTS system for time sensitive money transfers.



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Law Society of Ontario

Osgoode Hall, 130 Queen Street West,
Toronto, Ontario, M5H 2N6

Tel: 416-947-3300

Toll Free: 1-800-668-7380

Fax: 416-947-3924

Web: <http://www.iso.ca>

Print Close

Sample Form 9A

Electronic Trust Transfer Requisition

Requisition #ET001

Amount of funds to be transferred: **\$626.30**

Re:

Noir purchase from Blanc, 123 Main St., Anytown

Client: **Nicky Noir**

File No.: **10-43**

Reason for payment: **Fees (\$500) disbursements (\$54.25) and HST (\$72.05) billed to client**

Trust account to be debited:

Name of financial institution: **Bank of Ontario**

Account number: **123456789**

Name of recipient: **Leslie Lawyer, General Account**

Account to be credited:

Name of financial institution: **Bank of Ontario**

Branch name and address: **20 Downtown St., Anytown, ON Z9Y 2T2**

Account number: **987654321**

Person requisitioning electronic trust transfer: **Leslie Lawyer**

August 31, 2010

Leslie Lawyer

Additional transaction particulars:

Person entering details of transfer:

Name: **Sandy Secretary**

Sandy Secretary

Person authorizing transfer at computer terminal:

Name: **Bobby Bookkeeper**

Bobby Bookkeeper

Schedule "B"
LSO Sample Form 9A



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Tel: 416-947-3300

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Sample Form 9C

Electronic Trust Transfer Requisition: Closing Funds

Requisition #ETCR001

Amount of funds to be transferred: \$134,716.83

Re:

Noir purchase from Blanc, 456 Route St., Anytown

Client: **Nicky Noir**

File No.: **10-43**

Reason for payment: **Balance due on closing payable to solicitor for vendor**

Trust account to be debited:

Name of financial institution: **Bank of Ontario**

Account number: **123456789**

Name of recipient: **Sydney Solicitor, Barrister & Solicitor**

Account to be credited:

Name of financial institution: **Bank of Ontario**

Branch name and address: **Pine & Cedar, 32 Pine St., Anytown**

Account number: **987654321**

Person requisitioning electronic trust transfer: **Leslie Lawyer**

August 30, 2010

Leslie Lawyer

Person carrying out electronic trust transfer:

Name: **Sandy Secretary**

Sandy Secretary



15TH ANNUAL Real Estate Law Summit

Real Estate Audits: Pain-Free and Stress-Free

Rimpal Hinduja, CPA, CGA, Supervisor, Spot Audit,
Law Society of Ontario

Deborah Loh, CPA, CA, MAcc., Auditor, Spot Audit,
Law Society of Ontario

April 19, 2018

Real Estate Audits: Pain-Free and Stress-Free

Rimpal Hinduja, CPA, CGA
Supervisor - Spot Audit Program

Deborah Loh, CPA, CA, MAcc
Auditor – Spot Audit Program

Objectives of this Session

1. Overview of Spot Audit Program
2. Specific areas of focus

Authority

- Section 49.2 of the Law Society Act
- Frequency – every 5 to 10 years – applies to ALL firms large and small

Overall goal: Assess compliance with By-laws and Rules of Professional Conduct and to educate practitioners on those requirements

Specific Areas of Focus

- By-Law 9 – Teranet withdrawals from trust vs. general
- Rule 3.4 - Avoidance of conflicts of interest:
 - 3.4-12 - acting for borrower and lender
 - 3.4-16 - Two Lawyer Rule for real estate transactions
 - 3.4-5 to 3.4-9 - the Joint Retainer rule
- By-Law 7.1 – Compliance with client ID/verification requirements

Resources

- Law Society of Ontario:
<http://www.lso.ca/>
416-947-3300

- Bookkeeping Guide for Lawyers:
<https://www.lsuc.on.ca/Bookkeeping-Guide-for-Lawyers/>



15TH ANNUAL Real Estate Law Summit

Forfeited Corporate Property Act, 2015: One Year Later

Brenda Linington, Senior Counsel,
*Ministry of the Attorney General, Civil Law Division, Ministries of Energy/ Economic
Development and Growth / Research, Innovation and Science/ Infrastructure /
Accessibility*

Marta Zoladek, Legal Counsel,
*Ministry of the Attorney General, Civil Law Division, Ministries of Energy / Economic
Development and Growth / Research, Innovation & Science Infrastructure /
Accessibility*

April 19, 2018

Forfeited Corporate Property Act, 2015 : One Year Later

by Brenda Linington, Senior Counsel and Marta Zoladek, Counsel

Ministry of the Attorney General, Civil Law Division: Ministries of Energy / Economic Development and Growth / Research,
Innovation and Science / Infrastructure / Accessibility / Small Business

Who to Call/Where to Send Materials/Where to Get Info:

- All correspondence, litigation materials, applications and inquiries should be directed to the Ministry of Infrastructure:

Manager, Portfolio Performance
Ministry of Infrastructure
Realty Management Branch
777 Bay Street, 2nd floor, Suite 2300
Toronto Ontario, M5G 2E5

forfeitedcorporateproperty@ontario.ca
phone: 416-326-5696

- *Forfeited Corporate Property Act, 2015* (“FCPA”) defines the Minister as the Minister of Economic Development, Employment and Infrastructure. However, this portfolio has since been split and the Minister of Infrastructure is now responsible for the FCPA.
- You can check the responsible Minister for any statute on the E-Laws website:
<https://www.ontario.ca/laws/public-statutes-and-ministers-responsible>
- The *Business Corporations Act (Ontario)* (“BCA”) requires service on the Minister responsible for the FCPA when commencing proceedings against a dissolved corporation. These documents can be served by sending them to the address above and do not need to be sent to the Minister’s office.
- Information on the forfeited corporate property program is available on the Ontario.ca website: <https://www.ontario.ca/page/forfeited-corporate-properties>
- The Director of Titles issues Bulletins which relate to forfeited corporate property and may be of assistance. Bulletins may be found at: <https://www.ontario.ca/search/land-registration?sort=desc>

Prepared for distribution at the 15TH Annual Real Estate Law Summit, April 18 & 19, 2018.
The observations made in this document are those of the authors and
not those of Her Majesty the Queen in right of Ontario.

Observations on Litigation Materials:

- Some court materials continue to reference the repealed *Escheats Act* in relation to forfeited corporate real property. Forfeited corporate real property is dealt with solely under the FCPA.
- Materials related to proceedings against a dissolved corporation that deal only with forfeited corporate real property do not need to be circulated to the Office of the Public Guardian and Trustee (see ss. 242(4) of the BCA).
- Materials are required to include the notice set out in ss. 242(3) of BCA that,
 - (i) sets out the name of the dissolved corporation,
 - (ii) explains why the action, suit or other proceeding is being commenced against the dissolved corporation, and
 - (iii) identifies any property that is referred to in the proceeding and was owned by the corporation at the time of its dissolution.
 - Most materials we have received to date have not included this notice.
 - This is important information that allows MOI to determine whether the Crown has an interest in the proceeding and to respond in a timely manner.
- The *Proceedings Against the Crown Act* (“PACA”) should be reviewed to determine which remedies are available against the Crown. For example, we have seen requests for injunctions, which are not available under PACA, see s. 14.
- If you are commencing an action against a dissolved corporation, you should consider whether the Crown needs to be also named in the action and if the Crown is named, the rules of service are set out in several sections of PACA, ex. see section 7.

Vesting Orders:

- MOI continues to receive many applications for vesting orders of forfeited corporate real property under section 100 of the *Courts of Justice Act*. This process is being used instead of the statutory relief from forfeiture process under the FCPA where applicants can request relief from forfeiture from MOI based on a legal or moral claim to the property.

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- The FCPA process should be considered as it is more cost effective for clients, the statutory process was designed specifically for this purpose and there is certainty in the outcome as the FCPA provides that decisions are final and not reviewable for any reason, see section 5.
- Courts have granted vesting orders with respect to forfeited corporate property but in some cases have determined that vesting orders are not available given sections 15 and 19 of PACA that prohibit orders for recovery of Crown property and proceedings *in rem* against the Crown.
- We would have expected a greater take up of the statutory process but continue to see vesting order applications on a regular basis.
- Where there is a lack of moral or legal claim to the property by an applicant there is an increased chance that the Crown may take a position on or oppose the vesting order application. If the vesting order application fails, the possible solution could be that the applicant would purchase the property from the Crown. It is always open to the applicant to approach MOI and request a transfer before filing an application with the court.
- The Minister has the ability to dispose of forfeited corporate property on any terms and conditions that the Minister sets, subject to provision of notice to the dissolved corporation in certain situations.

Register of Ownership Interests:

- Section 140.1 of the BCA requires corporations to maintain a register of its ownership interests in land in Ontario.
- The register is required to include only current ownership interests. This means that once properties are sold they do not have to be continued in the register. Ownership interests in land that were disposed of prior to the record keeping requirement do not have to be included.
- The requirement to keep a register applies to registered ownership interests in land, not all interests in land. This would include co-ownership interests, but would not include leasehold interests or easements. Where a corporation is shown as a registered owner on a parcel.

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- Corporations incorporated or continued after December 10, 2016 are required to comply on a go forward basis.
- Corporations incorporated or continued before December 10, 2016 are required to comply after December 10, 2018 and the register should include property ownership on or after that date.

Cessation of Encumbrance under Section 102 of *Land Titles Act*:

- When making an application under section 102 of the *Land Titles Act* (“LTA”) for a cessation of an encumbrance you may be requested by the Ministry of Government and Consumer Services to obtain a letter from MOI where the encumbrance such as a mortgage was held by a corporation that dissolved.
- MOI would review the package which meets the requirements under s. 102 of the LTA in order to produce the letter. MGCS requires the letter to be submitted with the application.
- MOI does not become involved where the corporation dissolved under federal legislation or was not dissolved but is bankrupt.

Proposed Law Statements:

- MOI and the Ministry of Consumer and Government Services continue to work on electronic statements confirming that corporate searches have been undertaken.
- The current proposal is to amend Regulation 19/99 under the *Land Registration Reform Act*.
- What is being proposed is the requirement for a statement for registration of documents on title where any party to the document being registered is a corporation. The person signing the document for completeness for the corporation would have to confirm that they have conducted a corporate search and the corporation is not dissolved.

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15TH ANNUAL Real Estate Law Summit

Income Tax Traps When a Non-Resident Disposes of Property

Rock Lapalme, CPA, CA, TEP, Senior Tax Manager,
Collins Barrow SNT LLP

April 19, 2018

Income Tax Traps When a Non-Resident Disposes of Property

Rock Lapalme, CPA, CA, TEP

Collins Barrow SNT LLP, Sudbury, Ontario

LSUC 15th Annual Real Estate Law Summit

April 19, 2018

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APPENDIX – CITATIONS

PREFACE

This paper is intended to provide an introduction to some of the Canadian income tax traps that the unsuspecting practitioner faces when advising non-resident clients on the disposition of taxable Canadian property. The concept of section 116 of the Income Tax Act is explained along with some of the errors that can be made when interpreting it. This paper focuses specifically on transactions involving real estate and investments that derive their value primarily from real estate located in Canada. Dispositions of certain other properties, such as life insurance policies and resource and timber properties, may also be subject to the requirements of section 116; however, these are beyond the scope of this paper.

The contents of this paper may serve as a useful guide to the reader when advising non-resident clients. However, as tax law, its interpretation by the courts, and the administrative practices of the Canada Revenue Agency (“CRA”) are continually changing, this paper should not be considered a substitute for professional advice.

Unless otherwise noted, all statutory references are to the Income Tax Act (“ITA”).

1. INTRODUCTION TO SECTION 116

Non-residents of Canada are subject to income tax¹ on their taxable income earned in Canada, which includes income and taxable capital gains from the disposition of taxable Canadian property² (“TCP”). A U.S. individual’s sale of real property located in Canada is a prime example of a disposition of TCP, but it is just one simple example. The term *non-resident* may refer to an individual, corporation, trust, or estate. Furthermore, a *disposition* for income tax purposes is not limited to a conveyance by way of sale, and *TCP* includes much more than just direct ownership of real estate. Non-residents can be subject to tax on a broad range of transactions or events which will be explored in further detail in the sections that follow.

Reporting the income tax owing by a non-resident as a result of the disposition of TCP typically requires more work than just filing an income tax return. In order to protect the Canadian tax base, various rules were developed to ensure that the estimated income tax owing is collected at the time of the disposition by requiring that either the non-resident to remit the tax prior to the disposition, or by requiring the purchaser to withhold the income tax from the purchase price owing to the non-resident vendor and remit it to the CRA shortly after the disposition. These rules are found in section 116 of the ITA.

Although section 116 may seem simple, in practice non-compliance can easily occur as a result of misinterpretations of the terms non-resident, disposition, or TCP. Errors may also be made due to a lack of understanding of the filing requirements and deadlines imposed by section 116. These errors can lead to penalties being assessed to the non-resident vendor, the purchaser of the property, or both, and in some situations can lead to the purchaser of TCP being liable for tax without regard to whether the non-resident has been paid the full proceeds or whether the non-resident has also paid the tax.

The pages that follow include a review of the meanings of non-resident, disposition, and TCP, the procedures and filings required by section 116, some of the errors that may be made by practitioners and the implications of these errors, as well as best practices that practitioners can implement in order to mitigate their risk of liability.

2. MEANING OF NON-RESIDENT

The starting point in determining whether a client is subject to section 116 of the ITA is to determine whether they are a non-resident of Canada for income tax purposes. The terms “resident” and “non-resident” are not defined in the ITA, but the concept of “residency” for income tax purposes has been interpreted extensively by the courts, and various guiding principles for determining residency have been developed in the process.

2.1 Common Law Residence of an Individual

Residence of an individual is “a matter of the degree to which a person in mind and fact settles into or maintains or centralizes (their) ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question.”³ Courts have reviewed various “ties” an individual may have with Canada and weighed in on whether those ties indicate an ordinary mode of living, and therefore residence for income tax purposes, in Canada or another country. Many of these ties are conveniently summarized in the CRA’s Income Tax Folio S5-F1-C1, which is easily accessible on the CRA’s website.⁴

Having Canadian citizenship, passport, or work permit may be considered a tie to Canada, but is not in and of itself conclusive of residence. Factors such as dwellings owned or rented in Canada, having a spouse in Canada, and dependents in Canada are considered significant ties which are normally indicative of residence in Canada under common law principles. Secondary ties to consider include owning personal property in Canada, having social and economic ties with Canada (e.g. memberships, employment), and maintaining a driver’s licence, medical insurance, bank accounts, and a mailing address in Canada. Consideration should be given to other factors such as the individual’s intention to permanently reside in Canada and the regularity and length of visits to Canada. A lack of significant ties, secondary ties, and any intention to remain in Canada would typically indicate that an individual is a non-resident of Canada according to the common law tests.

2.2 Common Law Residence of a Corporation

In one British case from 1906, the residence of a company was determined using the following reasoning: “In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business (...) and the real business is carried on where the central management and control actually abides.”⁵ This commentary has stood the test of time, and

today the concept of central management and control (“CM&C”) is still the relevant test applied by courts in Canada when determining residence of a corporation.

Numerous cases over the years have considered the CM&C to be where the corporation’s board of directors exercises its responsibilities. For example, a corporation that is incorporated in a foreign jurisdiction but carries on business and holds its board of directors meetings in Canada may be considered resident in Canada. There may be exceptions to this, however. In one recent Canadian case,⁶ CM&C of a foreign trust was found to be with two Canadian-resident individuals who made substantive decisions for the trust despite the fact that they were not trustees, and so the trust was a resident of Canada for income tax purposes. It may only be a matter of time before this concept is applied in a Canadian court to a corporation where one or two individuals, and not the board of directors, effectively make all decisions. In fact, other jurisdictions are already doing this. In a recent British case,⁷ CM&C of a foreign corporation was found to be with one U.K.-resident director and the corporation was therefore resident in the U.K., despite the fact that the corporation operated and the board regularly met in another country. That particular case is unique in the fact that the organizational documents provided the U.K.-resident director with voting control. Nonetheless, its commentary may be useful in determining whether a corporation is resident in Canada.

2.3 Common Law Residence of a Trust or Estate

Historically, the residence of a trust or estate was often considered to be where the trustee or executor resides. However, a recent case⁸ challenged this line of thinking and as a result it is the same CM&C test that applies to corporations that now applies to trusts, and by extension, estates.⁹ If one or more beneficiaries or other persons effectively exercise control of trust assets, including making decisions regarding investments and distributions, a trust or estate may be considered resident where those beneficiaries are resident.

2.4 Common Law Residence of a Partnership

Section 116 of the ITA requires that a non-resident *person* follow certain procedures upon disposing of TCP. A person, by definition, includes a corporation¹⁰ and an individual¹¹ and by extension¹² also includes a trust or estate, but does not include a partnership. However, each non-resident person who is a member of a partnership holds an interest in the partnership's underlying TCP and is therefore subject to section 116 on their proportionate share of any disposition of TCP by the partnership.

2.5 Deemed Residency

The ITA includes provisions¹³ that deem an individual to be resident in Canada if the individual sojourned in Canada for a period of 183 days or more in a year, was a member of the Canadian Forces, or was an ambassador or other servant of Canada. The ITA also includes provisions¹⁴ that deem most corporations incorporated in Canada to be resident in Canada. These rules apply for all purposes of the ITA, including section 116. Therefore, an individual or corporation that would otherwise be considered a non-resident of Canada under the common law tests but that is deemed to be resident in Canada by these provisions may not be subject to section 116, unless a tax treaty overrides this.

The ITA includes other provisions¹⁵ that deem certain trusts and estates to be resident in Canada if there is a resident contributor to or beneficiary of the trust or estate. Although an in depth discussion of these deeming provisions would be beyond the scope of this paper, it is worthwhile noting that they only apply for specific purposes of the ITA, which do not include section 116. Therefore, a trust or estate that is a non-resident due to the CM&C test or a tax treaty would still be required to comply with section 116, notwithstanding that they may be deemed resident in Canada for other purposes.

2.6 Determination of Residence under a Tax Treaty

The ITA deems a person to be a non-resident of Canada if the person would otherwise be resident in Canada for tax purposes (after an analysis of the common law tests and deeming provisions of the ITA) but is, under a tax treaty with another country, resident in the other country and not resident in Canada. This deeming provision¹⁶ applies for all purposes of the ITA, including section 116. Most of Canada's income tax treaties closely follow the OECD Model Tax Convention which includes tie breaker rules to determine where a person is resident when they would otherwise be resident of both Canada and another country, or in neither country, under domestic laws.

In a typical tax treaty, an individual would be considered resident where they have a permanent home available to them. For this purpose, "any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.)."¹⁷ Many practitioners assume that a permanent home must be permanently in place; however, conceptually it is possible for a travel trailer or motorhome to qualify as a permanent home. If there is a permanent home available in both countries or in neither country, tax treaties will then normally point to where the individual's personal and economic relations are closer, followed by their centre of vital interests, their habitual abode, and then their citizenship to determine residence.

Many tax treaties do not include any tie breaker rules where the residence of a corporation, trust, or estate is uncertain. Some tax treaties will consider the place of incorporation or constitution to be the place of residence.

It is possible for an individual to be considered resident in two countries even after a review of the applicable tax treaty. For example, an individual who owns a house in both countries, has no

spouse or dependents, and spends equal amounts of time in each country for work and pleasure may be considered resident in both countries. If residence cannot be determined after a review of the tax treaty, taxpayers may request the CRA's determination on the matter by submitting CRA form NR73 or NR74, as applicable, and providing supporting documentation. In some cases it may take months to receive a determination from the CRA, and this is therefore not feasible in the context of a disposition of TCP where a decision regarding withholding tax under section 116 must be made within weeks or days. Therefore, taxpayers are often required to take a position regarding their residency and file on that basis. If a taxpayer files tax returns and pays income tax in one country on the basis that they are resident in that country, but another country asserts that the taxpayer is also a resident there, then a request may be made to what is called the "Competent Authority" of each country so that officials from Canada and the other country resolve the matter. The process for Competent Authority Assistance is outlined in CRA's Information Circular 71-17R5, "Guidance on Competent Authority Assistance Under Canada's Tax Conventions," which is accessible on the CRA's website.¹⁸

One should not assume that all of Canada's tax treaties include the same provisions as above. Care should be taken to review the actual treaty in place between Canada and the country in question. One should also not assume that any particular country has a treaty with Canada. Canada has a tax treaty with most developed countries, but not with all countries. If an individual is a resident of a country with which Canada does not have a tax treaty, it is possible that they could be subject to tax in both countries on the disposition of TCP.

3. MEANING OF DISPOSITION

Once it is established that a client is a non-resident of Canada for the purpose of section 116, the next step is to determine whether there has been a disposition of property. As previously mentioned, a disposition is not limited to a conveyance by way of sale. A disposition may be a "bestowal, as by gift or sale".¹⁹

3.1 Meaning of Disposition Expanded and Limited by the ITA

The ordinary meaning of disposition is both expanded and limited by the ITA.²⁰ A disposition of property includes the following (this list is abridged and paraphrased to limit the discussion to transactions involving direct and indirect holdings of real estate):

- any transaction or event entitling a taxpayer to proceeds of disposition of the property;
- where the property is a share, any transaction or event by which the property is in whole or in part redeemed, acquired or cancelled, or the share is converted because of an amalgamation or merger or, where the property is an option to acquire or dispose of property, the option expires;
- any transfer of the property to a trust or estate or, where the property is property of a trust or estate, any transfer of the property to any beneficiary; and
- where the property is, or is part of, a taxpayer's capital interest in a trust or estate, a payment made to the taxpayer from the trust or estate that can reasonably be considered to have been made because of the taxpayer's capital interest in the trust or estate;

but does not include:

- any transfer of the property as a consequence of which there is no change in the beneficial ownership of the property, except where the transfer is:
 - from a person or a partnership to a trust for the benefit of the person or the partnership;
 - from a trust or estate to a beneficiary; or
 - from one trust maintained for the benefit of one or more beneficiaries under the trust to another trust maintained for the benefit of the same beneficiaries; and
- certain vertical amalgamations (relevant to the discussion that follows, but the details of which are beyond the scope of this paper).

3.2 Deemed Dispositions in the ITA

Many other provisions throughout the ITA deem a disposition of property to occur for income tax purposes when there may be no actual disposition. For example, upon the death of an individual there is a deemed disposition²¹ which may result in income tax being payable, but this particular deemed disposition is not subject to the withholding requirements of section 116²² and the income tax is simply paid when a final tax return is filed for the deceased. Upon commencing²³ or ceasing²⁴ to be resident in Canada, taxpayers are deemed to have disposed of many forms of property, but in the case of an individual taxpayer TCP is excluded²⁵ from these rules, presumably because Canada retains the right to tax the TCP after the change in residency.

When a taxpayer begins using a personal property for an income-earning purpose or vice versa, the ITA includes “change in use” rules²⁶ that deem a disposition to occur, which could lead to an income tax liability and a requirement to remit tax under section 116 despite the fact that there is no change of ownership. In some circumstances an election may be filed to defer any taxation, including withholding obligations under section 116. This is discussed in more detail later in the paper.

3.3 Proceeds of Disposition

If there is a disposition, one must determine the proceeds of disposition for income tax purposes. This is necessary to calculate the withholding tax required under section 116, if applicable, but also to report the income tax liability whether or not there is a withholding requirement under section 116. In the case of parties dealing at arm’s length, the proceeds of disposition would be the total consideration paid, including money and the value other property or services exchanged for the property. In the case of a gift, or a sale at less than market value to any party that is not dealing at arm’s length with the transferor, the ITA deems the proceeds of disposition to be equal to the fair market value of the property at the time the gift is made.²⁷

4. MEANING OF TAXABLE CANADIAN PROPERTY

After determining that a client is a non-resident of Canada and that there is a disposition of property, the next step in determining whether the client is subject to section 116 is to determine whether the property disposed of is TCP.

4.1 Meaning of TCP in the ITA

The definition of TCP²⁸ includes the following (this list is abridged and paraphrased to limit the discussion to transactions involving direct and indirect holdings of real estate):

- real or immovable property situated in Canada;
- property used or held by the taxpayer in, or property described in an inventory of, a business carried on in Canada;
- a share of the capital stock of a corporation (other than a mutual fund corporation) that is not listed on a designated stock exchange, an interest in a partnership or an interest in a trust (other than a unit of a mutual fund trust or an income interest in a trust resident in Canada), if, at any particular time during the 60-month period that ends at that time, more than 50% of the fair market value of the share or interest, as the case may be, was derived directly or indirectly from one or any combination of:
 - real or immovable property situated in Canada;
 - Canadian resource properties;
 - timber resource properties; and
- an option in respect of, or an interest in, or for civil law a right in, a property described above, whether or not the property exists. For this purpose, an interest in real property does not include an interest as security only derived by virtue of a mortgage, agreement for sale or similar obligation.²⁹

Note that the definition of TCP includes certain indirect holdings of real estate, such as shares of a corporation or interests in a partnership or trust (including an estate) where the entity had derived its value primarily from real estate situated in Canada at any time in the previous 60 months, even if only for a brief moment in time. This is necessary to ensure the rules in section 116 of the ITA are not circumvented by holding property indirectly through a corporation, partnership, or trust.

4.2 TCP for the Purposes of Section 116

While non-residents are subject to Canadian income tax on all dispositions of TCP, not all dispositions of TCP are subject to the withholding requirements of section 116; for example, “excluded property” which includes³⁰ (this list is abridged and paraphrased to limit the discussion to transactions involving direct and indirect holdings of real estate):

- a property (other than real or immovable property situated in Canada, a Canadian resource property or a timber resource property) that is described in an inventory of a business carried on in Canada by the person;
- most public company shares and certain public trust units;
- a unit of a mutual fund trust;
- a bond, debenture, bill, note, mortgage, hypothecary claim or similar obligation;
- an option in respect of, or interest or right in, any of the above; and
- a property that is, at the time of its disposition, a treaty-exempt property of the person (discussed in the following section).

Note that section 116 may in some instances also apply³¹ to dispositions of life insurance policies in Canada and resource and timber properties. These types of dispositions are beyond the scope of this paper.

4.3 Treaty-Exempt Property

The reach of section 116 is further limited by many tax treaties. The list of excluded property includes “treaty-exempt property” of a non-resident person. This is also a defined term³² which has two requirements:

- the property is, at that time, a treaty-protected property of the non-resident person; and
- where the purchaser and the non-resident person are related at that time, the purchaser provides notice in respect of the disposition to the CRA.³³

For this purpose, “treaty-protected property” is also defined³⁴ as a property any income or gain from the disposition of which by the taxpayer at that time would, because of a tax treaty with another country, be exempt from income tax under Part I of the ITA. As a result of these provisions, where a tax treaty would exempt the disposition of the property from income tax in Canada, the non-resident person disposing of the property is not subject to the withholding requirements of section 116, so long as, where the parties are related, the purchaser provides the required notice to the CRA, using CRA form T2062C.

5. REQUIREMENTS OF SECTION 116

As previously mentioned, the goal of section 116 is to ensure that the income tax owing on a disposition of TCP by a non-resident of Canada is paid at the time of the disposition. The following is a summary of the provisions of section 116.

5.1 Notice of Proposed Disposition

Subsection 116(1) allows a non-resident to notify the CRA of a proposed disposition of many types of TCP, notably capital property (e.g. a house or cottage for personal use, a share of a corporation that is TCP) that is not considered inventory of a business or depreciable property

(i.e. it is not rented or used in a business). Other types of TCP that are considered inventory or depreciable property are addressed in subsection 116(5.2) (discussed later in this paper).

The notice to CRA is accomplished by completing and filing form T2062 and related attachments before the closing of the transaction. Supporting documents relating to the proceeds of disposition and the adjusted cost base of the property must be attached. The required tax must also be paid, which is 25% of the capital gain (proceeds minus adjusted cost base). If the non-resident does not have a Social Insurance Number, Business Number, or Trust Account, they must apply for one at the same time using prescribed forms. If the notice is complete and the tax is paid, subsection 116(2) requires that the CRA issue a certificate of compliance to the non-resident. This certificate provides comfort to the purchaser or recipient of the property that the required tax is paid (see discussion on purchaser liability that follows). In the author's experience, as of the date of this paper, obtaining a clearance certificate from the CRA may take several months depending on the complexity of the transaction and follow up questions or requests for documentation from the CRA.

The logic behind the 25% withholding tax rate is that only 50% of capital gains are included in income, and the top personal income tax rate is approximately 50%. The 50% capital gain inclusion in income multiplied by the top personal rate equals 25%. The payment required by section 116 is a payment on account of tax owing, not a final settlement of the tax owing to CRA. In most cases, once an income tax return is filed by the non-resident to report the gain and the withholding tax under section 116, a refund results as the actual income tax rates applicable to the non-resident are often lower than the top personal income tax rate.

In some circumstances, security equivalent to the tax may be accepted by the CRA, until the non-resident has the funds to pay the tax.³⁵ This relief is provided at the CRA's discretion and the non-resident should first contact the CRA well ahead of the disposition to determine which forms of security the CRA is prepared to accept in their circumstances.

Complying with subsection 116(1) is not mandatory.³⁶ The non-resident may instead wait until the time of disposition to notify the CRA of the disposition. However, given the delay in obtaining a certificate of compliance from CRA, it is often desirable to file ahead of time.

5.2 Notice of Completed Disposition

Subsection 116(3) requires a non-resident to notify the CRA of a completed disposition of TCP, other than those types that are addressed in subsection 116(5.2) (discussed later in this paper), and pay the required 25% tax on any capital gain not later than ten days after the disposition. This is not required if the non-resident has already sent a valid notice of a proposed disposition under subsection 116(1). For a notice of a proposed disposition to remain valid, the purchaser or recipient must not have changed since the notice was provided, the proceeds of disposition in the notice must be greater than or equal to the actual proceeds, and the adjusted cost base of the non-resident as set out in the notice must not exceed the actual adjusted cost base at the time of disposition. If no notice of a proposed disposition was filed, or if one was filed but details including the purchaser, proceeds, or adjusted cost base have changed since, then the process for filing a notice of a completed disposition is essentially the same as outlined above for notifying CRA of a proposed disposition, and the CRA will issue a certificate of compliance under subsection 116(4) if all requirements are met.

Failure to file all required paperwork within ten days after the disposition results in a penalty of \$25 for every day the notice is late, to a maximum of 100 days (\$2,500)³⁷ for each non-resident vendor, in addition to the tax owing and interest.

5.3 Purchaser Liability

Subsection 116(5) of the ITA causes a purchaser to be liable for the non-resident's tax withholding liability unless one of the following three exceptions is met:

- after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada;
- the property is treaty-protected property and any required notice by a related person is filed (previously discussed); or
- a certificate of compliance under subsection 116(4) for a completed disposition has been issued to the purchaser.

If none of these exceptions are met, the purchaser is liable for the non-resident's unpaid tax, being 25% of the excess of the purchaser's cost of the property (the non-resident's proceeds of disposition) over the proceeds set out in any certificate of compliance issued under subsection 116(2) for a proposed disposition, and is entitled to withhold this tax and pay the net amount to the non-resident. If there was no certificate issued for a proposed disposition, the purchaser is simply liable for 25% of their cost of the property. This liability remains even if all funds due on closing have already been paid to the non-resident!

The term "purchaser" used throughout section 116 can be misleading, since the disposition need not be by way of purchase and sale. A purchaser is defined as "the person to whom the non-resident person disposed of the property"³⁸ and can include a recipient of a gift, a corporation that repurchases, redeems, or cancels the shares held by a non-resident. It should also be noted that the purchaser can include any person, whether or not resident in Canada (the residence of the purchaser is irrelevant for the purposes of section 116).

If the purchaser is liable for the tax, they must remit it to the CRA within 30 days³⁹ from the end of the month in which the property was acquired. For example, a closing date of September 15 means that the purchaser must remit any required tax by October 30. Failure to do so exposes the purchaser to the following penalties⁴⁰ imposed on the tax:

- If the payment is one to three days late: 3%
- If the payment is four or five days late: 5%

- If the payment is six of seven days late: 7%
- If the payment is more than seven days late: 10%

The penalties above are for first offences. A second or subsequent offense or any failure to comply knowingly or due to gross negligence may result in a 20% penalty.⁴¹ Interest also applies on the tax and penalty owing.

5.4 Special Rules for Gifts

ITA 116(5.1) provides that where a non-resident disposes of TCP to any person by way of gift or to a person with whom the non-resident was not dealing at arm's length for no proceeds or proceeds for less than fair market value, for the purpose of section 116 the non-resident shall be deemed to have disposed of the property for proceeds equal to fair market value at the time, and the cost to the purchaser or recipient shall be equal to that fair market value. An exception to this rule is where the property disposed of is excluded property, which would be excluded from the requirements of section 116 in any event.

A second exception to the rule regarding gifts is where the property has been transferred or distributed on or after the non-resident person's death and as a consequence thereof. This would include the deemed disposition⁴² of capital property upon death. Although a final T1 tax return must be filed by the non-resident's representative to report any capital gain or income arising from the deemed disposition on death, there is no requirement to apply for a certificate of compliance and remit tax pursuant to section 116, which is logical given that there are no proceeds to withhold from. This exception would also include any transfer, distribution, or acquisition of property under or as a consequence of the terms of the will of the deceased, or as a result of the laws of intestacy.⁴³ This would not, however, include a sale of property by an estate followed by a distribution of the cash proceeds. If the estate is a non-resident at the time of sale, it would be required to comply with section 116 and apply for a certificate of compliance.

5.5 Dispositions of Depreciable Property

The aforementioned provisions in section 116 apply to a disposition of TCP that is not depreciable property or inventory of a business. In the context of real estate, these aforementioned provisions would typically apply to personal use real estate, such as a home or cottage, or an interest in a corporation, trust, estate, or partnership that is considered TCP, any sale of which above its original costs results in a capital gain.

Subsection 116(5.2) applies when disposing of other forms of TCP, including real estate that is inventory of a business (e.g. for non-resident property flippers, land developers, etc.) or depreciable property (i.e. real estate that has an income earning purpose, such as property that is rented or used in an active business, for which a deduction from income for capital cost allowance is available). In these cases, the non-resident is required to apply for a second certificate of compliance using form T2062A. This is in addition to filing form T2062 and reporting any tax on the capital gain. The non-resident must calculate the anticipated Federal income tax owing on any business income or recapture of capital cost allowance resulting from the disposition and pay this amount.

Subsection 116(5.3) of the ITA causes a purchaser to be liable for the non-resident's tax on the properties discussed above unless one of the following three exceptions is met:

- after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada; or
- the property is treaty-protected property and any required notice by a related person is filed (previously discussed).

If none of these exceptions are met, the purchaser is liable for the non-resident's unpaid tax, being 50% of the excess of the amount paid for the property over the proceeds set out in any certificate of compliance issued under subsection 116(5.3), and is entitled to withhold this tax

and pay the net amount to the non-resident. If there was no certificate issued for a proposed disposition, the purchaser is simply liable for 50% of the amount payable to the non-resident vendor. Like certificates issued under subsections 116(2) or 116(4), this is so even if all funds had already been paid to the non-resident!

The provisions of subsection 116(5.1) regarding deeming proceeds of disposition to be equal to fair market value also apply for subsection 116(5.3).

6. INCOME TAX TRAPS AND BEST PRACTICES

Some common errors and traps involving section 116 are as follows. This is not intended to be an exhaustive list of all of the potential errors or traps that are possible.

6.1 Residency – Failure to Exercise Due Diligence

When representing a purchaser, one would want to gain as much comfort as reasonably possible that the vendor is not a non-resident. A purchaser has a due diligence defence and is not liable for the vendor's tax under section 116 only if, after reasonable inquiry, the purchaser had no reason to believe that the vendor was not resident in Canada.⁴⁴ While a full audit of the vendor's residency is not necessary to meet the threshold of "reasonable inquiry", in some cases, a simple representation or certification by the vendor that they are not a non-resident may not be sufficient.⁴⁵

For example, where the vendor represents in writing that they are not a non-resident, but their mailing address, area code, driver's license, corporate name, or other information indicates that they are outside of Canada, further inquiries should be made as to why the person considers themselves resident in Canada with the responses documented. For partnerships, each partner should represent that they are not a non-resident. In order to rely on the due diligence defence, the purchaser must have no reason to believe that the vendor was not resident in Canada.

Where the vendor will not represent that they are not a non-resident, the purchaser should consider withholding the tax required under section 116 and remitting it to the CRA. In a recent British Columbia case,⁴⁶ the vendor's residency could not be confirmed. The notary representing the purchaser made no further inquiry into the matter and did not advise their client to withhold the tax. Upon a review by CRA, the vendor was determined to be a non-resident and CRA assessed the purchaser the 25% withholding tax which was in excess of \$600,000.

6.2 Residency – Incorrect Identification of the Vendor

When representing either the vendor or purchaser, take care to properly identify the non-resident persons who are selling the property. If this information is incorrectly provided on the notice to CRA, the notice could be considered invalid which may expose the vendor to late filing penalties. If the notice is considered invalid, the purchaser may also be required to withhold the tax, or face tax and penalties for failing to do so.

When the vendor is a partnership, each non-resident partner is required to notify the CRA and comply with the requirements section 116, but the CRA may administratively accept one notification filed on behalf of all non-resident partners if a complete listing of their names is provided, along with their Canadian and foreign addresses, identification numbers, percentage of ownership, and their portion of the payment or security.⁴⁷

When the vendor is a US Limited Liability Company ("LLC"), a member of the LLC may purport to be the vendor of a property, because for US tax purposes an LLC is often a disregarded entity and its members are taxed directly and currently on their proportion of the profits of the LLC, similar to a proprietorship or partnership but with limited liability protection. The CRA considers an LLC to be a corporation for Canadian tax purposes, and so it is the LLC that should file the notice under section 116 and ultimately a tax return to report the disposition, not its members.

When the vendor is a non-resident trust or estate, although the trustees may hold legal title to whatever property is sold, it is the trust or estate that is the taxpayer. As such, any required notice under section 116 should be filed in the name of the trust or estate.

Recall that a trust or estate is considered to be resident where the CM&C of the trust or estate is located. However, while it is conceivable that a trust or estate with a non-resident trustee and only Canadian-resident beneficiaries might be considered resident in Canada if the beneficiaries effectively make all decisions of the trust or estate, the non-resident trustee has legal title to the TCP being disposed of, and a strict reading of section 116 could indicate that the trustee has a requirement to comply with section 116. In such a case, it would be prudent to apply for a clearance certificate.

6.3 Residency – Determination is Made at the Incorrect Time

The determination of residence is always made at a point in time. Failure to determine residence correctly at the time of a disposition of TCP may result in non-compliance with section 116 and expose the non-resident vendor and purchaser to penalties. Where there is an indication that a vendor who is currently resident in Canada may be leaving the country, consider the timing and duration of their departure and whether the vendor may be considered a non-resident at the time the deal closes.

Consider the situation where an individual is leaving Canada for a job opportunity and severing ties, i.e. moving their family with them, closing bank accounts, etc. They list their house for sale and remain in Canada for a few weeks to tidy up the house and finish training their replacement at their current job. In the meantime, an agreement of purchase and sale is signed, with the sale to close in 30 days. The vendor is likely still resident in Canada at this point in time. A week or two later, before the closing date, the vendor moves into an apartment in their new country and starts working at their new job. At that time, they may be considered to have become non-resident, and so they would have a requirement to comply with section 116.

6.4 Dispositions – Transfer Between Spouses

A Canadian resident may generally transfer property to their spouse or common law partner without tax consequences since the property is deemed to have been disposed of for proceeds equal to the adjusted cost base,⁴⁸ meaning there is no capital gain. This same rule does not apply for dispositions involving non-residents. A disposition between spouses would generally result in deemed proceeds equal to fair market value.⁴⁹

Consider the scenario where non-resident client who is the sole owner of Canadian real property may, on the advice of a foreign tax or estate planner, ask a Canadian solicitor to transfer legal title to their spouse jointly. Unless a tax treaty exempts this transfer, this may cause a section 116 compliance requirement. Initially, it would appear the way to avoid this is to argue there is no disposition for income tax purposes. Recall that a disposition does not include any transfer of property as a consequence of which there is no change in the beneficial ownership of the property.⁵⁰ One would need to understand the family law and other laws of the non-resident's country and state of residence in order to determine whether there was a change in beneficial ownership, if the country in question even recognizes that there may be separate legal and beneficial ownership. However, notwithstanding that there may be no disposition, the CRA may be of the view⁵¹ that there is still an acquisition, and the acquiring spouse can then be liable for the tax under section 116! When in doubt, consider advising the client to comply with section 116, or have them sign an acknowledgement that they are aware of the risk.

6.5 Dispositions – Transfer to Former Spouse

Upon separation or divorce of a couple where both individuals are Canadian residents, a transfer to the former spouse or common law partner in settlement of rights arising out of their marriage or common law partnership is typically accomplished on a tax-deferred basis by deeming the transferor spouse to have received proceeds equal to their cost.⁵² This beneficial provision does

not apply where either or both of the transferor and transferee are non-resident. As with other transfers between spouses, section 116 may apply. Furthermore, be mindful of whether one spouse will be leaving Canada and the timing of that departure; if they are a non-resident at the time the transfer occurs, then tax under section 116 must be withheld.

6.6 Dispositions – Transfers to Corporations

A non-resident person may request that their Canadian real property be transferred to a Canadian corporation for various reasons. As with most transfers to non-arm's length persons, the proceeds of disposition would generally be deemed equal to fair market value⁵³ for the purposes of section 116 and so the non-resident would be required to give notice of the disposition to CRA and remit the tax accordingly, unless the transfer meets the requirements of section 85 of the ITA.

Many practitioners will be familiar with the “section 85 rollover” to a corporation. This is a commonly used provision of the ITA that allows a taxpayer to defer the tax on a transfer of certain property to a taxable Canadian corporation by deeming the proceeds of disposition to be equal to the taxpayer's cost, when shares of the corporation are taken back as consideration. The availability of this provision to non-residents is fairly restricted. A non-resident person may only rely on section 85 to defer the income tax on a transfer of real property to a corporation if:

- the property was used in the year in a business carried on in Canada by that person;⁵⁴
- the corporation is controlled by the non-resident and related persons immediately after the disposition;
- the disposition is part of a transaction or series of transactions in which all or substantially all of the property used in the business referred to above is disposed of by the taxpayer to the corporation (essentially, meaning this provision can only be used when the non-resident is incorporating their proprietorship or partnership); and

- the disposition is not part of a series of transactions that result in control of the corporation being acquired by a person or group of persons after the time that is immediately after the disposition.⁵⁵

If all of the conditions above are met and the provisions of section 85 are complied with, including the filing of form T2057, the transfer to the corporation will be deemed to occur at cost for income tax purposes. Note that a notice to the CRA under subsection 116(5.2) is still required, otherwise the corporation as purchaser would be liable for tax equal to 25% of the fair market value of the property transferred. Note that for 60 months after the rollover under section 85, the shares taken back by the non-resident as consideration for the transfer of TCP are themselves deemed to be TCP,⁵⁶ regardless of whether the corporation's value is derived primarily from TCP.

On a share for share exchange by a non-resident pursuant to section 51, 85.1, or 86, the CRA is of the view⁵⁷ that a notice under section 116 and 25% withholding tax on the excess of the fair market value of the property over the cost base is still required, even though no gain results on the transfer. Failure to comply would result in late filing penalties to the non-resident transferor, and the transferee corporation would be liable for the 25% withholding tax based on the fair market value of the property.

A non-resident may also request that property be transferred to their foreign corporation. Note that the provisions of section 85 are only available on transfers to a taxable Canadian corporation. Generally, unless the TCP qualifies as excluded property, a disposition of TCP to a foreign corporation or other entity would be deemed to occur for proceeds of disposition equal to fair market value for the purposes of section 116.

6.7 Dispositions – Repurchase or Redemption of Shares by a Corporation

If shares of a Canadian corporation are TCP as a result of the value of the underlying real estate, any repurchase or redemption of the shares by the corporation is considered a disposition by the

non-resident shareholder of the share⁵⁸ to the corporation.⁵⁹ Such a disposition may result in two events for income tax purposes:

- a deemed dividend⁶⁰, equal to the proceeds received or receivable on the repurchase or redemption less the paid up capital⁶¹ of the shares; and
- a capital gain or loss,⁶² equal to the proceeds of disposition minus the adjusted cost base of the shares.

With respect to the deemed dividend, withholding tax at a rate of up to 25% applies,⁶³ but this may be reduced by a tax treaty. This withholding is required of the corporation under Part XIII of the ITA and is considered a final income tax liability of a non-resident, i.e. it is unlike withholding under section 116, which is effectively an instalment on account of income tax to be reported on a tax return. For the purpose of computing the capital gain or loss of the non-resident, the proceeds of disposition are reduced by the amount of any deemed dividend in order to avoid double taxation of the same receipt.⁶⁴ These reduced proceeds of disposition are used to calculate the 25% remittance required under section 116.⁶⁵ For example, if the shares of a corporation resident in Canada that are considered TCP are redeemed for \$1,000 and the paid-up capital of those shares was \$20, a deemed dividend of \$980 results and is subject to withholding tax under Part XIII of the ITA. The proceeds of \$1,000 minus the deemed dividend of \$980 results in proceeds of disposition of \$20 for the purposes of section 116. However, note that where the non-resident shareholder does not remit the tax based on 25% of its deemed proceeds of disposition of \$20, the liability of the purchaser corporation will be 25% of its cost of the shares, being the full redemption proceeds of \$1,000, and not the deemed proceeds of disposition to the non-resident.⁶⁶ In such a case, the corporation would be remitting \$245 to the CRA on account of Part XIII withholding tax and \$250 on account of withholding tax under section 116.

Practitioners should take care to carefully calculate these amounts and consult a tax professional if there is uncertainty. Although the withholding rates under Part XIII of the ITA and section 116

appear similar, the two taxes are quite different. Withholding under section 116 and reporting the tax with a notice and application for a certificate of compliance, when there is in fact a deemed dividend, means a failure to withhold under Part XIII of the ITA and penalties could be levied.

Note that the deemed dividend provision applies to corporations resident in Canada only. If a non-resident corporation repurchased or redeemed shares that are considered TCP, it would be incorrect to calculate a deemed dividend and withhold tax under Part XIII, as this would result in a failure to withhold tax under section 116 and penalties could be levied.

6.8 Dispositions – Amalgamations or Mergers

An amalgamation or merger under domestic or foreign laws may result in a shareholder being deemed to have disposed of shares of a predecessor corporation under the ITA. If the shares of the predecessor corporations are TCP of a non-resident, and if a tax treaty does not exempt the deemed disposition from tax, then section 116 could apply to cause a withholding obligation.

Thankfully the CRA has a relieving administrative position that applies to many common amalgamations of taxable Canadian corporations that meet the criteria in subsection 87(4). Where a non-resident owned shares of a predecessor corporation that were TCP, the shares were capital property to the non-resident, and the non-resident received no consideration upon amalgamation other than shares of the new corporation, then the shares of the new corporation will be deemed to be TCP⁶⁷ of the non-resident and the CRA waives the requirement to comply with section 116 under these circumstances.⁶⁸

The rules surrounding other amalgamations and foreign mergers may be complex and are beyond the scope of this paper. Consult a tax professional in these circumstances.

6.9 Dispositions - Deemed

As previously mentioned, the ITA deems all taxpayers, wherever resident, to have disposed of property when the use of the property changes from personal use to an income-earning purpose or vice versa. The CRA is of the view⁶⁹ is that a non-resident is subject to the requirements of section 116 on these deemed dispositions unless an election is available and is filed pursuant to subsections 45(2) or 45(3). A discussion on these elections is beyond the scope of this paper; speak to an accountant when encountering situations like these.

Although a solicitor would likely not be notified by a client of such a change in use, look out for possible warning signs, including a client that requests assistance in drafting a lease agreement or in breaking a tenant's lease agreement.

6.10 Dispositions – Proving Fair Market Value

When a gift or transfer to a non-arm's length person is made, the ITA deems the vendor or transferor to have received proceeds of disposition equal to fair market value. The CRA considers "fair market value" to be "the highest price, expressed in terms of money or money's worth, obtainable in an open and unrestricted market between knowledgeable, informed and prudent parties acting at arm's length, neither party being under any compulsion to transact."⁷⁰

When dealing with a disposition of real property, in the author's experience the CRA generally will generally not accept the assessed value for property tax purposes as the fair market value of a property. The CRA will often request a formal appraisal by an accredited appraiser, or depending on the property value and the market, a letter of opinion and market comparables from a real estate agent as support for the fair market value.

When the property disposed of includes shares of a corporation that derive their value primarily or entirely from the underlying real estate owned by the corporation, other factors such as other

assets and sources of income, accrued or future income taxes, voting control or minority discounts may affect the fair market value of the particular shares. A practitioner advising a non-resident client on the disposition of shares to a non-arm's length person should consider referring them to a Chartered Business Valuator to build support for the fair market value of the shares.

In the absence of good evidence or support for fair market value, the CRA employs its own team of appraisers and valuers who will make their own determination. This may not work in the non-resident's favour!

6.11 TCP – Errors in Identifying TCP

Real estate located in Canada is clearly TCP. However, a share of a corporation or an interest in a partnership, trust, or estate may be considered TCP if, at any particular time during the 60-month period that ends at that time, more than 50% of the fair market value of the share or interest, as the case may be, was derived directly or indirectly from real property situated in Canada. This is not an easy determination to make in most cases. Care must be taken to review the financial information of the entity for the past 60 months to determine if more than 50% of its value could have been derived from real estate in Canada. Financial statements alone cannot be relied upon since most often these report the cost or net book value of assets, but not market values.

When in doubt, refer the matter to an accountant and certified appraiser. If it is still unclear as to whether the share or interest could be considered taxable Canadian property, consider filing a notice under section 116 and withholding and remitting the tax on a protective basis. The CRA has said that it will issue a certificate of compliance even if there is some uncertainty as to whether the property is TCP.⁷¹ Otherwise, failure to comply with section 116 as a result of a failure to identify TCP can result in penalties and interest. Unlike with the determination of residency, there is no due diligence defence available for failing to identify that the property is TCP.

Note that there is no requirement that the corporation, trust, or estate be resident in Canada for these rules to apply. TCP includes the share of any corporation or interest in any partnership, trust, or estate whether or not resident in Canada.

6.12 TCP – Chattels and Equipment

When advising on a disposition of real estate in Canada, take note of any chattels or equipment included in the deal. If these were used in a business of the non-resident vendor, they would also be TCP but the rate of withholding may be different than the 25% for capital gains and a request for a separate notice must be made for those assets, as required by subsection 116(5.2) (previously discussed). Since this separate notice is considered a separate information return, the aforementioned \$25 penalty per day to a maximum of 100 days (\$2,500) could apply for failure to file it and the purchaser may be liable for tax of 50% of the fair market value.

6.13 TCP – Sales by and Distributions from an Estate

When dealing with a non-resident estate, the sale of TCP of the estate is caught by the rules in section 116. Practitioners might be tempted to complete the notice to CRA for the estate by reporting the sale proceeds and the original cost of the deceased individual, along with 25% tax on account of that gain. Not so fast! An estate of a deceased individual is considered a separate taxpayer from the deceased individual. In most cases, the individual would be deemed to have disposed of the TCP for proceeds equal to fair market value on death, and their estate would be deemed to have acquired it at a cost equal to that value.⁷² As a result, there would often be little to no gain for the estate in these circumstances. Practitioners advising clients in these circumstances should recommend that the client see an accountant to file a final tax return for the deceased individual and, if this is already late, to determine whether a submission under CRA's Voluntary Disclosures Program may be advisable.

When distributing the sale proceeds or other property to a non-resident beneficiary in full or partial satisfaction of their interest in the estate, the beneficiary is deemed to have disposed⁷³ of an interest in the estate. If the interest in the estate can itself be considered TCP (i.e. the estate derived its value primarily from real estate located in Canada at any time in the previous 60 months) then this disposition is also subject to the requirements of section 116! In these cases, a notice (form T2062 and attachments) may be required to report this disposition, unless the interest in the estate is considered treaty-exempt property after a review of the applicable tax treaty. If a tax treaty does not exempt the interest in the estate from taxation, then the notice under section 116 should be filed, otherwise the estate or the estate trustee may be held liable for any tax required under section 116.

If instead of selling the TCP a beneficiary is inheriting it under the terms of the will or as a consequence of laws governing intestacy, then the rules in section 116 do not apply⁷⁴ to that particular disposition by the estate to the beneficiary. However, as discussed above, if the interest in the estate is itself considered to be TCP, then section 116 applies to the disposition of the interest in the estate.

6.14 Calculation Errors

The following are some common misconceptions about the calculation of the 25% tax required under section 116:

- **Principal Residence Exemption:** Some non-resident individuals may be able to claim the principal residence exemption with respect to the years they were resident in Canada in order to reduce or eliminate the capital gain on a sale of real estate in Canada. While section 116 does not technically permit a reduction in the 25% tax on account of this exemption, administratively the CRA allows a reduction of tax under section 116 so long as form T2091 is filed with the T2062.⁷⁵ Failure to do so, or failure to file notice at all, will result in penalties and purchaser liability for the 25% tax based on the proceeds.

- **Losses:** A non-resident may have losses available to offset the capital gain on a sale of TCP. These losses may be claimed by the non-resident when filing a tax return, but do not reduce the amount of withholding required under section 116.
- **Separate Calculations by Property:** If a non-resident is selling multiple properties to the same purchaser, the CRA administratively allows one T2062 to be filed with details on all properties.⁷⁶ However, a loss on one property cannot offset another as the language in section 116 does not permit this. For example, if Property A is selling for \$100 and has an adjusted cost base of \$80, and Property B is selling for \$80 and has a cost of \$100, the 25% withholding must be done on the \$20 capital gain on Property A without regard to the loss on Property B.
- **Foreign Exchange:** If the sale proceeds or adjusted cost base of the TCP are denominated in a foreign currency, these proceeds must be translated to Canadian dollars using the exchange rates in effect on the relevant transaction dates (i.e. the closing date for proceeds, and the date of acquisition for the adjusted cost base).

6.15 Timing Issues

In practice, the withholding required under section 116 can cause significant liquidity problems for the non-resident vendor. Consider the situation where a non-resident cannot compile support for the adjusted cost base of their property and is therefore advised to pay 25% of the gross sale proceeds to the CRA or have the purchaser withhold and do so on their behalf. If there is a mortgage to be discharged, there may be insufficient funds left to pay the required tax and closing costs. On account of these potential liquidity issues, non-residents should be advised as early as possible in the process of selling their property to locate documents that support their adjusted cost base of the property, or to seek alternate financing arrangements, including providing security with the CRA.

Note that section 116 requires that a notice be sent to the CRA containing certain information about the disposition, but does not actually prescribe a form for this purpose. As a result, many

practitioners choose not to complete form T2062 and instead simply send a letter to CRA containing the name and address of the parties to the sale, a description of the property, the proceeds of disposition, and the non-resident's cost of the property. While this may seem to save time initially, it may actually delay the processing of a certificate of compliance, as the CRA will often follow up with additional questions that are asked on form T2062, including whether the property was previously rented and the relationship between the vendor and purchaser. For this reason, a best practice is to simply fill out form T2062 despite its complex appearance.

Also note that there is no requirement to wait until near the closing date to file a notice under section 116. As soon as a purchaser is identified and the sale price is negotiated, the notice may be filed. Filing early in the process will also help ensure that any errors can be corrected in a timely manner, thus reducing the exposure to penalties for both parties.

The ITA requires that the purchaser withhold and remit the 25% tax under section 116 to the CRA if no certificate of compliance is received within 30 days following the month of disposition, otherwise the purchaser faces penalties. In practice, however, it may take several months after the non-resident files the required notice to receive the certificate of compliance from the CRA. In the author's experience, the CRA does not assess the purchaser for the tax under section 116 or any penalties on account of the CRA's administrative delays in providing certificates of compliance. However, practitioners advising purchasers in these circumstances should ensure they request a copy of the notice filed by the non-resident vendor to get comfort that a notice was actually filed, otherwise they should consider withholding the tax and remitting it by the deadline mentioned above.

The purchaser should consider withholding the 25% tax (in the solicitor's trust account) until a certificate of compliance is received, and may consider an indemnification for penalties that the CRA may assess should the non-resident fail to properly file the notice and the purchaser therefore misses the deadline to remit the tax.

6.16 Failure to File a Tax Return

Some practitioners may fail to adequately explain to a non-resident vendor that the tax paid pursuant to section 116 is not a final settlement of their income tax liability, but rather an instalment on account of income tax owing which must be reported on an income tax return. If the tax withheld under section 116 is more than the actual income tax owing, the non-resident would be missing out on a refund by filing an income tax return, and only has three years from the end of the year of the disposition to file a tax return and claim the refund, otherwise it is forfeited.⁷⁷ Conversely, if the tax withheld under section 116 is insufficient to cover the actual tax liability, the non-resident is exposed to late filing penalties⁷⁸ and interest on any unpaid income tax.

7. A NOTE ON PROPERTY IN QUÉBEC

The Province of Québec maintains its own legislation for income tax. Section 1101 of Québec's Taxation Act provides for a 12.875% withholding tax that is similar to the 25% tax under section 116 of the ITA but that is levied on "taxable Québec property". It should be noted that the Federal tax under section 116 is not reduced on account of any separate Québec withholding tax; therefore, when dealing with taxable Québec property, a total tax of 37.875% may be payable.

Most practitioners outside of Québec would rarely be asked to register a change of title of a real or immovable property located in Québec. However, similar to TCP in the ITA, taxable Québec property can include certain shares of the capital stock of a corporation, an interest in a partnership or an interest in a trust, if, at any time during the 60-month period that ends at the particular time, more than 50% of the fair market value of the share or interest, as the case may be, was derived directly or indirectly from immovable property situated in Québec.⁷⁹ Therefore, when dealing with a disposition by a non-resident of shares of a corporation or an interest in a partnership, trust, or estate that derives its value primarily from real or immovable property in Québec, exercise caution and speak with an expert on Québec income tax.

8. A NOTE ON GST/HST

Most practitioners will be familiar with the GST/HST rules applicable to supplies of real property. For all taxable supplies, including real property, the supplier must collect and remit GST/HST, unless an exemption or exception applies.⁸⁰ One common exception is on a sale of commercial real property where the recipient is a GST/HST registrant.⁸¹ In such cases, the recipient is required to “self-assess” and pay the GST/HST to CRA.⁸² (Note: If the recipient is entitled to claim an input tax credit on the acquisition of the supply, technically no tax needs to be remitted since the input tax credit offsets the tax owing.)

Note that in cases where the supplier of the real property is a non-resident of Canada, the recipient must always self-assess the GST/HST whether they are a GST/HST registrant or not.⁸³ Like section 116 of the ITA, this measure is put in place to ensure that Canada collects its tax.

9. CONCLUSION

While section 116 is simple in concept, in practice there are many opportunities to make small errors that can result in significant penalties. When in doubt or when time constraints will not allow you to focus on the tax issues, consider consulting with a tax professional and possibly even outsourcing the tax compliance work to mitigate your risk.

APPENDIX – CITATIONS

- ¹ ITA subsection 2(3)
- ² ITA subsection 115(1)
- ³ Thomson v. Minister of National Revenue, [1946] SCR 209, 1946 CanLII 1 (SCC), <<http://canlii.ca/t/1nmzk>>, retrieved on 2018-02-24
- ⁴ CRA Income Tax Folio S5-F1-C1, <<https://tinyurl.com/ybdsqsov>>, retrieved on 2018-03-03
- ⁵ De Beers Consolidated Mines Ltd. v. Howe, [1906] AC 455, as quoted in Fundy Settlement v. Canada, [2012] 1 SCR 520, 2012 SCC 14 (CanLII), <<http://canlii.ca/t/fqx4c>>, retrieved on 2018-03-15
- ⁶ Garron Family Trust v. The Queen, 2009 TCC 450 (CanLII), <<http://canlii.ca/t/25k0k>>, retrieved on 2018-02-24
- ⁷ Laerstate BV v. Her Majesty's Revenue and Customs [2009] UKFTT 209 (TC), <<http://financeandtax.decisions.tribunals.gov.uk//Aspx/view.aspx?id=4518>>, retrieved on 2018-03-15
- ⁸ Fundy Settlement v. Canada, [2012] 1 SCR 520, 2012 SCC 14 (CanLII), <<http://canlii.ca/t/fqx4c>>, retrieved on 2018-02-24
- ⁹ ITA subsection 248(1): The definition of "trust" includes an estate.
- ¹⁰ ITA subsection 248(1)
- ¹¹ ITA subsection 248(1): "Individual" means a person other than a corporation.
- ¹² ITA subsection 104(2): A trust is deemed to be an individual for the purposes of the ITA. The definition of "trust" in ITA subsection 248(1) includes an estate.
- ¹³ ITA subsection 250(1)
- ¹⁴ ITA subsection 250(4)
- ¹⁵ ITA subsection 94(3)
- ¹⁶ ITA subsection 250(5)
- ¹⁷ OECD Commentaries on the Articles of the Model Tax Convention, <<http://www.oecd.org/berlin/publikationen/43324465.pdf>>, paragraph 13, retrieved on 2018-03-03
- ¹⁸ CRA Information Circular 71-17R5, <<https://tinyurl.com/ybl7ezvh>>, retrieved on 2018-03-03
- ¹⁹ "disposition". Dictionary.com Unabridged. Random House, Inc. 15 Mar. 2018. <[Dictionary.com http://www.dictionary.com/browse/disposition](http://www.dictionary.com/browse/disposition)>.
- ²⁰ ITA subsection 248(1)
- ²¹ ITA subsection 70(5)
- ²² ITA subsection 116(5.1): Property that is transferred on or after death and as a consequence thereof is excluded from the requirements of section 116. A transfer "as a consequence of death" includes a transfer from the deceased individual to their estate (see ITA subsection 248(8) and CRA's Information Circular IC72-17R6, paragraphs 67-68).
- ²³ ITA subsection 128.1(1)
- ²⁴ ITA subsection 128.1(4)
- ²⁵ ITA 128.1(1)(b)(i) and 128.1(4)(b)(i)
- ²⁶ ITA subsection 45(1)

- ²⁷ ITA subsection 116(5.1)
- ²⁸ ITA subsection 248(1)
- ²⁹ ITA subsection 248(4)
- ³⁰ ITA subsection 116(6)
- ³¹ ITA subsection 116(5.2)
- ³² ITA subsection 116(6.1)
- ³³ ITA subsection 116(5.02)
- ³⁴ ITA subsection 248(1)
- ³⁵ CRA Information Circular IC72-17R6, paragraph 44 (<https://tinyurl.com/y8tc8hdx>)
- ³⁶ ITA subsection 116(1): Use of the word “may” rather than “shall” means there is no requirement to meet the conditions of subsection 116(1).
- ³⁷ ITA subsection 162(7)
- ³⁸ ITA subsection 116(3)
- ³⁹ ITA subsection 116(5)
- ⁴⁰ ITA paragraph 227(9)(a)
- ⁴¹ ITA paragraph 227(9)(b)
- ⁴² ITA paragraph 70(5)(a)
- ⁴³ ITA subsection 248(8)
- ⁴⁴ ITA paragraph 116(5)(a)
- ⁴⁵ See CRA’s Information Circular IC72-17R6, paragraph 58 (<https://tinyurl.com/y8tc8hdx>). According to CRA, “There is a question as to what constitutes “reasonable inquiry.” The purchaser must take prudent measures to confirm the vendor’s residence status. The CRA will review each case on an individual basis whenever a purchaser assessment is being considered. The purchaser may become liable if, for any reason, the CRA believes that the purchaser could have or should have known that the vendor was a non- resident or did not take reasonable steps to find out the vendor’s residence status. The CRA will not make inquiries on behalf of a purchaser in this regard.”
- ⁴⁶ Mao v. Liu, 2017 BCSC 226 (CanLII), <<http://canlii.ca/t/gxgpp>>, retrieved on 2018-03-04
- ⁴⁷ CRA Information Circular IC72-17R6, paragraph 10 (<https://tinyurl.com/y8tc8hdx>)
- ⁴⁸ ITA subsection 73(1.01)
- ⁴⁹ ITA subsection 116(5.1)
- ⁵⁰ See the definition of “disposition” in ITA subsection 248(1)
- ⁵¹ CRA Technical Interpretation 2001-0070415 – Although this technical interpretation is in the context of a section 51 share exchange, its analysis can apply to a transfer between spouses in the context of section 116. The CRA has stated that an *acquisition*, and therefore purchaser liability under subsection 116(5), may occur despite there being no *disposition* for tax purposes. This is incorrect in the author’s view for two reasons. First, without a disposition of something, it should logically follow that there is no acquisition. Second, 116(5) results in liability to a “purchaser”, which is a defined term in subsection 116(3), being “the person to whom the non-resident *disposed* of the property”. If there is no *disposition*, then arguably the non-resident has not *disposed* of the property to a person, and so there cannot be a purchaser for the purposes of subsections 116(3) or 116(5).
- ⁵² ITA subsection 73(1) and paragraph 73(1.01)(b)
- ⁵³ ITA subsection 116(5.1)

- ⁵⁴ ITA paragraph 85(1.1)(h)
- ⁵⁵ ITA subsection 85(1.2)
- ⁵⁶ ITA paragraph 85(1)(i)
- ⁵⁷ CRA Technical Interpretation 2002-0156945
- ⁵⁸ Subparagraph (b)(i) of the definition of “disposition” in ITA subsection 248(1)
- ⁵⁹ ITA subsection 84(9)
- ⁶⁰ ITA subsection 84(3)
- ⁶¹ Paid up capital is defined in subsection 89(1) of the ITA. It is often the stated capital as determined under corporate law but may be adjusted for numerous transactions or events by the ITA. A discussion would be beyond the scope of this paper.
- ⁶² ITA section 40
- ⁶³ ITA subsection 212(2)
- ⁶⁴ Paragraph (j) in the definition of “proceeds of disposition” in ITA subsection 54
- ⁶⁵ CRA Information Circular IC72-17R6, paragraph 20 (<https://tinyurl.com/y8tc8hdx>)
- ⁶⁶ This results from a strict interpretation of section 116, and CRA has confirmed this in its Technical Interpretation 2010-0387151E5.
- ⁶⁷ ITA subsection 87(4)
- ⁶⁸ CRA Income Tax Folio S4-F7-C1, paragraph 1.82 (<https://tinyurl.com/yazqc42f>)
- ⁶⁹ CRA External Interpretation 2005-0113981E5
- ⁷⁰ CRA Information Circular 89-3, paragraph 3 (<https://tinyurl.com/yicsnb238>)
- ⁷¹ 2010 Canadian Tax Foundation Conference Report, Canada Revenue Agency Round Table, Question 16
- ⁷² ITA subsection 70(5)
- ⁷³ Paragraph (d) of the definition of disposition in ITA subsection 248(1)
- ⁷⁴ ITA paragraph 116(5.1)(b), read in conjunction with ITA subsection 248(8)
- ⁷⁵ CRA Information Circular IC72-17R6, paragraph 73 (<https://tinyurl.com/y8tc8hdx>)
- ⁷⁶ See the instructions to form T2062
- ⁷⁷ ITA subsection 164(1) – The CRA may only process a refund if the 3 year deadline is met.
- ⁷⁸ ITA subsections 162(1) and 162(2.1)
- ⁷⁹ Section 1094 of The Taxation Act (Québec)
- ⁸⁰ Subsection 221(1) of the Excise Tax Act
- ⁸¹ Paragraph 221(2)(b) of the Excise Tax Act
- ⁸² Subsection 228(4) of the Excise Tax Act
- ⁸³ Paragraph 221(2)(a) and subsection 228(4) of the Excise Tax Act



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**Latest on Land Transfer Tax: Non-Resident
Speculation Tax, New Tax Rules re Vacant
Property Tax, Assignments/Flippers
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Sherri Lavine
Chaitons LLP

April 19, 2018

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Introduction

As a mechanism to curb inflation and rapidly rising housing prices in Ontario, the Ontario government has reviewed and considered a number of taxes and tax collection procedures in recent years. Some of these measures have been approved and implemented, others have been approved but have yet to be implemented and some (are thankfully) still up for consideration and debate.

This paper will focus on the following three:

1. Non-Resident Speculation Tax (“NRST”).
2. Vacant Property Tax.
3. Assignment/Flipping Tax.

This paper shall provide an overview of each of the aforementioned taxes (or proposed taxes) in Ontario and briefly discuss their purpose and formation. Where appropriate, comparisons will be drawn to other provinces/municipalities where similar taxes have been implemented (primarily British Columbia and Vancouver). Any relevant interactions with Ontario’s Land Transfer Tax (“LTT”) will also be highlighted, together with the certain legal implications and details of the implementation of same.

1. Non-Resident Speculation Tax

Comments from the 2017 Ontario Budget

The 2017 Ontario Budget¹ outlined that the Greater Toronto and Hamilton Area has, in recent months, been affected by dramatic price increases, both for purchasers and prospective tenants. The Budget outlines that Ontario’s government has, and will continue to, consider a number of actions to make homes and housing prices more affordable.² While acknowledging that Ontario’s economy benefits from newcomers who move into Ontario and create a home and a life here, the government has expressed concern that non-resident investors, people who purchase Ontario homes without the intent on living in Ontario, have been doing so primarily for speculation purposes. To this end, the government proposed the NRST as a means to increase access to affordable housing and with reference to the goal of deterring over-inflation in housing prices.³

¹ 2017 Budget, fin.gov.on.ca.

² *Ibid* at chpt 2, item 7.

³ *Ibid*.

General Information

Taking effect on April 21, 2017, the NRST is a provincial tax of 15% on the purchase or acquisition of an interest in residential property located in the Greater Golden Horseshoe Region of Ontario (the “GGHR”) by individuals who are not citizens or permanent residents of Canada, or by foreign entities and taxable trustees.⁴ NRST is payable in addition to LTT. The GGHR includes approximately 22 major areas and cities in Ontario, such as Toronto, York Region, Barrie, Hamilton, and Guelph.⁵ There is no NRST payable if both buyer and seller have signed a binding agreement of purchase and sale on or before April 20, 2017, and if an assignment is not entered into after April 20, 2017.⁶

Entities Subject to NRST

NRST applies to both foreign entities and taxable trustees, as defined by applicable legislation. A foreign entity is both a foreign national, or a foreign corporation. A foreign corporation is a corporation (i) that was not incorporated in Canada or (ii) whose shares are not listed on a Canadian stock exchange and is controlled, directly or indirectly by a foreign national, a corporation not incorporated in Canada, or a corporation that would, if its shares were owned by a particular person, be controlled directly or indirectly within the meaning of section 256 of the *Income Tax Act* (Canada) (the “ITA”).⁷

A taxable trustee means the trustee of a trust with (i) at least one trustee being a foreign entity or (ii) no foreign entity trustees if a beneficiary of the trust is a foreign entity. However, it does not include the following:

1. A mutual fund trust within the meaning of subsection 132(6) of the ITA; and
2. A real estate investment trust or a SIFT trust as defined in subsection 122.1(1) of the ITA.⁸

Types of Property Subject to NRST

NRST applies to the transfer of land containing at least one and not more than six single family residences. This would include houses, semi-detached houses, townhouses, or condominium units.⁹

⁴ NRST, fin.gov.on.ca.

⁵ *Supra* note 2.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Supra* note 4.

NRST does not apply to multi-residential apartment buildings with more than six units, nor agricultural, commercial, or industrial land.¹⁰

General Application

NRST applies only on the value of the residential portion of the property being transferred. If the land being transferred contains both residential property and another type of property, NRST applies on the portion attributable to the residential property.¹¹

While not providing a set formula with respect to apportionment, the Ministry of Finance has stated in their NRST bulletin that “a reasonable self-assessment” is required by taxpayers when apportioning the value for the purposes of NRST, and at the very least, should be based on the value of the residential land as compared to the non-residential land, not the square footage of the two.

The example provided by the Ministry of Finance is as follows: if the purchase price of the total transaction is \$1,000,000 and contains a single-family residence worth \$400,000 and commercial land worth \$600,000, the 15% NRST applies only to the \$400,000 portion.¹²

Furthermore, in a transaction involving multiple transferees, NRST applies in full if any one of the transferees is a foreign entity or taxable trustee. Each transferee is jointly and severally liable for any NRST payable. If a foreign entity or taxable trustee does not pay the NRST, the other transferees will be required to pay the tax. This applies even if the other transferees are Canadian citizens or permanent residents of Canada. The NRST does not apply when a person purchases or acquires residential property as a trustee of a mutual fund trust, real estate investment trust or specified investment flow-through trust. NRST also applies to unregistered dispositions of beneficial interests in residential property, such as, for example, a trade in partnership units in a limited partnership where the transferee is a foreign entity or a taxable trustee.¹³

Exemptions

Exemptions from NRST may be available when:

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Supra* note 4.

¹³ *Ibid.*

1. A foreign national is nominated under the Ontario Immigrant Nominee Program at the time of the purchase or acquisition, and has applied or certifies they will apply to become a permanent resident of Canada;
2. A foreign national is a protected refugee under section 95 of the *Immigration and Refugee Protection Act* (Canada) at the time of the purchase or acquisition; or
3. A foreign national jointly purchases residential property with a spouse who is a Canadian citizen, permanent resident, nominee or protected person.

For all the above exemptions, the foreign national (and their spouse if applicable) must certify that they will occupy the property as their principle residence.¹⁴

Rebates

A rebate of NRST may be available when:

1. A foreign national becomes a permanent resident within 4 years of the date of the purchase or acquisition;
2. A foreign national is a post-secondary student enrolled full time from an approved institution at a campus in Ontario; or
3. A foreign national has legally worked full time under a valid work permit in Ontario for a continuous period of at least 1 year since the date of the purchase or acquisition.

To qualify for a rebate, the foreign national must exclusively hold the property, or hold the property exclusively with his or her spouse. The property must also have been occupied as the foreign national's (and if applicable his or her spouse's) principal residence for the duration of the period that begins within 60 days after the date of the purchase or acquisition. Rebates must be applied for within 4 years after the day on which the NRST became payable, except for a rebate for a foreign national who becomes a permanent resident of Canada, in which case must be applied within 90 days of the foreign national becoming a permanent resident.¹⁵

Registration and Statements

Depending on whether NRST is payable or not, there are statements in Teraview for electronic registrations that must be selected and populated in accordance with the transaction. There are also comparable statements that must be made for paper registrations and unregistered dispositions.

¹⁴ *Ibid.*

¹⁵ *Supra* note 4.

For instance, as of December 16, 2017, the Ministry of Finance requires an express statement of whether or not a registration is subject to NRST. For electronic registrations, these statements have been incorporated into Teraview. When NRST is applicable, statement numbers 9170 must be selected, along with either statement number 9171 or 9172. When NRST is not applicable, statement 9173 must be selected, along with one of statements 9174 through 9181.¹⁶

For paper registrations, the Land Transfer Tax Affidavit has been amended to accommodate the appropriate statements at paragraph 5. If NRST is payable, paragraph 5(a) must be completed. If NRST is not payable, paragraph 5(b) must be completed.¹⁷

Additional Information from LAWPRO

LAWPRO has provided guidance online on LTT and NRST and consistently monitors and updates the information provided based on changes.¹⁸ The purpose of this online resource is to provide answers to frequently asked questions by real estate lawyers with respect to LTT and NRST and to provide risk management advice regarding same.

LAWPRO expands on, among other things, two key questions lawyers may have when dealing with real estate transactions affected by LTT and NRST.

Firstly, with respect to the level of due diligence required by lawyers for the collection of LTT and NRST information, the Ministry of Finance advises that it expects lawyers to review original and independent source documents provided by a client and to retain a photocopy for audit purposes. Examples of original independent source documents that may be used to verify the status or legal circumstances of a client can include a passport, birth certificate, permanent resident card, articles of incorporation, notice of change of directors, and/or certificate of corporate status. Additionally, in the case where no such documentation is available, lawyers could consider having their clients sign an affidavit to sign the specific requirements, such as the Prescribed Information Form for the purposes of Section 5.0.1 of the *Land Transfer Tax Act* (Ontario), which is in affidavit form and will provide lawyers with an extra source of client confirmation with respect to the information they provide.¹⁹

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Always up-to-date LTT and NRST Frequently Asked Questions*, avoidaclaim.com.

¹⁹ *Supra* note 18.

Secondly, with respect to transactions where both residential and non-residential land is subject and an apportionment must be calculated, LAWPRO suggests that in addition to the Ministry of Finance guidance on a “reasonable self-assessment” based on value and not square footage, that such reasonings and calculations be carefully documented in case apportionment is questioned after closing.²⁰

It is logical that in order for such apportionment to be justified and pass the scrutiny of a tax audit, it should, at the very least, match the assigned purchase price to the residential portion of the land. However, it is currently unclear whether this purchase price and an appropriate valuation for same must be backed up by external authority, such as a third-party valuation or survey that relates to the purchase in question. However, like much of the rest of tax legislation, NRST is self-reported and thus the exact method of apportionment is far from an exact science.

Comparison to British Columbia

Ontario’s implementation of NRST followed a virtually identical tax being imposed in British Columbia in July of 2016 within the Greater Vancouver Area, called the Additional Property Transfer Tax (“APTT”), which similar to NRST, targets purchases and acquisitions involving foreign nationals, foreign corporations, or taxable trustees. Both Vancouver and Toronto have in recent years experienced large spikes in housing costs and both provincial governments have been utilizing tax reform to curb this over-inflation. Notably, British Columbia’s recent 2018 Budget introduced changes to its APTT, increasing it from 15% to 20%.²¹

However, the APTT is currently facing judicial scrutiny on the basis of its constitutionality. The case of *Li v British Columbia*²² concerns an application under the *Class Proceedings Act* (British Columbia) challenging the validity of the “foreign transferee tax” which adds 15% property transfer tax upon purchases of residential property in the Greater Vancouver Regional District. The plaintiff challenged whether this tax offends the division of powers between federal and provincial governments on the basis that foreign affairs is within federal, not provincial, jurisdiction, or else is in violation of section 15 of the *Canadian Charter of Rights and Freedoms* due to its unequal treatment based on residency status. The Court determined that before a certification of a class action could be granted, the Court should, and will, rule on the constitutional issue posed to the Court. The summary trial was set to take place around January 2018, with no decision on either the certification or the constitutional issue having been released yet.

²⁰ *Ibid.*

²¹ *Additional Property Transfer Tax for Foreign Entities & Taxable Trustees*, www2.gov.bc.ca.

²² *Li v British Columbia*, 2017 BCSC 1616.

In the event that the Courts in British Columbia eventually rule that the APTT is unconstitutional, it is not unreasonable to assume that similar lawsuits and applications to repeal NRST will eventually follow in Ontario.

2. Vacant Property Tax

Comments from the 2017 Ontario Budget

Further to the overarching goals of the Ontario government to create and sustain affordable housing, the government considered adopting a tax on vacant homes, suggested by the City of Toronto, in order to increase housing supply and promote affordability. The government proposed amendments to legislation granting Toronto authority to levy an additional property tax on vacant homes, and would work with other municipalities experiencing homes left vacant due to speculation.²³

General Information

While having not been adopted or implemented yet, the power for a municipality to impose a vacant homes tax does exist through recent additions and amendments to the *Municipal Act, 2001*,²⁴ namely Part IX titled “Optional Tax on Vacant Residential Units”.

Section 338 of the *Municipal Act*, which came into force in January 1, 2018, outlines the following:

1. The Minister of Finance may designate municipalities to which this section of the *Municipal Act* applies;
2. Such designated municipalities may pass a by-law in order to imposed a tax on the assessed value of vacant units classified as residential property. Such by-law must state the tax rate and conditions of vacancy that make such a unit subject to the tax, and such by-law may provide for exemptions, rebates, audit and inspection powers, and establishment of dispute resolution mechanisms as appropriate; and
3. The Minister of Finance may make regulations regarding ancillary details relating to this part, such as designating municipalities, prescribing conditions, limits, certain persons who are exempt, defining “vacant unit”, governing the collection of such tax, governing

²³ *Supra* note 2.

²⁴ *Municipal Act, 2001*, S.O. 2001, c. 25 [“*Municipal Act*”].

the manner for apportioning an assessment attributable to vacant units, and governing dispute resolution.²⁵

As of the date of this paper, no municipality has been designated by the Minister of Finance nor has an municipality imposed such vacant homes tax by by-law or otherwise.

Possible Implementation in Toronto and Comparison to British Columbia

It remains uncertain as to when, if ever, the City of Toronto and other municipalities will implement a vacant homes tax. While not under the same legal scrutiny as NRST, there has been some pushback and uncertainty as to whether a vacant homes tax will have its desired effects.

Like NRST, Ontario's consideration of a vacant homes tax is inspired by the adoption of the Empty Homes Tax ("EHT") in Vancouver. Approved and enacted in November 2016, properties in Vancouver that are deemed empty are subject to a 1% tax on the property's assessed taxable value.²⁶ The revenues from the EHT are to be reinvested in affordable housing initiatives. All property owners are required to make a declaration about the status of their property on a self reporting basis to determine which properties are subject to the EHT. There are a number of exemptions to homes being deemed "vacant" or "empty", with the basic definition being a residential property having been unoccupied for more than 180 days during the tax year. Some examples of these exemptions include principle residence, limited use properties (such as for vehicle storage), property where the owner is undergoing medical care, the owner has passed away, or property that is undergoing heavy construction. However, property that is uninhabitable or has been listed for sale or rent but remains uninhabited are subject to the EHT.²⁷

Public opinion and feedback on the Toronto proposed tax was enlisted in mid 2017, following a presentation to Toronto's city council about the benefits and detriments of implementing such a tax.²⁸ For instance, the presented benefits of the vacant homes tax would be to encourage vacant homeowners to rent out their homes, increasing supply, and the contribution of the tax to funds need for affordable housing projects. Some of the challenges cited were property rights concerns, the task of identifying all vacant homes through declarations, and the needed administrative functions to manage the program to be implemented.²⁹

²⁵ *Supra* note 24 at s. 338.

²⁶ *Empty Homes Tax*, www.vancouver.ca.

²⁷ *Ibid.*

²⁸ *Vacant Homes Tax – Public Consultation*, www.toronto.ca.

²⁹ *A Vacant Home Tax in Toronto? Exploring Public Policy Benefits and Costs*, www.toronto.ca.

While statistics from the Toronto Real Estate Board (“TREB”) had suggested that the monthly average sale price of Toronto homes declined over the summer of 2017,³⁰ the TREB had also, around the same time, urged caution in adopting this measure without fully understanding the measured effects of the EHT in Vancouver. The president of the TREB has stated that as the issues targeted by the vacancy tax are not understood, and it is not clear how effective a policy it would be, it should be approached with caution, for it may have unintended outcomes that run counter to the stated benefits for the city of increasing rental supply.³¹

The TREB has continued to collect data to assist in the determination of whether the vacant homes tax would have its desired effects. For instance, a survey from the TREB shows that 2% of homeowners have a second property stating empty that may qualify as “vacant” for the purposes of this tax.³² The estimate of how many homes lay vacant in Toronto sit between 15,000-28,000, which is based on data from Toronto hydro on addresses where electricity and water has not been used in a year.³³

Meanwhile, the declaration deadline in Vancouver recently passed and approximately 8,500 homes have been declared vacant or underutilized. About 98% of homeowners submitted their declarations before the declaration date. However, the City did not release how many of the nearly 8,500 homes were granted an exemption. As of now, only about 2,100 homes will receive a tax bill for failing to make a declaration.³⁴

Now that the first year of collection for the EHT in Vancouver is underway, hopefully some of the speculation as to its effects on the housing market can be greater measured and studied, which may affect the decision of Toronto and other municipalities as to whether a vacant homes tax will have its desired effects.

3. Assignment/Flipping Tax

Comments from the 2017 Ontario Budget

Under the heading “Improving Transparency and Reducing Tax Avoidance in Pre-Sale Agreements”, the Ontario government describes the process of paper flipping, and how this practice may be contributing to tax avoidance and excessive speculation in the housing market. Paper

³⁰ *Ibid* at page 5.

³¹ *Toronto’s Vacant Homes Tax, a Retirement Warning, and No More Rentals*, www.zoocasa.com.

³² *Toronto Real Estate Board survey offers more info on vacant homes in the city*, www.metronews.ca.

³³ *Ibid*.

³⁴ *Thousands face empty homes tax in Vancouver as declaration deadline passes*, www.ctvnews.ca.

flipping, in their words, refers to entering into a contractual agreement to buy a residential unit and assigning it to another person prior to closing. In order for the government to determine the extent of the issue, they state that they will require information about assignments through the LTT system, and gather information to allow them to assess whether tax is being paid in the appropriate manner. Lastly, the Ontario government suggests that it will work with the federal government and the Canada Revenue Agency (“CRA”) to explore more comprehensive reporting requirements as it relates to paper flipping.³⁵

General Information

Before the Ontario government responded with comments about “paper flipping”, Scotiabank economists reportedly had encouraged the government to place a tax on house-flippers following a projection that the average housing price in Toronto would be up 25% in 2017 from the previous year.³⁶ The idea, they stated, would be to raise the cost of speculation without interfering excessively with the rest of the housing market. The report suggested that one way this could be accomplished would be placing a tax on property held only for a short period of time, while another would be to collect more capital gains taxed for investment property owned for less than a year.³⁷

Currently, persons who engage in these assignments and “paper flipping” are not subject to a unique or specific tax targeting same in Ontario. These types of transactions are scrutinized closely by the CRA to determine if such assignments/transfers are being done by people in the business of buying/selling homes for a profit, for this affects the treatment of the gains as it relates to income taxes. The fact that purchasing and selling property with the intent on making a profit from the sale is fully taxed as income is, to some extent, a form of assignment/flipping tax that is already present in the ITA.

If the purchase of a property is deemed to be capital in nature, meaning the individual is seeking to make ongoing profits from rental income, only 50% of the gains from sale are taxed. However, if one purchases a property with the intent on making a profit from its sale, it is considered business income and any gains from sale are taxed 100%. Furthermore, the CRA has strict requirements on what is considered a person’s “principle residence”, for a principle residence, when sold, is exempt from capital gains tax.³⁸

³⁵ *Supra* note 2.

³⁶ *Tax House-Flippers, Toronto Urged as Prices Forecast to Soar Again*, www.huffingtonpost.ca.

³⁷ *Ibid.*

³⁸ *Flipping houses and taxes*, www.turbotax.intuit.ca.

CRA Audit Factors

There are a number of factors the CRA will look at when conducting an audit to determine whether a particular transaction and its gains should be characterized as business or capital gains income. Such factors include the following:

- Primary Intention – To flip, or to hold and receive rental income.
- Zoning – What is the property zoned for? Commercial use? Residential use?
- Repairs and Maintenance – If a property is purchased as a “fixer-upper”, the profit on the sale is more likely to be considered business income.
- Nature of Business/Profession – Other employment may affect the way the CRA views your transactions. Example, a real estate agent or a builder will be more likely to be seen as transacting in homes to receive business rather than rental income.
- Money Borrowed – The more leveraged a purchase is, the more likely the CRA will view it as business income.
- Length of Ownership – If you own property for a very short time, it will likely be classified as business income.
- Frequency of Selling Real Estate – The more often you sell property, the more likely such transactions and their gains will be construed as business rather than capital gains income.³⁹

LTT on Assignments

While an assignment as a means of transferring land is not generally excluded from the application of LTT, assignments where the APS has not yet been completed are one of the exceptions to the application of LTT under Section 3(1)(g) of the *Land Transfer Tax Act*.⁴⁰

The exception enumerated in Section 3(1)(g) states that a disposition of a beneficial interest in land includes a sale, transfer or assignment, but does not include:

“a transfer or assignment of a beneficial interest in land arising on the execution of an agreement of purchase and sale of an interest in the land, or by a subsequent assignment of such beneficial interest by a purchaser under the agreement or by an assignee thereof, where,

³⁹ *Taxes on Flipping Canadian Real Estate – Capital Gains Vs. Business Income*, www.madanca.com

⁴⁰ *Land Transfer Tax Act*, R.S.O. 1990, c. L.6.

- (i) the value of the consideration specified in the agreement has not been paid to or for the benefit of the transferor, or
- (ii) the liability for the value of the consideration specified in the agreement has not been assumed by or on behalf of the transferee.”

In other words, paper flipping does currently attract additional LTT, and LTT is only payable upon registration of the applicable deed.⁴¹

Speculation Tax in Vancouver

As seen with NRST and the EHT, Ontario has moved forward with tax policy changes that have been imposed in British Columbia, for the housing market in both Vancouver and Toronto seem to suffer from the same over-inflation and mass speculation. To this end, it is important to recognize that British Columbia has recently released details of a proposed “speculation tax”, which, depending on its implementation, may prompt Ontario to consider similar measures in the coming months.

In its 2018 Budget, the British Columbia government announced it would be introducing an annual speculation tax to be effective in the 2018 tax year. The information sheet released from the British Columbia government suggests that the tax will target both foreign and domestic speculators who have removed their units from housing stock, meaning they are not owner-occupied or qualify as a long-term rental property. The proposed rate is to be 0.5% of assessed value in 2018, increasing to 2.0% of assessed value in 2019.⁴²

The majority of owners would receive an exemption from the tax, which will include exceptions available for principle residences, qualifying long-term rental properties, and other “special cases”. Additionally, the tax would include an income tax credit for British Columbia residents, with the goal to leave the bulk of the tax levied on vacant and short-term rental properties owned by non-residents and satellite families.⁴³

However, there has already been some backlash to this tax, particularly from British Columbia residents who own vacation properties that could be subject to the speculation tax. British Columbia’s Finance Minister has responded saying that details are being looked at and the

⁴¹ *Land Transfer Tax and the Treatment of Unregistered Dispositions of a Beneficial Interest in Land*, www.fin.gov.on.ca.

⁴² *Ministry of Finance Tax Information Sheet 2018-001 – Speculation Tax*, www.2.gov.bc.ca.

⁴³ *Ibid.*

imposition of this tax is not being rushed to address all these concerns. The Finance Minister also stated that responses to these concerns would come out before legislation would be proposed to give effect to this tax.⁴⁴

Conclusion

As tax policy continues to develop in Ontario and across Canada, and particularly as provincial governments continue to address concerns of overinflated real estate markets and a lack of housing supply, there may be further changes to existing tax policies that will impact this area of legal practice. Legal practitioners should be mindful of legislative and policy changes that may affect how real estate transactions are taxed, as well as what may be required from clients upon completion of these transactions, and from a reporting and record keeping perspective as well.

⁴⁴ *B.C.'s finance minister appears ready to tweak speculation tax*, www.vancouversun.com

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15TH ANNUAL Real Estate Law Summit

The Practicalities of Private Mortgage Discharges

Lorne Shuman
Isenberg & Shuman Professional Corporation

April 19, 2018

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Lorne Shuman, Isenberg & Shuman Professional Corporation, Barristers & Solicitors

1. What is a private mortgage?
 - June 2010 Real Estate Practice Guidelines for Lawyers
 - OREA/TREB form of Agreement of Purchase and Sale

2. Implications of dealing with a private mortgage when your client is buying/selling

3. Rules of Professional Conduct and Commentary
 - Rule 7.2 - 11 Undertakings

4. What is the Document Registration Agreement (DRA)?

5. How can the DRA assist when a private mortgage is on title in a real estate transaction?

6. What is the recommended practice for both a buyer's and seller's lawyer?

7. What is the recommended order of registration of documents?

8. What are some practical tips?

9. What if a lawyer refuses to sign the DRA?

10. What are the risks of not having a 3-way DRA?
 - what can go wrong?
 - how can you protect yourself?



15TH ANNUAL Real Estate Law Summit

When Should You Call an Environmental Specialist? Avoiding Negligence Claims Over Environmental Issues

Rosalind Cooper, C.S.
Fasken Martineau DuMoulin LLP

April 19, 2018

WHEN SHOULD YOU CALL AN ENVIRONMENTAL SPECIALIST

AVOIDING NEGLIGENCE CLAIMS

Rosalind H. Cooper

Fasken Martineau DuMoulin LLP

Introduction

Real estate practitioners may periodically find themselves dealing with environmental issues in their practices. It is sometimes difficult for them to know whether the issue is one that can be easily addressed and should be addressed by them, or whether it is a matter in respect of which the assistance of a specialist should be sought.

While some environmental specialists take the position that any and all environmental issues need to be dealt with by a specialist, that is not necessarily the case. Each case needs to be analyzed independently to determine whether a specialist is required, this paper is intended to provide the reader with some general guidance on common situations where it would be imprudent to proceed without specialized environmental advice.

The following situations are by no means exhaustive of the circumstances where specialized advice is required, and practitioners will need to determine whether they have the requisite expertise to advise, as environmental issues emerge in the course of their practices.

Environmental Reports

Where environmental reports have been prepared, either by the other side in a transaction or by your own clients, the author would caution non-specialists in reviewing or summarizing the contents of such environmental reports for their clients.

Often, it is tempting to extract the executive summary portion of such reports and to reproduce that summary in an email or opinion to the client. The practitioner may believe that, providing a disclaimer with respect to the information provided, may be sufficient to avoid potential liability. While it certainly may be possible to provide sufficient warnings and disclaimers to the client in relation to such summaries, the author recommends avoiding this approach.

Instead, the client should be informed that the lawyer does not have the expertise to review the environmental report and provide advice respect of the findings. The client should be informed that a specialist could be retained to review and provide that advice to the client or, alternatively, the client should seek its own advice with respect to the reports and their implications. All of this, of course, should be properly documented in the lawyer's file.

There are several areas of concern associated with reviewing an environmental report without sufficient expertise. First, the executive summary is just that, an executive summary of the information contained in the report. There are many circumstances where, in reviewing the entirety of the report, additional or modifying information is contained within the report that is important for the client to know. Unless the lawyer is capable of reviewing a detailed technical report and understanding the implications of the findings, it would not be possible for him or her to know whether the executive summary is inadequate. In the experience of the author, such executive summaries often are inadequate.

Second, environmental reports often contain numerous disclaimers or limitations from the consultant that prepared the report. It is important to fully understand the significance of those disclaimers and limitations, and to be able to explain that to the client. For example, sometimes reports will state that the consultant that conducted the site visit was limited by “snow cover”. A lawyer who is not well-versed in such matters might believe that this limitation is of no particular importance to his her client. However, this limitation means that the consultant was not able to properly assess or observe the surface of the ground. This could, for example, impair the consultant’s ability to observe stressed vegetation or other indicators of potential contamination, such as sheens on the ground. This needs to be drawn to the client’s attention, but might easily be overlooked by someone not familiar with environmental reports.

Similarly, many environmental reports contain limitations with respect to searches that have been conducted in various registry systems and/or freedom of information requests that have been submitted. This is because, often within the timeframes provided for preparation of the reports, the consultant is unable to receive the results of the searches submitted. The client needs to understand the gaps that may be created by the lack of this information and be provided with an adequate explanation of the additional benefits that may be derived from receipt of such information.

In certain situations, the consultant may have been unable to obtain groundwater samples in certain locations because the monitoring wells installed were

still dry. The report may state, for example, that three of the five monitoring wells sampled did not exceed applicable criteria, which might lead to an assumption that the site is acceptable. However, this means that two wells could not be sampled for groundwater and the condition of groundwater in those areas would be entirely unknown. This would need to be adequately explained to the client in order to ensure that he or she appreciates the limitations associated with the sampling exercise.

Many environmental reports contain limitations on the parties that are entitled to rely on the reports. If the lawyer's client needs the report for financing purposes, those limitations on reliance would need to be addressed with the consultant. Lawyers will also need to advise their clients that they cannot rely on environmental reports provided by third parties without reliance being extended by the consultant.

There could be many environmental terms or other unique terminology contained within environmental reports that require proper explanation to the client. The report might state, for example, that the low levels of contamination present would make the site a suitable candidate for a risk assessment. However, the lawyer must be able to explain to the client what that means, whether the process involves the regulator, and the legal implications of proceeding with the risk assessment. The lawyer must also be able to advise on other options. Failure to do so adequately creates risk of liability.

Finally, it is often helpful to advise the client with respect to the reputation or credentials of the consultant that prepare the environmental reports or whether the age of the report limits its reliability. That may be a challenging task for a lawyer that

does not have sufficient familiarity with environmental consultants or understanding of market expectations on report dates.

It is not difficult to envision circumstances where a lawyer may fall short in giving advice to his or her client in relation to some of the above matters or others relating to environmental reports. That could lead to allegations from an unhappy client with respect to his or her misunderstanding of the reports and its implications, and possible negligence claims against the lawyer.

Drafting Environmental Provisions

One of the areas that most often leads to negligence claims against lawyers in the context of environmental matters relates to drafting of provisions in agreements. The author has often been consulted to provide legal opinions, or to arbitrate or mediate disputes in relation to environmental clauses that are later interpreted to be ambiguous or where commitments have been made in relation to environmental matters that are either impossible or too expensive to comply with.

For example, in situations where contamination is found to be present at a property, there will often be covenants to conduct remedial work. Those covenants may fail to specify the degree of remedial work required. They may set a standard of remediation which is either impossible to achieve; requires a timeframe that the parties may not expect; or involves an exceptionally high cost to implement. In all of these circumstances, a client may be very unhappy to find that he or she is in a situation

where the cost, timing or ability to carry out certain environmental commitments are unexpected.

Another area of frequent disputes relates to lease agreements where lawyers may fail to consider possible issues that can arise in the context of a tenancy arrangement. For example, a lawyer may place the obligation to address contamination that arose during the term of the tenancy on the tenant. In principle, this seems like a reasonable and equitable approach. However, if the lawyer does not consider the means of determining the impacts caused during the term of the tenancy and how that will be evaluated, the client will likely hold the lawyer responsible for failing to provide proper advice in that regard. For example, in such situations, it is often prudent to conduct a baseline environmental assessment at the commencement and termination of lease in order to have a means of assessing the contamination that may have occurred during the tenancy. However, appropriate guidance needs to be provided to the consultant in this regard.

Another area of potential concern relates to wording of representations of warranties and indemnities. In the case of indemnities, for example, it is important to understand the various forms of liability that can be imposed in the context of environmental matters in order to ensure that proper coverage is provided under indemnities. Without a complete and thorough understanding of exposure to environmental liability, this can be difficult to do. A client who is deprived of the ability to seek recovery against another party pursuant to an indemnity due to its inadequacy will undoubtedly be looking to his or her lawyer in that regard.

The author has often seen clauses in agreements that require approval of the regulator on remedial plans. Such a clause may state that the remedial work is not considered to be completed until such approval obtained. If the lawyer does not understand that the regulator does not typically approve remedial plans in Ontario, he or she may be including or agreeing to a clause that can never be satisfied.

Finally, definitions related to environmental matters can be a significant source of ambiguity lead to conflicting interpretations.

Advice on Interpretation of Contracts

As with all contractual situations, ensuring that the client understands the meaning and implications of contractual provisions is key. However, that may be more challenging for a lawyer who lacks expertise in a particular subject matter. For example, a lawyer may not be able to properly explain to his or her client the legal consequences of agreeing to certain commitments in an environmental context. The lawyer may not appreciate the subtleties associated with specific wording and may fail to explain those to the client and, in particular, the possibility of litigation in relation to such provisions. This may form the basis for an assertion of negligence against the advising lawyer when disputes arise in relation to such contractual provisions.

In some situations, there may be litigation consequences associated with environmental issues. For example, if contamination appears to be migrating over property boundaries, it is important for counsel to be able to advise his or her clients with respect to the ability to recover and against which parties that might be possible.

Similarly, advice may be required in respect of the potential for claims to be advanced against the client and possible defences in that regard. Without an appreciation of the litigation issues surrounding environmental matters, this may be difficult to do.

Counsel may also not be up-to-date on recent jurisprudence or may not be following case law in the environmental area, and this can dramatically impact the advice given and drafting of clauses in agreements. For example, a few years ago, a decision was released which suggested that the limitation period for environmental claims would run from the date that a Phase 1 environmental site assessment was received, which identified the potential for contamination to exist. This was a change in approach from existing case law and would obviously impact advice given to a client with respect to limitation periods for claims. On appeal, the decision was reversed and the court held that the limitation would not begin to run for a plaintiff until such time as actual sampling results are received. This was more consistent with the previously existing case law but, again, required that the previous advice be changed.

Retaining Environmental Consultants

The terms and conditions associated with engaging environmental consultants can be challenging. Many consultants attempt to limit exposure to liability by including limitations in the contractual terms and conditions on the scope of the retainer. For example, a common limitation from consultants is to state that the exposure to liability of the consultant is the lesser of the cost of the work undertaken and a specific amount. Most environmental lawyers are aware of these strategies and

will know what additional benefits can be negotiated for their clients. One can envision a situation where a client is limited in its recovery against the consultant because of the lawyer's failure to negotiate such terms and conditions. This type of situation could also result in a negligence claim.

Conclusions

It may be that clients are reluctant, for fees or other reasons, to engage specialists to provide advice in some of the circumstances outlined above. However, the lawyer can avert a negligence claim by making it clear to the client that the specific area of advice is beyond his or her expertise, and that he or she recommends that the client seek specialized advice. If the client rejects that recommendation, counsel should document that and be sure to explain the risks that the client is taking on by doing so.



15TH ANNUAL Real Estate Law Summit

Recent Changes to the *Residential Tenancies Act* that Will Affect Your Practice

Joseph Hoffer
Cohen Highley LLP

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RECENT CHANGES TO THE *RESIDENTIAL TENANCIES ACT* THAT WILL AFFECT YOUR PRACTICE

Prepared and presented by Joe Hoffer, Cohen Highley LLP

In April 2017 the Province of Ontario gave Royal Assent to the "*Rental Fairness Act, 2017*", a statute amending provisions of the *Residential Tenancies Act, 2006* (RTA). The RTA amendments are mostly "substantive" in nature and are sprinkled throughout the entirety of the statute. In this paper, the focus is on RTA amendments that are most likely to affect the advice you give your clients relative to residential rental property.

The summary of major changes that real estate lawyers should be aware of are as follows:

- Changes to the rules relative to possession for "landlord and purchaser's own use" (ss. 48 and 49 RTA), including new penalties for landlord breaches of the provisions (s. 57 RTA)
- New penalties relative to possession for "substantial renovation" or for conversion of use (s. 57.1 RTA)
- The mandatory "Prescribed Lease" required for use in most residential tenancies (s. 12.1)
- Loss of "New Construction" exemption and imposition of Rent Controls on new builds (Notices given on or after April 20, 2017 are limited to the Guideline and/or other rent increase rules).
- Relevance of "Condo Status" re: Pets, Single Family Uses and remedies
- Changes to Rules for "Above Guideline Applications": removal of right to apply for extraordinary cost increases in "vital services"
- Exemptions from RTA arising from policy initiative to promote transitional housing for homelessness risks.

LANDLORD'S OWN USE CHANGES (S.48 RTA): THIS WILL AFFECT "SMALL LANDLORDS" WHO MAY BE YOUR RENTAL INVESTOR CLIENTS

The old rule:

Prior to amendments, s. 48 permitted a landlord to regain possession of a rental unit at the end of a term of the tenancy in circumstances where the landlord required possession for use by the landlord or a member of the landlord's immediate family or for a caregiver who would provide care services to a member of the landlord's immediate family, where the care recipient lived in the same "residential complex" (s. 48 (1) RTA). The main legal requirement was that Notice of Termination be in the proper form and be given in "good faith". There was Court of Appeal precedent (and other precedents) to support the position that the Notice could be given by a corporation, even though a corporation is incapable of residing in the rental unit.

The "mischief" arising from the old rule:

There were frequent instances of abuse by owners of small rental properties giving tenants notice to vacate based on landlord's own use; however, subsequent to the tenant vacating, the owner might move in for only a short time and/or would renovate the unit; rent it out for a much higher market rent; and then operate or sell the property which itself would have a much higher value due to the more lucrative rental income generated by the asset. The notices were in fact not given in good faith, but tenants would often vacate having no reason to doubt the *bona fides* of the landlord, or even if they

learned later that the notice was not given in good faith, they may not have been inclined to initiate proceedings.

The new rule:

Section 48 has now been amended to insert additional protections and remedies for tenants who move in response to a “landlord’s own use” Notice. First, the Notice may not be served unless the Landlord *bona fide* requires (and asserts) that occupancy is required for a period of at least one year by the designated person for whom the notice was given: see the revised form N12 at the following link: <http://www.sjto.gov.on.ca/ltb/forms/> . Section 48 (5) has been enacted to overrule the Court of Appeal decision referred to above, and provides that a landlord cannot give the Notice unless the landlord is an individual and the rental unit is owned in whole or in part by an individual: a corporate owner cannot give the Notice.

If it is necessary to apply for an eviction order (and you don’t have to wait until the termination date has come and gone) then the landlord must confirm in an affidavit submitted to the Board (s. 72 (1) (a)) that possession is required by the designated person for at least one year; furthermore, the landlord must pay the tenant a penalty of one month’s rent compensation or offer another unit acceptable to the tenant. If the landlord does not pay the rent compensation the tenant may apply for recovery of same years later as the usual one year limitation period within which to file an application does not apply (s. 135 (1.1) RTA).

The province also enacted a menu of new remedies and legal tests to be applied to the question of whether the landlord acted in good faith in giving the notice under s. 48 in circumstances where the designated person did not occupy the rental unit “within a reasonable time” after the tenant vacated:

s. 57 (5): “...it is presumed, unless the contrary is proven on a balance of probabilities, that the landlord gave a notice of termination under s. 48 in bad faith” if at any time between the date the landlord gave the notice of termination and the date the tenant vacated, the landlord advertises the unit for rent; enters into a tenancy agreement for the unit with anyone other than the tenant who vacated; advertises the rental unit, or the building it is in, for sale; demolishes the rental unit or the building containing the rental unit; or, takes any step to convert the rental unit or the building it is in to a use other than residential.

The effect of the section is to impose a “freeze” on transactions involving the building for at least 14 months (60 days’ notice plus one year), although the “presumption of bad faith” is rebuttable (ie: death, life’s vagaries can be used to displace the ‘reverse onus’). If the landlord does breach the “freeze” period or the designated person does not occupy at all, then the tenant has a menu of harsh financial penalties to apply for as against your client (rent differentials, moving expenses, abatement of rent, and an administrative fine of up to \$25K plus a breach is a Provincial Offence subject to a \$25K fine, s. 234 (c) RTA), with no limitation period on recovery of the one month compensation payment.

Recommendation:

If you are aware of your client’s intention to either in bad faith or in good faith seek possession of a rental unit based on “landlord’s own use”, ensure that the client is aware of the new obligations and risks associated with the giving of the notice.

PURCHASER'S OWN USE CHANGES (S.49 RTA)

The old Rule:

If the property is a “residential complex” with no more than 3 residential units, then a Landlord (vendor) may give Notice of Termination on behalf of a prospective purchaser of the rental unit or the residential complex. The agreement of purchase and sale must be in place before the Notice of Termination is given and must be effective on the last day of a term or rental period.

The Notice is to be given for occupation of rental unit or “residential complex” by same class of persons listed in s. 48 and the Notice may be given by a vendor on behalf of a prospective purchaser of a condominium unit.

The mischief arising from the old rule:

As with the section 48 notice, a prospective purchaser and vendor could abuse the concept of “*bona fides*” by giving the notice in bad faith; securing possession of the rental unit; and then renovating the unit (or units) and either flipping the property or renting it for a much higher market rent. The vendor landlord would serve the notice on behalf of a prospective purchaser in order to deliver vacant possession to the purchaser, thereby commanding a higher purchase price; or, the purchaser would require the vendor to give the notice which the vendor might give in good faith, only to discover later that the purchaser never moved in.

The new rule:

While a payment of one month’s rent is not required, and there is no requirement that the purchaser reside in the rental unit for at least a year, section 57 (1) (b) RTA provides that if the purchaser or designated person does not move in within “a reasonable time”, then a former tenant may apply for an order against the vendor landlord within one year of the date the tenant vacated. The remedies that may be ordered against the vendor landlord are the same as those against a landlord under s. 48, but there is no “presumption of bad faith” made against the landlord in an application based on a notice given under s. 49.

Recommendations:

Lawyers who are asked to ensure that a notice is given on behalf of a prospective purchaser should consider putting provisions in the agreement which survive closing to protect the vendor from liability in the event the purchaser or designated person does not move in within a reasonable time. Another good practice to avoid risk would be to secure from the purchaser an affidavit as provided for in s. 72 (1) (b) RTA (which would be necessary if an application for eviction were required) so that if issues arise post closing, the vendor landlord (ie: your client!) will have at least some protections or rights of indemnification from the purchaser if a former tenant subsequently applies. Since there is a one year limitation period after the date the tenant leaves within which an application by the tenant may be brought, the post-closing warranty or indemnity from a purchaser should last at least that long. An excellent roadmap for the structure of the basic legal requirements for notices given under s. 48 or 49 is available through a review of the Landlord and Tenant Board’s (LTB) Interpretation Guideline 12 which is at the following link:

<http://www.sjto.gov.on.ca/documents/lrb/Interpretation%20Guidelines/12%20-%20Eviction%20for%20Personal%20Use.html>

SUBSTANTIAL RENOVATIONS AND THE TENANT'S "RIGHT OF FIRST REFUSAL"

The old rule:

The old rule (ss. 50 and 53 RTA) provided that if a landlord gave a tenant notice to vacate at the end of a rental period or term based on the landlord's intention to renovate the rental unit so substantially as to require vacant possession, then the Notice of Termination (Form N13) required the landlord to pay compensation for the time the tenant was out of possession (maximum 3 months) and give the tenant the right to re-occupy the rental unit after renovations with rent payable at the old rent. Any time prior to the tenant vacating, the tenant was required to notify the landlord of the tenant's intention to re-occupy after the renovations were completed.

The mischief caused by the old rule:

While the Notice of Termination form makes it clear the tenant has the right to re-occupy the rental unit following renovations, there were some landlords who simply failed to notify the vacated tenant that the unit was ready for re-occupation at the old rent, with the result that, as a practical matter, the tenant was unable to exercise the right of first refusal to re-occupy. The landlord would rent the renovated unit to a new tenant, for a much higher rent, and thereby substantially increase rental income with an attendant positive impact on the value of the building. Where many such notices were given for multiple units, the landlord could substantially increase property value by denying tenants who vacated a reasonable opportunity to exercise the right of first refusal.

The new rule:

New penalties and remedies have been enacted to address situations where the Board "determines that a landlord has "failed to afford the former tenant a right of first refusal" s. 57.1 (1). In addition, there is a new remedy if the landlord failed to "renovate or demolish or convert use...within a reasonable time" of the tenant vacating the rental unit. The liability and remedies, as is the case with s. 48 and 49, are listed in s. 57 (3) of the RTA, subject to a one year limitation period from the time the tenant vacates the rental unit. On the issue of payment by the landlord of up to three months' rent compensation due to renovation, demolition or conversion of use, there is no effective limitation period for recovery pursuant to the new provision in s. 135 (1.1) RTA. As with s. 49 RTA, there is no presumption of bad faith for failing to renovate, demolish or change the use "within a reasonable time", but as a practical matter, it is more likely than not that any delay in implementation of the grounds given for the notice will invite such a presumption.

Recommendations:

If you as legal counsel are involved at all in landlords' business plans that involve the issuance of notices under ss. 50 and 53 of the RTA, you are well advised to ensure your client is well advised of the consequences and to get written instructions from the client to serve the notice after giving written confirmation of the exposure. Again, LTB Guideline 12 has an excellent roadmap for implementing notices under ss. 48, 49 and 50.

For an interesting case on “conversion to non-residential use”, see *Sertic v. Mergarten*, attached, where a granny suite was effectively converted to “storage”, but don’t let your clients get any ideas!

THE “STANDARD FORM OF LEASE”

The old rule:

Pursuant to s. 2 (definition of “tenancy agreement”) of the RTA, a tenancy agreement “means a written, oral or implied agreement between a tenant and a landlord for occupancy of a rental unit...”. There was a requirement that the landlord provide written notice to a new tenant, within 21 days of commencement of a tenancy, the “legal name and address of the landlord to be used for giving notices and other documents”...under the RTA (s. 12). The requirement for such written notice applied regardless of whether the tenancy agreement was “oral or implied”. A failure to produce the written notice of the legal name and address of the landlord within 21 days resulted in a suspension of the tenant’s obligation to pay rent until such time as the notice was provided; however, after compliance, any withheld rent was then recoverable by the landlord (s. 12 (4 (5) RTA). These requirements applied to all tenancy agreements.

Most landlords in Ontario used standard lease forms which included the legal name and address of the landlord and which also included a comprehensive set of terms and conditions governing all aspects of the tenancy, including parking regulations; use provisions; rules and regulations governing a range of items such as smoke alarms, window coverings, assignments and sublets, care of the premises, rent discounts and deposits, insurance requirements, and, procedures for termination of the tenancy and vacating the rental unit. The RTA required that regardless of whether a lease form was used, landlords were to provide to new tenants, “prescribed information” which consisted of a 2 page sheet of basic information about the Landlord and Tenant Board and tenants’ rights (s. 11 RTA).

The mischief caused by the old rule:

Tenant advocacy groups contended that the lease forms were confusing and contained “illegal clauses” and that oral or implied tenancy agreements left tenants open to abuse. They also complained that the font size was too small and the lease was too long (four pages “legal size” paper in most cases) and that the terms and conditions were too onerous for tenants to comply with. Demands were made for a “standard form of lease” which would govern all tenancies in Ontario; would be easy to read; and which would prevent landlords from incorporating “illegal terms and conditions” in their leasing documents.

The new rule:

The Province amended the RTA (s. 12.1) to include a requirement that all landlords use a “prescribed form” of lease for different classes of tenancies (it is 13 pages long) and has enacted a regulation which will come into effect on April 30, 2018 making it mandatory for landlords of most kinds of “rental units” (i.e. condos, houses, apt buildings, secondary suites) to use the “Standard Form of Lease” for all tenancies entered into on or after April 30, 2018 (O. Reg. 9/18, attached). The Standard Form is not required for “Care Homes”, Mobile Home/Land Lease tenancies, tenancy agreements for member units in non-profit housing cooperatives; and tenancy agreements which are generally governed by “social housing” exemptions in the RTA (see ss. 6 – 8 RTA). A copy of the Standard Form of Lease is available as form number 047-2229E from the Ontario Central Forms Repository or by going to the following link:

<http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&SRCH=&ENV=WWE&TIT=2229E&NO=047-2229E>

The legislative requirement is that, beginning April 30, 2018, the Standard Lease Form must be signed on or before day Tenant is entitled to occupy the rental unit and applies to tenancy agreements “entered into” on or after April 30: any tenancy agreements that were entered into prior to that date, even if the commencement date of the tenancy was long after April 30, 2018, and even if the tenancy agreement is “oral or implied”, are “grandfathered”. The Standard Form of Lease contains 7 pages of basic terms and conditions of tenancy (parties, lawful rent, services and facilities, see attachment to this paper) and 6 pages of “Information for Tenants”. There is also a permissive provision which allows landlords to add “Terms and Conditions” which would be the equivalent of “Rules and Regulations” and other operational terms previously used by most professional landlords but it is up to individual landlords as to whether they choose to add terms and conditions. A signed copy of the lease must be given to the tenant within 21 days of the tenant signing it and the agreement must be signed before the tenant is entitled to occupy the rental unit (s. 12.1 (2) RTA).

If the Standard Form of Lease is not used for a tenancy agreement that is entered into on or after April 30, 2018 then the tenant of the affected rental unit may demand “in writing” a signed copy that complies with RTA from the landlord (only once during tenancy). If the landlord does not give a signed copy within 21 days, the tenant may withhold rent payments “that become due” after expiry of 21 days (ie: the next month’s rent), the tenant may withhold a maximum of one month rent. If the landlord complies within 30 days of date rent is withheld, then the tenant must repay the withheld rent but if there is no compliance, then after 30 days the tenant can keep the rent that was withheld.

In addition, if the landlord does not provide the Standard Form Lease within 21 days after the tenant’s written request for same, the tenant has the option to give a 30 day notice to vacate, regardless of what the fixed term of the lease is. If the landlord does provide the signed Standard Lease, then the tenant still has the option, within 30 days of receipt of same, to either sign the document or refuse to sign and give 60 days’ notice to terminate, again regardless of the lease term. If the tenant is given the document and does nothing within the 30 day time frame, then the tenant is bound by the “non-compliant” tenancy agreement which may be “written, oral or implied”. Note that if a tenant and landlord properly entered into the Standard Form of Lease, and a copy was given to the tenant within 21 days of occupancy, then the landlord is not required to respond to the tenant’s written demand for same at a later date (although it is recommended that the landlord do so anyway).

The bottom line is that landlords who are very disorganized and operationally (or out of ignorance of the law) incapable of producing a signed Standard Form of Lease in timely response to a tenant’s written demand for same, stand to lose one month’s rent and have the tenant break a fixed term lease on 60 days’ written notice. It is not an “offence” for a landlord to fail to use the Standard Form of Lease.

Recommendation:

When acting for purchasers of rental properties in Ontario, ensure that they are advised of the mandatory obligation to use the Standard Form of Lease and make them aware of the consequences of the failure to do so. It would also be prudent to recommend that prior to closing they obtain copies of all tenancy agreements of existing tenancies and review the dates the tenancy agreements were entered into for compliance with the Standard Form of Lease requirement. If there is non-compliance,

then at a minimum the purchaser/landlord should be aware of their exposure to tenants who are subject to non-compliant leases and the obligation to respond to a written demand for same. The purchaser's lawyer should generally, by default, make it clear, in writing to the client that the retainer does not include due diligence by the lawyer with respect to tenancy agreement compliance with the requirements of the RTA, including the requirement for use of the Standard Form of Lease.

For landlords who add "Additional Terms and Conditions" and seek legal counsel with respect to same, the lawyer and the client should be aware that the doctrine of *contra proferentem* will likely apply to the interpretation of the landlord's added terms and conditions. An added term or condition which is inconsistent with a provision of the RTA (ie: a No Pets clause, or a clause requiring the tenant to remove snow from their townhouse sidewalk) is "void" (s. 4 (1) RTA and s. 4 2. O. Reg. 9/18). If advice is sought regarding completion of the Standard Form, be aware that there are some traps for the unwary landlord that are built into the prescribed lease: for example, "services and facilities" should not include "visitors' parking"; it is not a good idea to "agree to give notices" via email because no LTB Rules permit this and the notices can easily be deleted or confused with RTA service requirements resulting in eviction proceedings being declared "void" for failure to comply with RTA service requirements. Ultimately, professional legal advice and training are recommended for landlords both with respect to filling out the Standard Form of Lease and the addition of terms and conditions.

REMOVAL OF "NEW CONSTRUCTION" EXEMPTION FROM GUIDELINE RENT CONTROL

The old rule:

Units that were in a building which was not occupied for residential purposes prior to November 30, 1991 were exempt from most rent control provisions of the RTA, including the restriction on giving notices of rent increase by an amount that was no more than the annual "Guideline". Notices were to be given on the Notice of Rent Increase Form N2 and could be for any amount of increase.

The principle behind the old rule was that in "new builds" there was at one time some urgency to quickly lease up a new building to "take out" the more expensive construction financing and put long term financing in place. Low rents were used to achieve sufficient "lease up" status to secure less expensive long term financing and the exemption from the Guideline restriction would then allow the operator to achieve market rent levels over time through annual rent increases. The exemption encouraged construction of new rental housing.

Mischief created by the old rule:

Landlords who wished to secure an "economic eviction" of tenants could increase the rent by such a substantial amount that the tenant would effectively be forced to move. In Toronto particularly (and after serving a CBC reporter with an exorbitant rent increase) the tight and buoyant rental market led many landlords to engage in a practice of seeking exorbitant rent increases. Low interest rates and high demand for rental was presumably deemed sufficient to motivate the construction of new rental housing without the need for an exception from rent controls which has been a feature of Ontario residential tenancies legislation since the mid-1970s.

The new rule:

All rental units which are fully governed by the RTA are now subject to the rent control Guideline. The new rule was enacted April 20, 2017 so any Notice of Rent Increase given on the form N2 prior to that date, regardless of the date it takes effect, would still be valid. There are still some “social housing” exemptions from the Guideline (see ss. 6 – 8 RTA).

Recommendations:

Landlords should not increase rent by an amount above the annual guideline unless they have applied for an “above Guideline rent increase” and should use the Form N1 because if they use the wrong form, the increase may be declared “void”.

CHANGES TO RULES PERMITTING “ABOVE GUIDELINE RENT INCREASES” (“AGI”s)**The old rule:**

Landlords who made major capital investments in their rental buildings or who incurred “extraordinary operating cost increases” in utilities or property taxes/municipal charges could qualify for AGIs if they met prescribed criteria set out in the RTA and regulations (s. 126 RTA and ss. 18 through 34, O. Reg. 516/06). The policy behind permitting AGIs for qualifying capital work was to encourage ongoing investment into rehabilitation of existing rental housing stock to ensure it remained in a good state of repair. The policy behind permitting AGIs for “extraordinary” operating cost increases for utilities such as water rates; hydro; natural gas, etc. was based on the recognition that certain vital services consumption charges were beyond the control of the building operator: the same policy principle applied to property tax increases.

The ability to increase the rent above the Guideline encouraged investment in housing stock through qualifying capital expenditures and helped offset substantial increases to vital utility services and municipal charges so that ultimately rental revenue would pay for the increases. The inability to pass on all or part of such costs would, for all practical purposes, result in a substantial deterioration of housing stock and other forms of cost cutting measures by landlords (ie: maintenance and repairs or the supply of vital services) to offset losses.

The mischief caused by the old rule:

There isn’t really any mischief caused by the old rule except that landlords who installed energy efficient components in existing buildings would likely see a decrease in consumption costs for regulated vital services and would also benefit if they applied for a capital expenditure AGI and secured a rent increase above the Guideline. The net operating income, at least in the short term, would greatly improve the overall building value, again in the short term.

The new rule:

The Province has repealed the provisions of the RTA which permit a landlord to apply for an AGI based on “extraordinary operating cost” increases, with the exception of extraordinary increases in municipal property taxes and “municipal taxes and charges”, (ie: landlord licensing fees). The effect of the change is that hydro, water and fuel increases that are experienced due to regulated commodity price increases

will have to be absorbed by the landlord through annual rent increases that do not exceed the Guideline. One effect of this will be to encourage landlords to install energy conservation components or to transfer risk to tenants by, for example, sub-metering electricity and water consumption and passing payment obligations on to new tenants under new tenancy agreements. There are strict RTA rules (ss. 137, 138 RTA) around sub-metering electricity and there is virtually no ability to transfer responsibility for payment of same to existing tenants.

The Province has also amended the RTA (s. 126 (7) RTA) to provide the LTB with expanded jurisdiction to disallow capital expenditures which under the old rule would have qualified for an AGI. The expanded jurisdiction is based on “prescribed circumstances” and as of the date of drafting this paper (March 26, 2018) the regulation listing the prescribed circumstances has not yet been enacted. In policy releases relative to the amendments to the RTA there is some suggestion that capital work related to “curb appeal”, such as lobby renovations, may be at risk even though, under the old rules, the expenditure would qualify based on features such as new accessibility compliance, energy conservation, or the need for replacement of components to meet building codes or standards.

The ability to recover extraordinary increases for “municipal taxes and charges” remains to allow for increases not just for municipal property taxes but also for circumstances where municipalities use other powers to effectively impose new charges on landlords, such as “landlord licensing” fees (see Rent Control Bulletin) at the following link:

<http://cohenhighley.com/articles/landlord-licencing-fees-result-in-whopping-rent-increase/>

Recommendation:

If your clients seek advice about increasing rents above the Guideline due to capital investments to be incurred or due to extraordinary cost increases, ensure that they are directed to qualified legal advisors who can provide relevant advice.

SOME OTHER THINGS TO BE AWARE OF WHEN ADVISING LANDLORD CLIENTS

Relevance of Condo Status of Rentals:

While the provisions of the RTA will apply to tenancies in priority to any other provincial statute (other than the *Human Rights Code*, s. 3 RTA), it is possible for residential landlords of condo units to enforce some provisions of condominium Declarations, By-laws and Rules against tenants. For example, the “No Pets” and “Family Status” use provisions in some condo documents can be enforced in a tenancy subject to condo tenure whereas they would be unenforceable in an apartment setting subject to fee simple or land lease tenure. Despite the ability to enforce, the means of enforcement will require an application to the LTB on the basis of “interference with the landlord’s legal interest” and a Board Member always has an ability to refuse eviction based on an exercise of discretion. There are precedents, however, to support eviction based on a breach of the “no pets” and “family use” restrictions set out in condominium documents (see: *Metropolitan Toronto Condominium Corp. No. 949 v. Irvine*, (1994) 42 R.P.R. (2d) 319 and *Simcoe Condominium Corporation No. 89 v. Dominelli*, 2015 ONSC 3661 [“no pets”] and *Nippissing Condominium Corporation No. 4 v. Kilfoyl*, 2010 ONCA 217 (“family status”).

ELEVATOR/WORK ORDER ISSUES: S. 126 RTA

The RTA was recently amended to provide that any Landlord who files an AGI application must also file evidence of the status of any outstanding RTA or the Technical Standards and Safety Act orders relative to building elevators, regardless of whether the compliance period remains open and regardless of whether the work is being claimed on the application. If as of the hearing date, the compliance period for elevator work order is expired, no AGI will issue until the work is done or the LTB may elect to dismiss the AGI altogether (ss. 126 (12) (12.1), (13) RTA).

NEW EXEMPTION FOR “TRANSITIONAL HOUSING”

The RTA has added a new exception from the RTA to deal with transitional housing (s. 5.1 RTA). The policy goal appears to be to encourage a transition from homelessness or emergency housing to permanent housing. To fall within the exemption the RTA enshrines a comprehensive set of statutory terms which must be present in the tenancy agreements for such housing. If there is compliance with the statutory terms, then the operators of such housing are able to increase rent substantially and secure possession without resort to the Landlord and Tenant Board (but a writ would be required from Superior Court).

STUDENT AND YOUTH RENTALS

The Standard Form of Lease, by default, imposes “joint and several” liability under the lease terms; however, there is also the ability for landlords to enter into tenancies where liability is “several”: this often is the preference for operators of student rental housing. Until recently, there were LTB decisions which held that, regardless of a written agreement which provided that tenants were jointly and severally liable, if a landlord negotiated separately with one of two or more “roommates” who were subject to a single tenancy, the landlord could inadvertently convert the tenancy to a tenancy in common. This was based on application of the provisions of the *Conveyancing and Law of Property Act* and the common law leasing doctrines relative to the “four unities”.

Landlords renting to multiple students or “roommates”, especially in the context of converted residential dwellings, would be careful to have the tenants sign “joint and several” leases and operate as households even where the tenants reserved to themselves exclusive rights with respect to their own bedrooms. This practice ensured that the tenancy was not declared to be a “lodging or rooming” house (with attendant licensing and Fire Code requirements) and also ensured that if the tenants did not get along, the full rent would still be paid (see *St. Catharines* case, attached). The risk of incurring a transformation of a joint and several tenancy to tenancies in common means landlords would be less likely to rent to students or “roommates” regardless of demand.

There is now some persuasive precedent at the LTB to reduce the risk of renting to students and roommates on a joint and several basis since application of a 19th century statute and common law principles of four unities have been found to be displaced by the simple statutory principle that “The RTA applies despite any other act...” as set out in s. 3 RTA (see *JDN v. Edmond et. al*, attached).

ARE THERE SPECIAL RULES FOR “LUXURY” RENTALS?

The answer to the above question is “no”, but as a practical matter, when dealing with high end rentals, there is less likely to be reliance on RTA rights and a greater likelihood that the parties will honour the terms of their rental agreements. There is a requirement, regardless of how luxurious the rental is, that the Standard Form of Lease be used, but as a practical matter, if a special form of tenancy agreement is used it does not mean the agreement is unenforceable, nor is it an offence to use a form of tenancy agreement other than the Standard Form of Lease.

If there is a default under the lease then swift legal action should be taken due to the limitation of the monetary jurisdiction of the LTB (\$25K) and the much higher cost of enforcement in Superior Court if the arrears exceed the LTB monetary jurisdiction. Since it can take months for a hearing to be completed at the LTB, the limitation of jurisdiction in recovery of rent arrears for a luxury rental is a substantial factor in deciding to pursue a remedy quickly, even if the remedy is just seeking judgment for arrears of rent and not eviction.

There are also no special rules for termination of a luxury rental; consequently if an individual rents out their home on a temporary basis (ie: a “snowbird” or a teacher renting for a few months), serious problems can arise if the tenant refuses to move. The RTA states that an agreement to terminate a tenancy that is entered into at the commencement of a tenancy is “void” (s. 37 (4) RTA); consequently, if a tenant refuses to leave at the end of a short term tenancy, a homeowner who wishes to regain possession of their home must serve a proper 60 day notice of termination based on “landlord’s own use” as discussed above and then stay in a hotel or with friends (for months!) until such time as the order can be enforced.

One option to consider when dealing with short term rentals is to rent the space to a trusted friend who in turn can ‘sublet’ the space to a prospective subtenant and thereby ensure that the right to vacant possession at the end of the term can be enforced more effectively, but we won’t go into the full details of implementing that option here: get competent legal advice if your client is considering letting their home for rent on a short term basis!

Attachments

1. LTB “**Guideline 12**”: A roadmap for Landlord’s own use and for giving notices on behalf of prospective purchasers
2. Sertic v. Mergarten, 2017 ONSC 263
3. Ontario Regulation 9/18
4. **Excerpts** of Standard Lease Agreement
5. Rent Control Bulletin: “Municipal Charges”
6. 2161907 Ontario Inc v. City of St Catharines et al, 2010 ONSC 4548
7. JDN v. Edmond et. al [2018] SWL-02916-17-RV



Eviction for Personal Use, Demolition, Repairs and Conversion

Interpretation Guideline G12

Interpretation Guidelines are intended to assist the parties in understanding the Board's usual interpretation of the law, to provide guidance to Members and promote consistency in decision-making. However, a Member is not required to follow a Guideline and may make a different decision depending on the facts of the case.

Introduction

A landlord may apply to terminate a tenancy on the basis the rental unit is needed for use by the landlord, the landlord's family member, or a person who provides or will provide care services to the landlord or landlord's family. A landlord may also terminate a tenancy on the basis the rental unit is required for the personal use of a purchaser, the purchaser's family member, or a person who provides or will provide care services to the purchaser or purchaser's family.

A landlord may also apply to terminate a tenancy on the basis that the landlord: (1) will demolish the rental unit; (2) needs vacant possession to do extensive repairs or renovations; or (3) intends to convert the rental unit to non-residential use.

This Guideline discusses how the Landlord and Tenant Board (LTB) deals with these applications made under the *Residential Tenancies Act, 2006* ("RTA"). Amendments were made to some of the RTA provisions on September 1, 2017 in Bill 124, *An Act to amend the Residential Tenancies Act, 2006*. Special transitional rules may apply to some notices and applications served before the amendments were proclaimed.

For general information about eviction applications, see Guideline 10, "Procedural Issues regarding Eviction Applications".

Personal use by the landlord or landlord's family

Section 48(1) of the RTA permits the landlord to give notice of termination to a tenant if the landlord, in good faith, requires the unit for residential occupation for a period of at least one

year by the landlord, a family member or a caregiver. This notice is often referred to as a "Form N12".

Section 191 of the RTA and LTB [Rule 5](#) set out the rules about how to serve documents.

Who can occupy the rental unit?

The Form N12 can indicate that any one of the following persons intends to occupy the rental unit: the landlord; the landlord's spouse; a child or a parent of either the landlord or the landlord's spouse; or a person who provides or will provide care services to the landlord or a family member of the landlord where the person receiving the care services resides or will reside in the building.

The notice of termination cannot include other family members who are not specified in section 48(1), such as a landlord's siblings. See for example: [TSL-70431-16 \(Re\)](#), 2016 CanLII 52813 (ON LTB); [NOL-03484-10 \(Re\)](#), 2011 CanLII 5985 (ON LTB).

Termination date

The termination date in the landlord's notice of termination must be at least 60 days after the notice is given and must be the last day of a fixed term tenancy, or if there is no fixed term, on the last day of a rental period. For example, if the current month is January and the lease expires on June 30 of the same year, the termination date should be June 30. If there is a month to month tenancy agreement and notice is provided to the tenant on January 20, the earliest the termination date on the notice can be is March 31 which is 60 days after the notice is given and on the last day of the monthly rental period.

A notice of termination with an incorrect termination date is defective. A defective notice cannot be amended after it has been given to the tenant. The LTB cannot issue an order terminating a tenancy on the basis of a defective notice of termination. See for example: [CEL-02248 \(Re\)](#), 2007 CanLII 75937 (ON LTB); [TSL-72954-16 \(Re\)](#), 2016 CanLII 44293 (ON LTB).

After being given the notice, the tenant is allowed to terminate the tenancy at an earlier date by giving the landlord ten days written notice.

The landlord may apply to the LTB for an eviction order as soon as the notice has been given to the tenant, but section 69(2) of the RTA says that it may not be filed later than 30 days after the termination date in the notice. If the application is filed late, it will be dismissed. The LTB schedules a hearing to consider the landlord's application and all parties have a right to attend the hearing and provide relevant evidence and submissions.

Affidavit

Subsection 72(1) of the RTA requires the landlord to file an affidavit sworn by the person who personally requires the rental unit certifying that the person in good faith requires the rental unit for his or her own personal use for at least one year. The person who provided the affidavit is not required to testify at the LTB hearing, unless they have been summoned by one of the parties. However, as a general principle of law, oral testimony at an LTB hearing is given greater weight than testimony provide by affidavit.

Examples of LTB orders addressing the affidavit requirement include: TNL-86355-16; SWL-85060-16 (Re), 2016 CanLII 44343 (ON LTB); TSL-70431-16 (Re), 2016 CanLII 52813 (ON LTB).

If there is a conflict between the oral testimony and the affidavit it is up to the Member to decide what evidence is most persuasive: Sertic v. Mergarten, 2017 ONSC 263.

Requirement of good faith

At the LTB hearing the landlord must prove, on a balance of probabilities, that he or she in good faith requires the rental unit for the purpose of residential occupation by the person specified in the notice of termination. That means that the Member must decide whether it is more likely than not the landlord or family member will move into the unit within a reasonable time after the unit becomes vacant.

When deciding "good faith" the LTB must consider whether the landlord has a genuine intention to occupy the premises. Whether the landlord's plan is reasonable is not the test: Feeney v. Noble, 1994 CanLII 10538 (ON SC).

In Salter v. Beljinac, 2001 CanLII 40231 (ON SCDC) the Divisional Court stated at paras 18, 26-27:

In my view, s.51(1) [now RTA s.48(1)] charges the finder of fact with the task of determining whether the landlord's professed intent to want to reclaim the unit for a family member is genuine, that is, the notice to terminate the tenancy is made in good faith. The alternative finding of fact would be that the landlord does not have a genuine intent to reclaim the unit for the purpose of residential occupation by a family member.

While it is relevant to the good faith of the landlord's stated intention to determine the likelihood that the intended family member will move into the unit, the Tribunal stops short of entering into an analysis of the landlord's various options.

Once the landlord is acting in good faith, then necessarily from the landlord's subjective perspective the landlord *requires* the unit for the purpose of residential occupation by a family

member. That is sufficient to meet the s.51(1) standard. The fact that the landlord might choose the particular unit to occupy for economic reasons does not result in failing to meet the s.51(1) standard.

In *Fava v. Harrison*, 2014 ONSC 3352, the Divisional Court affirmed that the motives of the landlord in seeking possession of the rental unit are largely irrelevant and that the only issue is whether the landlord has a genuine intent to reside in the property. The Court also stated the LTB can consider the conduct and the motives of the landlord in order to draw inferences as to whether the landlord desires, in good faith, to occupy the property.

For example, a tenant may wish to prove that the same landlord gave a notice of termination for personal use of another unit earlier, obtained possession and then rented it to another tenant. This is not determinative evidence that the landlord lacks good faith, but it may be considered by the Member in weighing the landlord's evidence. Evidence of previous problems between the current tenant and the landlord may also be relevant to the genuineness of the landlord's intention to use the unit as stated in the notice.

Examples of LTB orders finding that the landlord has satisfied the good faith requirement: [TEL-69842-16 \(Re\)](#), 2016 CanLII 38802 (ON LTB); [TSL-60770-15 \(Re\)](#), 2015 CanLII 69062 (ON LTB); [TSL-56775-14 \(Re\)](#), 2014 CanLII 71671 (ON LTB); [TSL-75867-16 \(Re\)](#), 2016 CanLII 71599 (ON LTB).

Examples of LTB orders finding that the landlord has not satisfied the good faith requirement: [TSL-76001-16 \(Re\)](#), 2017 CanLII 28525 (ON LTB), [EAL-59819-16 \(Re\)](#), 2016 CanLII 88067 (ON LTB); [TSL-55743-14 \(Re\)](#), 2015 CanLII 9141 (ON LTB); [TSL-09908-10 \(Re\)](#), 2011 CanLII 13483 (ON LTB).

Allowable uses of the rental unit

The landlord must establish that the unit will be used for "residential occupation" as required by section 48 of the RTA. That term is not defined in the RTA but it has been considered in a number of LTB and court decisions.

- Occasional or infrequent use of the rental unit may not constitute residential occupation: [TSL-65943-15 \(Re\)](#), 2015 CanLII 94908 (ON LTB); [CET-33575-13 \(Re\)](#), 2014 CanLII 71654 (ON LTB); [NOL-09721-12 \(Re\)](#), 2012 CanLII 74622 (ON LTB); [TSL-08570-10 \(Re\)](#), 2010 CanLII 76079 (ON LTB).
- Using the rental unit as a business office so that the landlord can meet with tenants of the building and have access to a bathroom was found to be inconsistent with the purpose of subsection 48(1): [TSL-24120-12 \(Re\)](#), 2012 CanLII 21575 (ON LTB).

- Leaving the rental unit empty after the tenant vacates was found not to be residential occupation: TEL-01943 (Re), 2007 CanLII 75965 (ON LTB).
- Using the basement rental unit for storage of items the landlord uses for her profession and to construct a recreation room was found to be residential occupation: TSL-62768-15-RV2 (Re), 2015 CanLII 100191 (ON LTB), upheld by the Divisional Court, Sertic v. Mergarten, 2017 ONSC 263.
- Using a basement rental unit as home office/study where the landlord lives on the upper floors was found to be "residential occupation" so long as the scholarly, professional, business or other such activity does not constitute the predominant use: TSL-72600 [2005] O.R.H.T.D. No. 34.

Corporate landlords and shareholders of a corporation

On September 1, 2017 the RTA was amended to provide that section 48 only applies to rental units owned by landlords who are individuals. A corporate landlord cannot serve a notice under section 48 or obtain an eviction order under this section. Earlier decisions permitting some corporations to serve this type of notice are no longer valid.

Compensation

For notices under section 48 given to a tenant on or after September 1, 2017, the landlord must compensate the tenant in an amount equal to one month's rent or offer another rental unit acceptable to the tenant. This requirement must be met before the termination date on the notice of termination. The LTB will not issue an order ending the tenancy and evicting the tenant unless the landlord has satisfied this obligation. Under subsection 135(1.1) of the RTA, a landlord is deemed to have retained money in contravention of the RTA, if the landlord fails to pay the tenant the required compensation.

Personal use by a Purchaser or their family

Section 49 of the RTA permits the landlord to give notice of termination to a tenant on behalf of a purchaser of the rental unit if:

- a. the landlord has entered into an agreement of purchase and sale to sell a residential complex containing no more than 3 units, or a condominium unit; and
- b. the purchaser, in good faith, requires possession of the complex or the unit for residential occupation by the purchaser, his or her spouse, or a child or parent of one of them.

Agreement of purchase and sale

Before a landlord may give a notice under section 49, there must be an agreement of purchase and sale for the residential complex or condominium unit. The LTB may refuse an application if it is not reasonably certain that a completed sale will result from the agreement. If a term or condition of the agreement makes it uncertain that the deal will be completed, it may be appropriate to delay the application until the sale becomes more certain.

The LTB may also dismiss the application if satisfied the purchase is a pretence created for the purpose of evicting the tenant. For example, a transfer to a family member or a sale for much less than market value may raise questions. Section 202 of the RTA directs the LTB to look at the real nature of any transactions. See for example: SOL-01897 (Re), 2007 CanLII 75946 (ON LTB); CEL-61051-16 (Re), 2016 CanLII 88110 (ON LTB).

A landlord applying based on a notice under section 49 is well advised to submit a copy of the agreement of purchase and sale with the application, together with an explanation of the circumstances of the intended sale.

There is also a good faith requirement similar to that related to section 48 (see above). The requirement relates to the genuine intention of the purchaser and the person who declares they intend to occupy the unit (see subsections 49(1) and 72(1) of the RTA). See for example: TSL-76546-16 (Re), 2016 CanLII 71338 (ON LTB); TNL-27406-12 (Re), 2012 CanLII 27936 (ON LTB).

As section 49(1) states that a notice to terminate a tenancy for use by a purchaser or family member can only be served if the residential complex has no more than three residential units, an application concerning a residential complex with more than three units will be dismissed: TSL-80642-16 (Re), 2017 CanLII 28814 (ON LTB).

Personal use by a person who provides or will provide care services

Subsection 48(1)(d) and 49(1)(d) of the RTA permit a landlord to give notice of termination to a tenant if the landlord or purchaser, in good faith, requires the unit for residential occupation by a person who provides or will provide care services to the landlord or purchaser, or the landlord's or purchaser's spouse, parent, child, or spouse's parent or child. In the case of care services being provided to the landlord or the landlord's family, the caregiver must live in the rental unit for at least one year.

The person receiving the care must reside or intend to reside in the building, related group of buildings, mobile home park or land lease community in which the rental unit is located.

Under section 2 of the RTA, "care services" is defined as meaning "subject to the regulations, health care services, rehabilitative or therapeutic services or services that provide assistance with the activities of daily living". Care services are further defined in section 2 of Ontario Regulation 516/06.

Restriction on "co-ownerships"

Subsection 72(2) of the RTA contains special provisions that apply only to an unusual type of housing arrangement known as "co-ownership". This involves a number of individuals owning a building through a corporation or as tenants-in-common. Subsection 72(2) applies when such a building has been marketed as single units. This method of offering a building for sale on a unit basis avoids the rules of the *Condominium Act*. The co-owner has no rights to the unit they are apparently buying, except by agreement with the other co-owners. Their rights respecting the unit may include both the rent revenue from that unit and the right to occupy the unit.

Subsection 72(2) provides protection for tenants of units that have been sold in this way to co-owners. Even if the co-ownership agreement purports to give the "unit owner" the right to occupy the unit, they cannot do so unless: the building does not have more than four units, or; the landlord, the landlord's spouse, a child or a parent of either the landlord or the landlord's spouse, or a person who provided care services to the landlord, the landlord's spouse, or a child or parent of the landlord or the landlord's spouse previously lived in the unit.

This section of the RTA does not apply to other types of rental units and is not a general prohibition on landlords of complexes with more than four rental units relying upon sections 48 or 49 of the RTA. See *Seibert v. Juhasz*, 2012 ONSC 5447.

Termination for demolition/renovation/conversion

Section 50(1) of the RTA allows a landlord to serve a notice of termination if the landlord intends to:

1. demolish the rental unit;
2. convert it to a purpose other than residential premises; or
3. do repairs or renovations to it that are so extensive that they require a building permit and vacant possession of the rental unit.

The termination date in the landlord's notice of termination must be at least 120 days after the notice is given and must be the last day of a fixed term tenancy, or if there is no fixed term, the last day of a rental period. This notice is often referred to as a "Form N13". Also see the above discussion about the consequence of an incorrect termination date on the notice.

After being given the notice, the tenant is allowed to terminate the tenancy at an earlier date by giving the landlord ten days written notice.

Demolition

If a tenant is given a notice because the rental unit is being demolished and is located in a residential complex that contains at least five residential units, the landlord must give the tenant an amount equal to three months' rent or offer the tenant another rental unit that is acceptable to the tenant. This requirement does not apply if the landlord has been ordered to demolish the residential complex.

Whether or not the intended activity constitutes "demolition" is discussed in these LTB orders: [TSL-51257-14-RV \(Re\)](#), 2015 CanLII 22344 (ON LTB); [TSL-05299-10 \(Re\)](#), 2010 CanLII 76078 (ON LTB).

Conversion

If a tenant is given a notice because the rental unit is being converted to a non-residential use and is located in a residential complex that contains at least five residential units, the landlord must give the tenant an amount equal to three months' rent or offer the tenant another rental unit that is acceptable to the tenant. See for example: [NOL-07899 \(Re\)](#), 2009 CanLII 77993 (ON LTB).

Whether or not the intended activity constitutes conversion to a non-residential use is discussed in these LTB orders: [TSL-66897-15 \(Re\)](#), 2015 CanLII 99152 (ON LTB); [TSL-12596 \(Re\)](#), 2009 CanLII 51178 (ON LTB).

Whether the landlord intends in good faith to convert the rental unit to a non-residential use is discussed in these LTB orders: [TSL-66668-15 \(Re\)](#), 2015 CanLII 94900 (ON LTB); [SOL-14849-11 \(Re\)](#), 2011 CanLII 34688 (ON LTB).

Renovation/repair

If a tenant is given a notice because of extensive repairs or renovations, the tenant can choose to move back into the rental unit after the repairs or renovations are complete. The rent must be the same as the rent before the tenancy was terminated. Before the tenant moves out, the tenant must inform the landlord in writing of their intent to re-occupy the rental unit. The tenant also has to keep the landlord informed in writing of any change in their address.

If the rental unit is located in a residential complex that contains at least five residential units and the tenant does not give the landlord a written notice stating that they want to move back

after the repairs are completed, the landlord must give the tenant an amount equal to three months' rent or offer another rental unit that is acceptable to the tenant.

This requirement does not apply if the landlord has been ordered to do the repair or renovation.

If the tenant lives in a residential complex that contains at least five residential units and gives written notice that they will be moving back into the rental unit once the repairs are complete, the landlord must give the tenant an amount equal to the rent for the lesser of three months and the period of time that the unit is undergoing repairs or renovations. This requirement does not apply if the landlord has been ordered to do the repair or renovation.

Whether vacant possession is necessary for the landlord to do the repairs or renovations is discussed in these LTB orders: TSL-81965-17 (Re), 2017 CanLII 28702 (ON LTB); SOL-14870-11 (Re), 2011 CanLII 101419 (ON LTB).

Mobile Homes and Care Homes

If the landlord is giving the notice because the landlord will be converting, demolishing, repairing or renovating a site on which a tenant-owned mobile home or land lease community home is located, the landlord must give the tenant: (a) a minimum of one year's notice; and (b) compensation equal to one year's rent, or \$3,000, whichever is less.

There are also special rules that apply to care homes, including a requirement that the landlord make reasonable efforts to find the tenant suitable alternate accommodation.

Application and issues the LTB will address at the hearing

The landlord may apply to the LTB for an eviction order as soon as the notice has been given to the tenant, but section 69(2) of the RTA says that it may not be filed later than 30 days after the termination date in the notice. If the application is filed late, it will be dismissed. The LTB schedules a hearing to consider the landlord's application and all parties have a right to attend the hearing and provide relevant evidence and submissions.

At the hearing the landlord must prove, on a balance of probabilities, that he or she in good faith intends to carry out the activity specified in the notice of termination. That means that the LTB must decide whether it is more likely than not the landlord will carry out the activity within a reasonable time after the unit becomes vacant.

The landlord must also prove that he or she has:

- a. obtained all of the necessary permits or other required authority or taken; or

- b. taken all reasonable steps to obtain all necessary permits or other authority that may be required to carry out the activity, if it is not possible to obtain the permits or other authority until the rental unit is vacant. [See for example: [TSL-81104-17 \(Re\)](#), 2017 CanLII 28544 (ON LTB).]

LTB Order and relief from eviction

After holding a hearing, the LTB may issue an eviction order if the landlord has proven their case. The eviction enforcement date cannot be before the termination date in the notice.

Even where the LTB finds that the landlord or purchaser requires the unit in good faith or intends to carry out the activity described in the notice, under section 83 of the RTA the LTB must consider, having regard to all the circumstances, whether to refuse to grant the application or to postpone the eviction. In some cases, refusing or delaying the eviction is discretionary. See for example: [NOL-15753-14-RV \(Re\)](#), 2014 CanLII 57596 (ON LTB); [TSL-71705-16 \(Re\)](#), 2016 CanLII 71624 (ON LTB); [TSL-70781-16 \(Re\)](#), 2016 CanLII 39812 (ON LTB); [TSL-12596 \(Re\)](#), 2009 CanLII 51178 (ON LTB). In other cases, refusing the eviction is mandatory. See for example: [SOL-53030-14 \(Re\)](#), 2015 CanLII 16020 (ON LTB); [TSL-51257-14-RV \(Re\)](#), 2015 CanLII 22344 (ON LTB); [TSL-60770-15 \(Re\)](#), 2015 CanLII 69062 (ON LTB).

If the landlord does not provide the tenant with the required compensation, as discussed above, the LTB must refuse the eviction. If the landlord pays the tenant the required compensation and the LTB dismisses the landlord's application, the tenant may be ordered to re-pay the landlord.

See also [Caputo v. Newberg](#), 2009 CanLII 32908 (ON SCDC), and [Guideline 7: "Relief from Eviction - Refusing or Delaying an Eviction"](#).

Landlord gave notice in bad faith

A former tenant may file an application with the LTB under section 57 of the RTA if the former tenant believes that:

- a. the landlord gave a notice to a tenant under sections 48,49 or 50 in bad faith; and
- b. the tenant moves out of the unit as a result of the landlord's notice or an application to the Board or an order by the Board based on such a notice; and
- c. no person specified under the appropriate subsection has occupied the unit within a reasonable time after the tenant vacated the rental unit, or the landlord did not demolish, convert or repair or renovate the rental unit within a reasonable time after the tenant vacated the rental unit.

The LTB holds a hearing to consider the former tenant's application and all parties have an opportunity to attend and provide relevant evidence and submissions. It is the tenant, as the applicant, who must prove all three elements of the test set out above.

Examples of LTB orders finding that the tenant has satisfied the three parts of the test contained in section 57 include: SWT-95207-16 (Re), 2017 CanLII 9457 (ON LTB); TST-77957-16 (Re), 2016 CanLII 88282 (ON LTB); TST-77144-16 (Re), 2016 CanLII 88292 (ON LTB); TST-72609-16 (Re), 2016 CanLII 71210 (ON LTB); TST-63263-15 (Re), 2015 CanLII 75856 (ON LTB); TST-68404-15 (Re), 2016 CanLII 40119 (ON LTB).

Examples of LTB orders finding that the tenant has not satisfied the three parts of the test contained in section 57 include: TET-67474-16 (Re), 2016 CanLII 52833 (ON LTB); TST-63837-15 (Re), 2016 CanLII 39762 (ON LTB); TST-62541-15 (Re), 2015 CanLII 59059 (ON LTB); TST-57328-14 (Re), 2015 CanLII 93464 (ON LTB); CET-33575-13 (Re), 2014 CanLII 71654 (ON LTB).

For applications based on a notice given under section 48 on or after September 1, 2017, it is presumed, unless the contrary is proven on a balance of probabilities, that a landlord gave the notice of termination in bad faith if the landlord:

- a. advertises the rental unit for rent;
- b. enters into a tenancy agreement in respect of the rental unit with someone other than the former tenant;
- c. advertises the rental unit, or the building that contains the rental unit, for sale;
- d. demolishes the rental unit or the building containing the rental unit; or
- e. takes any step to convert the rental unit, or the building containing the rental unit, to use for a purpose other than residential premises.

These provisions only apply during the period that begins on the date the landlord gave the tenant the notice and ends one year after the former tenant moves out of the unit.

Remedies the LTB may award

If the tenant proves all three elements of the test set out above, the LTB may order the landlord to pay:

- a. a specified sum to the tenant for all or any portion of any increased rent that the former tenant has incurred or will incur for a one-year period after vacating the rental unit;

- b. reasonable out-of-pocket moving, storage and other like expenses that the former tenant has incurred or will incur;
- c. an order for abatement of rent;
- d. an administrative fine not exceeding the greater of \$25,000 and the monetary jurisdiction of the Small Claims Court; or,
- e. any other order that the LTB considers appropriate.

Who should be named as the respondent

In considering whether the tenant has satisfied the three parts of the test contained in section 57, the LTB must consider the conduct and knowledge of the landlord who served the notice of termination. If the tenancy was terminated as a result of a notice of termination for personal use of a unit by a purchaser, a family member of the purchaser, or a person who provides or will provide care services, it is the landlord who served the notice of termination who should be named as the respondent.

September 1, 2017

sjto.ca/ltb

CITATION: Sertic v. Mergarten, 2017 ONSC 263
DIVISIONAL COURT FILE NO.: 280/16
LTB FILE NOS.: TSL-62768-15-RV2
TST-64537-15-RV2
DATE: 20170111

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

NORDHEIMER, STEWART and LABROSSE JJ.

BETWEEN:)
)
KATRY MARIA SERTIC) *David Strashin*, for the Respondent
) (Landlord)
Respondent (Landlord))
)
– and –)
)
DANIELA MERGARTEN) *Karen Andrews*, for the Appellant(Tenant)
)
Appellant (Tenant)) *Brian A Blumenthal* for the Landlord and
) Tenant Board
)
)
) **HEARD at Toronto:** January 11, 2017

NORDHEIMER J. (orally)

[1] Daniela Mergarten, the tenant, appeals from two orders of the Landlord and Tenant Board. The first order allowed the landlord’s application to evict the tenant so that the landlord could take possession of the premises for her own purposes. The second order dismissed the tenant’s request for a review of the first order.

[2] An appeal lies to the Divisional Court from an order of the Board restricted, though, to a question of law: *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s. 210.

[3] The matter proceeded in a somewhat unusual way. The landlord had sought to evict the tenant on an earlier occasion, but the Board found that the landlord’s wish to repossess the premises was more for the purposes of a conversion and not for the purposes of “residential occupation” under s. 48(1) of the *Residential Tenancies Act, 2006* because storage did not constitute such a use.

[4] The landlord then brought a second application to evict the tenant for the purpose of converting the premises for non-residential use – a process that the Board had suggested, in its reasons on the first application, the landlord might use.

[5] When the second application came before a Vice-Chair of the Board, he raised an issue whether the holding by the Board on the first application was correct. In particular, the Vice-Chair expressed doubt about the conclusion, that using the premises for storage that was related to the landlord's personal occupation of the premises, did not constitute residential occupation. I note that the premises in question are the basement of a house that the landlord otherwise occupies. The Vice-Chair then adjourned the hearing to allow the parties to make submissions on this issue. The hearing continued on two subsequent dates after which the Vice-Chair made the decision that is now the subject of this appeal.

[6] At the time that this matter was heard, the rules of the Board, under rule 29.1.1, expressly permitted a Vice-Chair of the Board to initiate a review of any order or decision. The rules have since been amended to give that authority to the Board as a whole: rule 29.4. It was therefore open to the Vice-Chair to take the steps that he did to revisit the earlier order. There was no prejudice to the parties in doing so, as they were given ample time to regroup and respond to the concerns that the Vice-Chair raised, nor was there any procedural unfairness visited on the parties by the manner in which the Vice-Chair chose to raise the issue.

[7] While the tenant raises issues regarding the *bona fides* of the landlord's desire to occupy the premises for her own purposes, the Vice-Chair heard the evidence on this point, and was satisfied that was the intention of the landlord. The tenant submits that that finding was not open to the Board because the landlord's affidavit did not so state. I am unaware of any legal principle that provides that the contents of an affidavit overrules the *viva voce* evidence heard. While conflicts between the two are always a matter of concern, it is ultimately up to the trier of fact to decide what evidence they accept and what they do not. The Board accepted the *viva voce* evidence of the landlord. There is no basis for this court to interfere with his conclusion on the evidence that he heard.

[8] I also do not find any basis to interfere with the Vice-Chair's conclusion as to the proper meaning of the term "residential occupation". In my view, the Vice-Chair's interpretation, that requiring the premises for the purposes of storage and other uses directly related to the landlord's otherwise personal occupation of other portions of the premises meets the requirement of residential occupation, is a reasonable one. I note, on this point, that a tribunal's interpretation of its home statute is generally to be reviewed on a standard of reasonableness, not correctness: *First Ontario Realty Corp. v. Deng*, [2011] O.J. No. 260 (C.A.).

[9] Finally, I see no merit in the appellant's contention that the Vice-Chair demonstrated a reasonable apprehension of bias in the manner in which he dealt with this matter. The interest of the Vice-Chair was clearly to try and deal with the ultimate determination in a manner that was as expeditious as possible. This was in the best interests of all parties, and consistent with the general approach of the Board to matters that come before it, and its statutory mandate under

s.183. The appellant may not like the result, but there is no basis for suggesting that the handling of the matter by the Vice-Chair evidences any appearance of bias. No reasonable person, fully informed of the facts, could conclude that the Vice-Chair was not an impartial and objective decision-maker.

[10] Given my conclusions regarding the first order, there is no basis for interfering with the review order of the Board that essentially reached the same conclusion.

[11] The appeal is dismissed.

COSTS

[12] I have endorsed the Appeal Book and Compendium as follows: “For oral reasons given today, the appeal is dismissed. While the landlord and tenant agreed that costs of \$2,500 are reasonable, given the unusual way in which this matter arose, particularly at the instance of the Board itself, we would exercise our discretion and make no order as to costs.”

Nordheimer J.

I agree

Stewart J.

I agree

Labrosse J.

Date of Reasons for Judgment: January 11, 2017

Date of Release: January 12, 2017

CITATION: Sertic v. Mergarten, 2017 ONSC 263
DIVISIONAL COURT FILE NO.: 280/16
LTB FILE NOS.: TSL-62768-15-RV2
TST-64537-15-RV2
DATE: 20170111

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

**NORDHEIMER, STEWART
and LABROSSE JJ.**

BETWEEN:

KATRY MARIA SERTIC

Respondent (Landlord)

– and –

DANIELA MERGARTEN

Appellant (Tenant)

ORAL REASONS FOR JUDGMENT

NORDHEIMER J.

Date of Reasons for Judgment: January 11, 2017

Date of Release: January 12, 2017

ONTARIO REGULATION 9/18
made under the
RESIDENTIAL TENANCIES ACT, 2006

Made: February 6, 2018
Filed: February 7, 2018
Published on e-Laws: February 7, 2018
Printed in *The Ontario Gazette*: February 24, 2018

TENANCY AGREEMENTS FOR TENANCIES OF A PRESCRIBED CLASS

Prescribed class of tenancies

1. The following class of tenancies is prescribed for the purposes of subsection 12.1 (1) of the Act:
 1. The class that consists of all tenancies for occupancy of accommodation with respect to which all or part of the Act, other than Part V.1, applies, except for tenancies for occupancy of any of the following:
 - i. A rental unit in a care home.
 - ii. A rental unit that consists solely of a site for a mobile home.
 - iii. A rental unit that consists solely of a site on which there is a land lease home.
 - iv. Accommodation described in clause 6 (1) (a) or (b) of the Act.
 - v. A rental unit described in subsection 7 (1) of the Act.
 - vi. A rental unit described in subsection 6 (1) or (3) of Ontario Regulation 516/06 (General) made under the Act.
 - vii. Any accommodation which is not described in subparagraphs i to vi and for which the tenant pays rent in an amount geared-to-income due to public funding.

Prescribed date

2. For the purposes of subsection 12.1 (1) of the Act, the prescribed date for the prescribed class of tenancies described in paragraph 1 of section 1 of this Regulation is April 30, 2018.

Prescribed form of tenancy agreement

3. For the purposes of paragraph 1 of subsection 12.1 (1) of the Act, the prescribed form of tenancy agreement for the prescribed class of tenancies described in paragraph 1 of section 1 of this Regulation is,
 1. the form in English entitled “Residential Tenancy Agreement (Standard Form of Lease)”, dated 2018/01 and available on the website of the Government of Ontario Central Forms Repository, or
 2. the form in French entitled “Convention de location à usage d’habitation (Bail standard)”, dated 2018/01 and available on the website of the Government of Ontario Central Forms Repository.

Prescribed requirements for tenancy agreement

4. For the purposes of paragraph 2 of subsection 12.1 (1) of the Act, the prescribed requirements for a tenancy agreement for the prescribed class of tenancies described in paragraph 1 of section 1 of this Regulation are as follows:
 1. The tenancy agreement shall set out, in their entirety and in substantially the same format as in the prescribed form of tenancy agreement described in section 3, all the contents of the prescribed form, which consists of the following parts:
 - i. An introductory note, which sets out general information about the agreement and about legislation governing landlords and tenants.
 - ii. Sections, which set out all the mandatory terms of the agreement and provide information or instructions respecting the mandatory terms.
 - iii. An appendix, which sets out general information relating to the rights and responsibilities of landlords and tenants.
 2. The tenancy agreement may include additional terms but only if those terms are not inconsistent with the mandatory terms set out in the prescribed form of tenancy agreement described in section 3, and any such additional term included in the tenancy agreement that is inconsistent with those mandatory terms is void.

Clarification

5. For greater certainty, in this Regulation, a reference to a tenancy does not include a subtenancy and a reference to a tenancy agreement does not include a subletting agreement.

Commencement

6. This Regulation comes into force on April 30, 2018.

Made by:

Pris par :

Le ministre du Logement,

PETER MILCZYN
Minister of Housing

Date made: February 6, 2018
Pris le : 6 février 2018

Français

[Back to top](#)

Note

This tenancy agreement (or lease) is required for tenancies entered into on **April 30, 2018 or later**. It does not apply to care homes, sites in mobile home parks and land lease communities, most social housing, certain other special tenancies or co-operative housing (see Part A of General Information).

Residential tenancies in Ontario are governed by the *Residential Tenancies Act, 2006*. This agreement cannot take away a right or responsibility under the *Residential Tenancies Act, 2006*.

Under the Ontario *Human Rights Code*, everyone has the right to equal treatment in housing without discrimination or harassment.

All sections of this agreement are mandatory and cannot be changed.

1. Parties to the Agreement
Residential Tenancy Agreement between:
Landlord(s)

Landlord's Legal Name

Note:

See Part B in General Information

and Tenant(s)

Last Name

First Name

2. Rental Unit

The landlord will rent to the tenant the rental unit at:

Unit (e.g., unit 1 or basement unit)

Street Number

Street Name

City/Town

Province
Ontario

Postal Code

Number of vehicle parking spaces and description (e.g., indoor/outdoor, location)

The rental unit is a unit in a condominium. Yes No

If yes, the tenant agrees to comply with the condominium declaration, by-laws and rules, as provided by the landlord.

3. Contact Information

Address for Giving Notices or Documents to the Landlord

Unit	Street Number	Street Name	PO Box
City/Town	Province		Postal Code / ZIP Code

Both the landlord and tenant agree to receive notices and documents by email, where allowed by the Landlord and Tenant Board's Rules of Practice.

Yes No

If yes, provide email addresses:

The landlord is providing phone and/or email contact information for emergencies or day-to-day communications:

Yes No

If yes, provide information:

Note:

See Part B and E in General Information

4. Term of Tenancy Agreement

This tenancy starts on: _____
Date (yyyy/mm/dd)

This tenancy agreement is for: (select an option below and fill in details as needed)

a fixed length of time ending on: _____
Date (yyyy/mm/dd)

a monthly tenancy

other (such as daily, weekly, please specify): _____

Note:

The tenant does not have to move out at the end of the term. See Parts C and D in General Information.

5. Rent

a) Rent is to be paid on the _____ (e.g., first, second, last) day of each (select one):

Month

Other (e.g., weekly) _____

b) The tenant will pay the following rent:

Base rent for the rental unit _____

Parking (if applicable) _____

Other services and utilities (specify if applicable):

Total Rent (Lawful Rent) _____

This is the lawful rent for the unit, subject to any rent increases allowed under the *Residential Tenancies Act, 2006*. For example, the landlord and tenant may agree to a seasonal rent increase for additional services of air conditioning or a block heater plug-in. This amount does not include any rent discounts (see Section 7 and Part G in General Information).

c) Rent is payable to:

d) Rent will be paid using the following methods:

Note:
The tenant cannot be required to pay rent by post-dated cheques or automatic payments, but can choose to do so.

e) If the first rental period (e.g., month) is a partial period, the tenant will pay a partial rent of \$ _____ on _____ . This partial rent covers the rental of the unit from _____ to _____ .
Date (yyyy/mm/dd) Date (yyyy/mm/dd) Date (yyyy/mm/dd)

f) If the tenant's cheque is returned because of non-sufficient funds (NSF), the tenant will have to pay the landlord's administration charge of \$ _____ plus any NSF charges made by the landlord's bank.

Note:
The landlord's administration charge for an NSF cheque cannot be more than \$20.00

6. Services and Utilities

The following services are included in the lawful rent for the rental unit, as specified:

Gas	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Air conditioning	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Additional storage space	<input type="checkbox"/> Yes	<input type="checkbox"/> No
On-Site Laundry	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> No Charge <input type="checkbox"/> Pay Per use
Guest Parking	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/> No Charge <input type="checkbox"/> Pay Per use
Other _____	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Other _____	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Provide details about services or list any additional services if needed (if necessary add additional pages):

The following utilities are the responsibility of:

Electricity Landlord Tenant

Heat Landlord Tenant

Water Landlord Tenant

If the tenant is responsible for any utilities, provide details of the arrangement, e.g. tenant sets up account with and pays the utility provider, tenant pays a portion of the utility costs (if necessary add additional pages):

Note:

If the tenant will be responsible for paying for electricity measured by a meter or suite meter, the landlord must give the prospective tenant available information about the electricity usage in the rental unit over the last twelve months using the appropriate Landlord and Tenant Board form.

7. Rent Discounts

Select one:

There is no rent discount.

or

The lawful rent will be discounted as follows:

Provide description of rent discount (if necessary add additional pages):

Note:

See Part G in General Information for what types of discounts are allowed.

8. Rent Deposit

Select one:

A rent deposit is not required.

or

The tenant will pay a rent deposit of \$ _____ . This can only be applied to the rent for the last rental period

of the tenancy.

Note:

This amount cannot be more than one month's rent or the rent for one rental period (e.g., one week in a weekly tenancy), whichever is less. This cannot be used as a damage deposit. The landlord must pay the tenant interest on the rent deposit every year. See Part H in General Information.

9. Key Deposit

Select one:

A key deposit is not required.

or

The tenant will pay a refundable key deposit of \$ _____ to cover the cost of replacing the keys, remote entry devices or cards if they are not returned to the landlord at the end of the tenancy.

If a refundable key deposit is required, provide description and number of keys, access cards and remote entry devices:

Note:

The key deposit cannot be more than the expected replacement cost. See Part H in General Information.

10. Smoking

Under provincial law, smoking is not allowed in any indoor common areas of the building. The tenant agrees to these additional rules on smoking:

Select one:

None

or

Smoking rules

Provide description of smoking rules (if necessary add additional pages):

Note:

In making and enforcing smoking rules, the landlord must follow the Ontario *Human Rights Code*. See Parts M and S in General Information.

11. Tenant's Insurance

Select one:

There are no tenant insurance requirements.

or

- The tenant must have liability insurance at all times. If the landlord asks for proof of coverage, the tenant must provide it. It is up to the tenant to get contents insurance if they want it.

12. Changes to the Rental Unit

The tenant may install decorative items, such as pictures or window coverings. This is subject to any reasonable restrictions set out in the additional terms under Section 15.

The tenant cannot make other changes to the rental unit without the landlord's permission.

13. Maintenance and Repairs

The landlord must keep the rental unit and property in good repair and comply with all health, safety and maintenance standards.

The tenant must repair or pay for any undue damage to the rental unit or property caused by the wilful or negligent conduct of the tenant, the tenant's guest or another person who lives in the rental unit.

The tenant is responsible for ordinary cleanliness of the rental unit, except for any cleaning the landlord agreed to do.

Note:

See Part J in General Information.

14. Assignment and Subletting

The tenant may assign or sublet the rental unit to another person only with the consent of the landlord. The landlord cannot arbitrarily or unreasonably withhold consent to a sublet or potential assignee.

Note:

There are additional rules if the tenant wants to assign or sublet the rental unit. See Part P in General Information.

15. Additional Terms

Landlords and tenants can agree to additional terms. Examples may include terms that:

- Require the landlord to make changes to the unit before the tenant moves in, and
- Provide rules for use of common spaces and/or amenities.

These additional terms should be written in plain language and clearly set out what the landlord or tenant must or must not do to comply with the term. If typed, the additional terms should be in a font size that is at least 10 points.

An additional term cannot take away a right or responsibility under the *Residential Tenancies Act, 2006*.

If a term conflicts with the *Residential Tenancies Act, 2006* or any other terms set out in this form, the term is void (not valid or legally binding) and it cannot be enforced. Some examples of void and unenforceable terms include those that:

- Do not allow pets (however, the landlord can require the tenant to comply with condominium rules, which may prohibit certain pets),
- Do not allow guests, roommates, any additional occupants,
- Require the tenant to pay deposits, fees or penalties that are not permitted under the *Residential Tenancies Act 2006* (e.g., damage or pet deposits, interest on rent arrears), and
- Require the tenant to pay for all or part of the repairs that are the responsibility of the landlord.

See General Information for more details.

The landlord and tenant may want to get legal advice before agreeing to any additional terms.

Select one:

- There are no additional terms.

or

This tenancy agreement includes an attachment with additional terms that the landlord and tenant agreed to.

16. Changes to this Agreement

After this agreement is signed, it can be changed only if the landlord and tenant agree to the changes in writing.

Note:

The *Residential Tenancies Act, 2006* allows some rent increases and requires some rent reductions without agreement between the landlord and tenant. See Part I in General Information.

17. Signatures

By signing this agreement, the landlord(s) and the tenant(s) agree to follow its terms.

Unless otherwise agreed in the additional terms under Section 15, if there is more than one tenant, each tenant is responsible for all tenant obligations under this agreement, including the full amount of rent.

Landlord(s):

Name	Signature	Date (yyyy/mm/dd)

Tenant(s):

Name	Signature	Date (yyyy/mm/dd)

Note:

All of the landlords and tenants listed on the first page in Section 1 (Parties to the Agreement) must sign here. The landlord must give a copy of this agreement to the tenant within 21 days after the tenant signs it.



Cohen Highley^{LLP}

L A W Y E R S

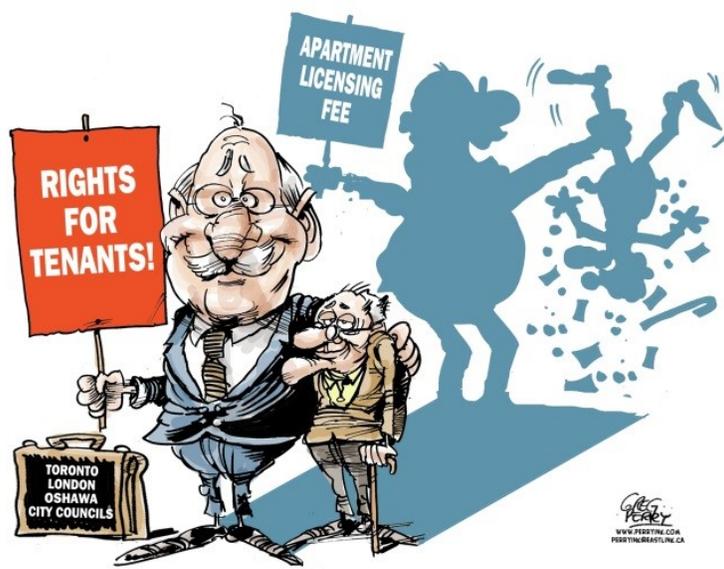
The City of Waterloo is by far the greediest of all municipalities when it comes to the charges levied under its Landlord Licensing By-law. Waterloo's licensing fee and mandatory charges (the bulk of which go to its bureaucratic "cousin", the Electrical Safety Authority) amount to over \$1,000 per townhouse unit and are imposed on a "per bedroom" basis (the more bedrooms the higher the fee). The fees are imposed on "converted residential dwellings" but are also imposed on purpose built, properly zoned townhouse complexes which are fully compliant with all applicable building codes from the date of construction but they are a lucrative target for revenue hungry bureaucrats.

The Waterloo "tax grab" was recognized by the Landlord and Tenant Board in a landlord's application for an above guideline rent increase (AGI) based on the levy of the licensing fee as an extraordinary cost in "municipal taxes and charges". The rent increase resulting from Waterloo's license fee levies was 6.0% plus the Guideline increase of 1.8%, for a total of 7.8% (on average about \$70.00 per month increase in monthly rent!).

Two tenants, funded by the Province of Ontario, appealed the Board's decision to the Divisional Court and we defended the Landlord's position seeking a dismissal of the appeal. The Divisional Court dismissed the tenants' appeal and awarded the Landlord legal costs of \$7500.00 (for a copy of the Court's ruling, go to the following link: [Houston v. 530675 Ontario Limited](#))

For the past few years the Landlord of this complex urged council not to impose its demonstrably unfair tax and warned of the onerous rent increase consequences for family based tenancies. The City bureaucrats persuaded Members of Council to ignore those warnings and it is the tenants who must now pay for Staff's greed and Council's indifference.

As determined by the Landlord and Tenant Board, and affirmed by the Divisional Court, the licensing fees and mandatory charges levied by Waterloo are "municipal charges and taxes". and the money goes straight into the coffers of the bureaucracy at City Hall and funds an easy "make work" project for the ESA...it does nothing for tenants who are already completely protected under the *Residential Tenancies Act*. No doubt the City will cast blame on the landlord for passing on this "tax"; however, it is the accepted practice (and certainly the practice of bureaucrats and politicians) to pass expenses incurred in the course of business or employment on to the ultimate consumer...and the City was aware from the outset that this would be the consequence of their money grab.



If you have any questions about this article or wish to discuss the contents, you may contact Joe Hoffer at 519-672-9330 or hoffer@cohenhighley.com.

If you would like to read any of our previous bulletins, you can find copies at this link: [Cohen Highley LLP's Rent Control Bulletins](#)

Yours Truly,



Joe Hoffer, Partner ([Profile](#))
Cohen Highley LLP Lawyers
London | Kitchener | Chatham | Sarnia

One London Place, 255 Queens Avenue, 11th Floor, London, ON N6A 5R8
t. (519) 672-9330 x.309 | f. (519) 672-5960

CITATION: 2161907 Ontario Inc v. City of St Catharines et al, 2010 ONSC 4548
COURT FILE NO.: 51822/09 (St. Catharines)
DATE: 2010-08-18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
2161907 Ontario Inc)
) Joe Hoffer, for the Applicant
Applicant)
)
– and –)
)
The Corporation of the City of St.) Donna G. Gibbs, for the Respondents
Catharines and Jim Somerville)
)
Respondents)
)
)
)
) **HEARD:** April 19, 2010

2010 ONSC 4548 (CanLII)

THE HONOURABLE MADAM JUSTICE W. L. MACPHERSON

[1] This is an Application under section 25 of the *Building Code Act* appealing an Order to Remedy Unsafe Building issued by a Building Inspector for the City of St. Catharines.

[2] Following an inspection of the property owned by the Applicant, the Inspector determined that the property had been changed from a “single dwelling unit” to a “boarding, lodging or rooming house” without a building permit and that it did not meet various fire and life safety requirements under the *Ontario Building Code*. An Order was issued requiring the Applicant to take certain steps to remedy the deficiencies and to reduce the number of occupants.

[3] The issues on this appeal are:

- 1) What is the appropriate standard of review of the Inspector's decision - correctness or reasonableness?
- 2) For purposes of the *Building Code Act*, is the property a "boarding, lodging or rooming house" or is it a "dwelling unit"?
- 3) If the property is determined to be a "boarding, lodging or rooming house" is the provision in the *Building Code* governing such properties void for being contrary to:
 - a. the provisions of the *Residential Tenancies Act* and
 - b. the provisions of the *Human Rights Code* because it discriminates in accommodation based on family status, marital status, and/or age.

Background

[4] Howard Jung is the President and sole shareholder of 2161907 Ontario Inc, a corporation that owns 2 Bessey Street in St. Catharines, Ontario. On August 5, 2009, a letter was sent by Jim Somerville, a Building Inspector with the City of St. Catharines. The letter indicated that Boarding, Lodging and Rooming Houses are a concern to the City of St. Catharines and that the City's Building and Fire Services intended to investigate complaints that had been received dealing with residential occupancy to ensure that life safety concerns were identified and corrected. As the property had been the subject of a complaint, the Applicant was directed to contact Somerville to arrange an inspection of the property.

[5] On September 1, 2009, Somerville attended at the property and conducted an inspection. On December 14, 2009 Somerville issued an Order to Remedy Unsafe Building ("Order to Remedy") pursuant to section 15.9(4) of the *Building Code Act* 1992 (S.O. 1992, c. 23) based on his determination that the subject property was a "boarding, lodging or rooming house" under the *Building Code*, O. Reg. 350/06.

[6] Mr. Jung now appeals this Order to Remedy.

Order Sought

[7] The Applicant seeks the following:

- 1) A declaration that the property municipally known as 2 Bessey Street, St. Catharines, Ontario is a “dwelling unit” and not a “boarding, lodging or rooming house” under the *Building Code Act* and *Building Code*.
- 2) An Order rescinding the Order to Remedy an Unsafe Building dated December 14, 2009 issued by Jim Somerville.
- 3) In the alternative, if the property is determined to be a “boarding, lodging or rooming house” for purposes of the Building Code Act and the Code, an Order declaring that the Order to Remedy is void as it:
 - a. contradicts the provisions of the *Residential Tenancy Act*, and
 - b. offends the provisions of the *Human Rights Code*, because it discriminates in accommodation based on Family Status, Marital Status and/or Age.
- 4) In the further alternative, if the property is determined to be a “boarding, lodging or rooming house” for purposes of the BCA and the *Code* and does not offend the *Residential Tenancy Act* or *Human Rights Code*, an Order extending the time for the Applicant to correct the contraventions noted in the Order to Remedy to a date sixty days after the Respondent issues a building permit to the Applicant to change the use of the property from a “dwelling unit” to a “boarding, lodging and rooming house”.

[8] The Respondent seeks the following:

- 1) An Order dismissing the Applicant’s appeal such that the Order to Remedy Unsafe Building dated December 14, 2009 would be upheld.

1. What is the appropriate standard of review of the Inspector’s decision - correctness or reasonableness?

[9] There is a statutory right of appeal from a decision of the Chief Building Official or a Building Inspector with broad rights given to the appeal judge, including the right to substitute his or her decision for the decision of the Official (Section 25 (1) and (4) of the *Building Code Act*).

[10] The Applicant contends that the appropriate standard of review is correctness.

[11] The Respondent argues that the appropriate standard is reasonableness. I disagree.

[12] It is clear from a review of the case law that the more that the decision is a determination of law, the closer the standard will be to correctness. The more that the decision is dependent upon factual determinations within the special expertise of the Official, the more deference should be given, with a standard of reasonableness being applied. However, to the extent that the decision is based on the proper legal interpretation of legislation, by-laws or regulations, the Official must be correct (*Runnymede Development Corp. V. 1201262 Ontario Inc.* (2001) 2000 CarswellOnt 934 (S.C.J.) and *Oriole Park Resort Inc. v. Middlesex Center (Municipality)* 2008 CarswellOnt 6965 (S.C.J.)).

[13] In this case, what was being determined by the Inspector was the proper interpretation of certain defined terms under the *Ontario Building Code*, namely whether the property fit within the definition of a “rooming, boarding or lodging house” or whether it was a “dwelling unit”. Although it was not an interpretation of by-laws as in the *Runnymede* case, it was still a determination of law.

[14] The determination that the property was a “boarding, lodging and rooming house” meant that the property was unsafe as it did not comply with the more stringent fire and life safety

requirements required for such buildings under the *Building Code*. If the property had been determined to be a “dwelling unit” then it met all of the fire and life safety. In those circumstances it is not sufficient that the Inspector’s interpretation be reasonable – the Inspector’s determination must be correct.

2.For purposes of the *Building Code Act*, is the property a “boarding, lodging or rooming house” or is it a “dwelling unit” ?

[15] The Respondent argues that the property is a “boarding, lodging or rooming house” as defined by the *Ontario Building Code*. Where the occupants are together for one purpose - temporary housing - and where they engage in separate activities without a communal interest, given the nature of that living environment, there is a need to ensure that this type of occupancy is sufficiently safe. That is the reason for the increased fire and life safety requirements for “boarding, lodging and rooming houses” under the *Code*.

[16] The Applicant concedes that the property fits within the definition of “boarding, lodging or rooming house” but argues that it is equally consistent with the definition of a “dwelling unit”. The Applicant argues that if a more thorough review of the use being made of this property had been done by the Inspector, including a review of the lease and a discussion with the tenants, the Inspector would have correctly determined that the occupants were living as a cohesive unit as defined under the *Code* as a “dwelling unit” and that the additional fire and life safety requirements were not necessary in this situation. I agree with the Applicant.

[17] Under the Regulations to the *Ontario Building Code* (O.Reg.350/06) the relevant terms are defined as follows:

1.4.1.2. Defined Terms

- (1) Each of the words and terms in italics in this *Code* has,
(b) the following meaning for the purposes of the *Code* and, where indicated, for the purposes of the Act:

Board, lodging or rooming house means a *building*,

- (a) that has a *building height* not exceeding three *storeys* and a *building area* not exceeding 600 m²,
(b) in which lodging is provided for more than four persons in return for remuneration or for the provision of services or for both, and
(c) in which the lodging rooms do not have both bathrooms and kitchen facilities for the exclusive use of individual occupants

Dwelling unit means a *suite* operated as a housekeeping unit, used or intended to be used as a domicile by one or more persons and usually containing cooking, eating, living, sleeping and sanitary facilities.

Suite means a single room or series of rooms of complementary use, operated under a single tenancy, and includes,

- (a) *dwelling units*,
(b) individual guest rooms in motels, hotels, boarding houses, rooming houses and dormitories, and
(c) individual stores and individual or complementary rooms for *business and personal services occupancies*.

[18] The Code (sections 9.9.8.2, 9.10.10, 9.10.19, 9.32.1) then sets out the requirements for the number of required exits, separation of service rooms, smoke alarms, and mechanical ventilation in dwelling units and boarding, lodging, and rooming houses. The requirements are clearly more onerous in the case of boarding, lodging and rooming houses.

[19] The definition of “boarding, lodging and rooming houses “ is identical to that which is found under the Fire Code (O. Reg 213/07).

[20] The following facts about the property at 2 Bessey Street are undisputed:

- a) the property is a two-storey dwelling not exceeding 600 m²;
- b) the property is a six- bedroom home occupied by six persons;
- c) there was a residential tenancy agreement (lease) ;
- d) the lease was for a fixed term (September 1, 2009 to April 30, 2010);
- e) the tenants were responsible for the housekeeping and maintenance of the property;
- f) the tenants were responsible for furnishing the property and for the assignment of the bedrooms;
- g) the landlord paid the hydro, gas, water and heat up to \$300 per month, with any amount in excess to be split equally between the six tenants;
- h) the tenants were responsible for cable, telephone and internet expenses;
- i) the tenants had full and unencumbered access to all areas of the property;
- j) the tenants had joint and several legal responsibility over all areas of the property; and
- k) there had been no renovations or physical alterations to the property.

[21] On September 1, 2009, the Respondent inspected the property under section 15.9 of the *Building Code* to ascertain whether the building was safe. The Inspector found the building to be unsafe solely as a result of his determination that the building was a “boarding, rooming and lodging house”. Prior to making his determination as to the use of the property, the inspector did not speak with any of the occupants, nor did he did request nor review a copy of the lease agreement.

[22] The Respondent suggested that the Inspector was not required to consider the lease nor was he required to consider any other extrinsic evidence before making his determination. I

disagree. Although the terms of the lease are not conclusive, its terms are certainly relevant to making a decision as to the use being made of the property and whether there had been a change in the use. A consideration of such other evidence was necessary in order to consider and rule out the possibility that the property was a “dwelling unit” – namely a “suite” operated as a “housekeeping unit” “under a single tenancy” and to determine whether or not the more stringent fire and life safety requirements should apply.

[23] As a secondary position, the Respondent argued that **if** the Inspector had reviewed the lease, there were certain provisions that supported his determination that the property was a “boarding, lodging and rooming house”. Unfortunately, once the determination had been made by the Inspector regarding the use of the property, he became *functus officio* (having performed his office) once he had made the Order to Remedy.

[24] In any event, the provisions in the Lease that were referred to by the Respondent did not further their argument.

i) Single Monthly Rental Payment

The provision dealing with the monthly rental amount was unclear in that it was blank at the beginning, later referred to each tenant being “responsible for an equally divided share of the rent which amounts to \$350 per month” and later provided “will collectively amount to a single monthly payment of \$350.” However, this provision goes on to state “The tenants will collectively pay the full base Rent as a single monthly payment on or before the first of each and every month of the term of the Lease to the Landlord”.

The evidence of the Landlord was that the total monthly rent was \$2060.00 per month and that it was paid in a single monthly payment. I accept that evidence.

ii) Provision of Furnishings

The lease referred to the Landlord having supplied furnishings “as noted in the inspection report” and the obligation of the Tenants to maintain the furnishings in reasonable condition.

The evidence of the Landlord was that there were no furnishings supplied by him and that all furnishings were supplied by the Tenants. I accept that evidence.

iii) Payment of Utilities

The Landlord was responsible for the payment of utilities (hydro, gas, water and heat) but only up to \$300 per month, with any excess being split equally between the six tenants.

There would need to have been some discussions amongst the Tenants to determine and ensure payment of the apportioned amounts owed for these utilities and for the cable, telephone and internet charges.

iv) Hiring of Cleaning Service for the Property

The Landlord could hire a cleaning service at the Tenant's expense, but the initial obligation was on the tenants to keep the premises clean during their occupation of and prior to vacating the property. Only if the state of cleanliness was inadequate would the Landlord exercise any control over the premises.

This provision supported the position that the Occupants' exercised control over the premises, rather than the Landlord.

v) Additional Provisions

There were several references in the lease to "common areas" and "common facilities", "posting of rules by the Landlord" and "removal of shoes at the entrance". However, when read in the context of the entire lease, I am not satisfied that these provisions support the determination made by the Inspector that this was a "boarding, lodging and rooming house".

[25] The Respondent suggested that the case law in this area is not particularly useful. I disagree. Although the decision in *Good v. City of Waterloo* (2004) 2004 CanLii 23037(Ont C.A.) involved the interpretation of a bylaw and not the *Ontario Building Code*, it is helpful in that it considered the criteria for determining whether premises were a single unit for housekeeping purposes. These factors included: a) how the rent was paid; b) the furnishing of the house and rooms by the occupants; c) payment of utilities by the occupants; d) the assignment of rooms by the occupants; and e) how the housekeeping, or lack of it, was to be done.

[26] The decision in the *Ottawa (City) v. Bentolila* (2006) 2006 CarswellOnt 8833 is also helpful as it sets out the factors relevant to making a finding as to whether a property was a “dwelling unit under a single tenancy” or a “boarding, rooming and lodging house”. Although the decision was rendered in the context of an appeal from various Fire Code infractions, it was noted that the Building Code and Fire Code are companion regulations as the category of occupation determines the building and fire safety requirements. In the *Bentolila* case, the property was found to be a “boarding, lodging and rooming house” based on such factors as:

- a) There had been substantial renovations done to the property (converted from a single storey two bedroom home to a three-storey fourteen bedroom home);
- b) The landlord’s son lived in the third-floor unit which was not accessible to the other occupants;
- c) Each tenant entered into his or her own lease with the landlord and agreed to pay a fixed rent by way of post-dated cheques;
- d) The tenants were selected by the owner’s son or the superintendent student; and
- e) There was no sharing of utilities or other expenses associated with the operation of the house.

[27] It is clear on those facts that the Landlord exercised a great deal of control over the premises and rather than occupying the property under a single tenancy, the occupants were roomers/lodgers and the more stringent fire and life safety requirements were necessary.

[28] The set of facts in the case before me were very different than those in the *Bentolila* case. Upon reviewing all of the evidence, I find that there was ample proof that this group of six occupants functioned as a cohesive unit, that they had control of who and what took place at the property, and that there was a level of familiarity with one another that would support a finding

that this property was a “dwelling unit” namely a “suite” operated as a housekeeping unit “under a single tenancy”.

[29] On this appeal, the onus falls on the Applicant to show that the Inspector made an error in law. I find that the Applicant has met that burden of proof as the Inspector failed to consider all relevant factors prior to making his determination that the property was a “boarding, lodging or rooming house”.

3. If the property is determined to be a “boarding, lodging or rooming house”, is the provision in the Building Code governing such properties void for being contrary to:

- a. **the provisions of the *Residential Tenancies Act*; and**
- b. **the provisions of the *Human Rights Code* because it discriminates in accommodation based on family status, marital status, and/or age?**

[30] Given my finding that this is a “dwelling unit” rather than a “boarding, lodging, or rooming house”, it is not necessary for me to consider whether or not the Building Code contravenes the *Residential Tenancies Act* or the *Human Rights Code*.

Conclusions

[31] For the reasons set out above, the appeal is allowed and the following Order shall issue:

- 1) A declaration that the property municipally known as 2 Bessey Street, St. Catharines, Ontario is a “dwelling unit” and not a “boarding, lodging or rooming house” under the *Building Code Act* and Building Code.
- 2) An Order rescinding the Order to Remedy Unsafe Building dated December 14, 2009 issued by Jim Somerville.

Costs

[32] If the issue of costs cannot be resolved, I direct that the party seeking costs to deliver written submissions to my office within 15 days of the release of this Judgment with responding submissions to be delivered to my office within 15 days thereafter. The written submissions are

not to exceed three typewritten, double spaced pages, excluding the Bill of Costs and Costs Outline.

W. L. MacPherson J.

Released: August 18, 2010

CITATION: 2161907 Ontario Inc v. City of St Catharines et al, 2010 ONSC 4548

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2161907 Ontario Inc

Applicant

– and –

The Corporation of the City of St. Catharines and Jim
Somerville

Respondents

REASONS FOR JUDGMENT

W. L. MacPherson J.

Released: August 18, 2010

Order under Subsection 21.2 of the
Statutory Powers Procedure Act
and the **Residential Tenancies Act, 2006**

File Number: SWL-02916-17-RV

In the matter of: 250 FLEMING DRIVE
LONDON ON N5V 4Y8

Between: Laurie Rowbotham
JDN Property Management

Landlords

and

Alie Edmonds
Amanda Redford
Elizabeth Stephen
Emily Barnes
Morghan Chiesa

Tenants

Review Order

Laurie Rowbotham and JDN Property Management (the 'Landlords') applied for an order requiring Morghan Chiesa, Alie Edmonds, Amanda Redford, Elizabeth Stephen and Emily Barnes (the 'Tenants') to pay the rent that they owe (the 'L9 Application').

This application was resolved by order SWL-02916-17 issued on November 24, 2017.

On December 22, 2017, the Landlords requested a review of the order. The request was heard in London on February 13, 2018.

The Landlord, Laurie Rowbotham ('L.R.'), the Landlords' Legal Counsel, Joseph Hoffer, the Tenant, Elizabeth Stephen ('E.S.'), the Tenants' Legal Representative, Wendy Cavacas and the witness, Jeff Nead ('J.N.'), attended the hearing. Ms. Cavacas represented all of the Tenants except Amanda Redford ('A.R.'). As of 10:30 a.m., A.R. was not present or represented at the hearing although properly served with notice of this hearing by the Board.

Determinations and Reasons:

1. On November 24, 2017, the Landlord and Tenant Board (the 'Board') issued order SWL-02916-17. In that order, the hearing Member found that the tenancy took the form of a tenancy in common rather than a joint tenancy. The Landlord requested the present review on the basis that the Member made serious errors of law and jurisdiction in this finding.

2. At the outset of the hearing on September 26, 2017, the parties came to an agreed statement of facts as set out in the order:

7. The Landlord and the four Tenants who were represented at the hearing, agreed that:

- a. All five Tenants signed the lease with a fixed term of September 1, 2016, to August 31, 2017.
- b. One guarantor for each Tenant signed the lease.
- c. Each Tenant paid a portion of the monthly rent of \$2,275.00
- d. Rent was paid electronically.
- e. The arrears owing to August 31, 2017, are \$5,215.00. The Landlord is holding a last month's rent deposit of \$2,275.00, and paid a filing fee of \$190.00.

3. In addition, the written lease between the parties provided as follows:

13. This lease and all contained in it shall enure to the benefit of and be binding upon the parties hereto and their heirs, executors, administrators, successors and assigns. All obligations of the Tenant contained herein shall be joint and several as between or among the tenants. When the context so requires or permits the singular shall include the plural and he masculine/feminine/neuter gender shall include the others.

14. No amendment to this agreement shall be effective unless it is done in writing and signed by all parties to this agreement.

4. On page 3 of the lease, each of the bedrooms was priced according to its size. The Landlords did not assign the Tenants to the rooms; this was a matter left to the Tenants themselves. Each Tenant selected her own room and assumed responsibility for payment of the amount listed in the lease associated with that room. The sum of these prices totaled the monthly rent of \$2,275.00. Nowhere in the lease did the Landlords convey an interest among the Tenants of an exclusive use or otherwise restrict exclusive possession of the rental unit amongst the Tenants; again, this was a matter determined by the Tenants amongst themselves upon renting the house together.

5. Early in the tenancy, a conflict developed between A.R. and the other Tenants and she failed to pay her portion of the monthly rent. The Landlords filed the L9 Application seeking payment of lawful rent outstanding.

6. The hearing Member found that the conduct of the parties and a statutory presumption in the *Conveyancing and Law of Property Act* (the 'C.L.P.A.')

¹ pointed to a tenancy in common rather than a joint tenancy as set out in the lease:

27. In a joint tenancy, there is a single tenancy agreement and the tenants are jointly and severally (individually) liable for the payment of the entire rent for the rental unit. By contrast, in the case of a tenancy-in-common, although there may be a single tenancy agreement document and while all the tenants may occupy the same premises, each tenant-in-common has a separate tenancy with the landlord. Each tenant in common is individually responsible for the payment of his or her share of the rent for the rental unit.

¹ R.S.O. 1990, c. C.34 (the 'C.L.P.A').

28. Section 13 of the *Conveyancing and Law of Property Act*, R.S.O., 1990, c. C.34, provides that there is a presumption in favour of a tenancy in common "unless an intention sufficiently appears on the face of the letters patent, assurance or will that they are to take as joint tenants". "Four unities" are required for a joint tenancy: unity of title, time, interest, and possession. In other words, the tenants must all take possession under the same tenancy agreement, they must have entered into the tenancy agreement at the same time, they must each take the same estate and each must take possession of the undivided whole of the premises (that is no joint tenant must exclude another joint tenant from any part of the property). (See: Fleming, Jack, *Residential Tenancies in Ontario*, 3rd ed. (Toronto: LexisNexis, 2011) at 158.)
29. The lease is unambiguous in describing the tenancy as joint and several and I have no doubt that the Tenants understood what they were signing. However, although the lease is unambiguous, section 202 of the Act requires me to ascertain the "real substance of all transactions and activities" relating to this tenancy. For that purpose, I am permitted to "*disregard the outward form of a transaction*" and I "*may have regard to the pattern of activities relating to the residential complex or the rental unit*".
30. In looking at the pattern of activities relating to this tenancy, I am not satisfied that the true nature of the tenancy was joint. In order to actually be a joint tenancy the four unities must exist. Although each of the Tenants took a leasehold interest for the same time period, each Tenant had her own room, with a lock on the door, to which other Tenants were not allowed entry. The Landlord specifically provided separate keys for each Tenant's room; the rent for each was determined according to the size of the individual Tenant's room; each Tenant paid her own deposit and each paid her monthly rent separately by electronic funds transfer; and, the Landlord kept a separate ledger for each Tenant's payments. And, significantly, when a dispute arose, the Landlord negotiated independently with one Tenant to terminate her tenancy and arrange for her to pay her own arrears in installments.
31. The fact that the four remaining Tenants agreed to pay AR's rent for December does not, in my view, demonstrate that the relationship between the parties was that of a joint tenancy. All it suggests is an attempt to mitigate loss in the context of the Landlord attempting to get the Tenants to agree to pay AR's portion of the rent. The tenants taking responsibility, at least for a short time, to attempt to sublet AR's room also suggests an attempt to mitigate loss in the context of the Landlord attempting to have the Tenants assume responsibility for the outstanding arrears.
32. When the Landlords requested that the Tenants sign an agreement confirming that they would be liable to pay the entire amount of the rent, including AR's portion, they declined to do so. In an email explaining that decision, ER noted: "...If by January 30th the arrears have still not been paid, it will likely not work in my or my other roommates favour to have signed 2 documents claiming responsibility for the outstanding rent. If we have already signed the joint and several lease, is that not enough?" Although this response demonstrates an understanding on the part of the parties that when the tenancy commenced, a clause that this was a joint tenancy existed in the tenancy agreement, the manner in which the Landlord rented to the tenants as set out above, the independent negotiation by the Landlord with AR when arrears accumulated and the fact that the Tenants did not all take possession of the same undivided whole of the property reveal a pattern of conduct more consistent with a tenancy-in-common relationship.

7. Section 13 of the C.L.P.A. provides as follows:

13. (1) Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be

considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.

(2) This section applies notwithstanding that one of such persons is the spouse of another of them.

(3) In subsection (2),

“spouse” means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage.

8. Historically, this provision served to address the consequences at common law of an estate passing to a husband and wife where the matrimonial relationship has ended, usually through the death of the wife. As the (then) Ontario Supreme Court held in 1928 in *Spring v. Kinnee*:

At common law because of this matrimonial relationship the husband and wife would have taken an estate by entireties, but the effect of the *Married Women's Property Act* is to enable the wife to take as though she were a feme sole, and so the effect of the marital relationship is ended so far as real property is concerned. This view was adopted by Falconbridge, J., in 1891; in *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O.R. 397, after some conflict had arisen in England, and this has never been questioned since. The English cases are discussed in Challis, 3rd ed., p. 378; and, though there remains some doubt as to the effect of a conveyance to a husband and his wife and a third party, I do not gather that there is now any real difference of opinion in England as to the effect of a conveyance to the husband and the wife. In England they would still take as joint tenants, but the effect under our *Conveyancing and Law of Property Act* is different. They take as tenants in common.²

9. This was a significant conundrum with the succession of estates in the nineteenth and early twentieth centuries, particularly given the profound effect that the *Married Woman's Property Act, 1872*³ had on the prior common law result wherein a husband and wife took the estate by entireties. That statute significantly altered the existing law with respect to the property rights of married women, which besides other matters, allowed married women to own and control property in their own right.
10. As Justice Falconbridge succinctly noted in *Re Wilson and Toronto Incandescent Electric Light Co.*, “under a conveyance made to husband and wife in 1874 they take as strangers, i.e., as tenants in common.”⁴ Section 13 of the present C.L.P.A. simply reflects this continued rebuttable presumption of a tenancy in common *in the absence of sufficient intention to the contrary*.
11. Academically intriguing though all of this is, the Landlord's Legal Counsel rightly noted that Mr. Fleming's reliance on a principle related to land transfers in the nineteenth century has little relevance to the very different modern reality of the rental housing

² [1928] O.J. No. 73 at para. 8.

³ 1872 (45 & 46 Vict. c.75).

⁴ [1891] O.J. No. 118 at para. 22 (Ont. High Ct. Jus. (Queen's Bench Div.)).

market of the twenty-first century, particularly where unrelated tenants often rent a dwelling as a group.

12. In any event, there is no necessity to look beyond the *Residential Tenancies Act, 2006* (the 'Act') for the relevant legislation since section 3 of the Act provides that the Act "applies with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary." In other words, section 3 of the Act states that the Act governs the relationships between landlords and tenants in residential tenancies and nowhere in the Act is there any suggestion that the C.L.P.A. applies. As a result, the C.L.P.A. has no application to this tenancy. To determine the nature of a tenancy, one must look to the contract between the parties, and where this is silent, a factual analysis, rather than another statute such as the C.L.P.A. should decide the issue.
13. However, even if this were not the case, subsection 13(1) of the C.L.P.A. clearly states that the presumption of tenants in common only applies in the absence of a clear intention on the face of the tenancy agreement "that they are to take as joint tenants." This is not the case on the present facts.
14. The contract between the parties and their conduct in relation to the tenancy overwhelmingly confirmed the joint and several nature of the tenancy. According to the hearing recording, there was no evidence lead at the hearing to support a finding that any of the Tenants used a lock to prevent another Tenant from gaining access to her bedroom or that each Tenant necessarily occupied a single bedroom for the duration of the tenancy. However, even if the hearing Member was correct in this assumption, any decisions to reserve or limit private space within the rental unit was made by the Tenants themselves. In other words, there was no evidence to indicate that the Landlords separately rented parts of the rental unit exclusively to specific Tenants. Under the terms of the tenancy agreement, the Landlords gave exclusive possession of the whole rental unit to all of the Tenants on a joint and several basis.
15. As well, in emails to the Landlords, submitted at the hearing, the Tenants acknowledged that their liability for payment of the rent was joint and severable. The Tenants also initially accepted the responsibility for finding a replacement tenant for A.R. rather than have the Landlords impose a stranger upon them. It was only after one of the guarantors took exception to paying the vacating Tenant's share of the rent that the Tenants advanced their present position that they were tenants in common.
16. Although the Landlords acknowledged that they kept a separate ledger for each of the five Tenants, this practice was adopted in the interests of accurate record keeping and does not in and of itself suggest an intent to create tenancy in common. Separate ledgers served the practical purpose of determining who was not paying her portion of the rent, useful information for negotiation with *all* of the Tenants in the event of non-payment.
17. At paragraph 28 of the order, the hearing Member's stated that the "four unities" described by Mr. Fleming must be present for a joint tenancy to exist. The concept of four unities is a distinct issue from the C.L.P.A. However, with respect, the Member's interpretation of the "unity of time" as defined in the order is incorrect. There is no

requirement that for a joint tenancy to be effective, the joint tenants must simultaneously sign the lease. The "unity of time" requirement is satisfied if all tenants are parties to the lease at the time that the tenancy agreement takes effect. This interpretation conforms with subsections 13(1) and 92) of the Act which state:

13. (1) The term or period of a tenancy begins on the day the tenant is entitled to occupy the rental unit under the tenancy agreement.

(2) A tenancy agreement takes effect when the tenant is entitled to occupy the rental unit, whether or not the tenant actually occupies it.

18. In the present case, while the Tenants signed the tenancy agreement days apart from each other, the "unity of time" was satisfied by all five Tenants having entered into the lease as of September 1, 2016 when the agreement took effect.
19. In any event, the "unity of time" is not the sole deciding factor for a determination of joint and several liability. In Board order SWL-98259-17, issued on March 29, 2017, the Member concluded that the cumulative actions between one of six tenants and the landlord caused the tenancy to convert from joint tenancy to a tenancy in common for that one tenant, whereas the other tenants' joint tenancy remained intact. In that case, five tenants entered into a joint and several tenancy agreement and an additional tenant was added a few months later. This addition did not create a tenancy in common with the new tenant. The late-joining tenant served the landlord with a notice of termination not long after moving into the rental unit and entered into negotiations with the landlord to resolve her issues. When another person was found to assume the departing tenant's part of the lease, the landlord drafted an assignment agreement. However, the other four tenants did agree to the proposed assignee. When the landlord eventually asked the remaining tenants for permission to assign the room, the other tenants expressed a preference for choosing a new tenant themselves as they wanted to determine if the new person would be a "good fit."
20. The Member found that when the landlord offered the departing tenant the option of paying out her portion of the lease or assigning it for a fee, the landlord was treating the tenant's payment differently to that of the other tenants and held that the exiting tenant's payment was separated from the previously whole monthly rent, thereby creating a tenancy in common with the other tenants. As the Member found at paragraph 34 of the order:

Although there was still one lease agreement and it set out the intention of a "joint and several tenancy" the conduct of the Landlord and A.A. over the course of the agreement changed and their behaviour severed the joint tenancy relationship with A.A.

21. None of these factors are present in the instant case. However, order SWL-98259-17 does confirm that the Board may look past the express terms of the written lease when the conduct of the parties diverges from that original intent. In the present case, none of the tenants negotiated with the landlord apart from the others. Rather, there was an active and transparent negotiation between all of the parties to reach a resolution. In addition to their acknowledgement of the joint tenancy, the Tenants confirmed their joint

and several liability by paying the full amount of the rent due for December, 2016, which included A.R.'s "share."

22. At the same time, unlike the landlord in SWL-98259-17, the present Landlords continued to treat the Tenants' liability as joint and several and consistently refused to release them from that responsibility. While the hearing Member dismissed this conduct as significant, one cannot cherry pick evidence of the parties' intent when assessing whether the tenancy has been converted from joint and several to a tenancy in common. To that end, when the Landlords negotiated with A.R. for the unpaid arrears, I find that this did not constitute an intention to create a tenancy in common or to treat her payment as distinct from that of the other Tenants. Instead, it reflects an informal attempt to recover the missing portion of the rental payment and an attempted mitigation of the Landlords' losses, as required by section 16 of the Act.
23. Furthermore, the hearing Member's analysis of the other "unities" in paragraph 30 and 32 of the decision contain errors of fact that lead to the flawed determination that the conduct of the parties resulted in a tenancy in common. For example, she found that the Tenants parcelled out exclusive use of the bedrooms, thereby violating the unity of possession. However, this determination is at odds with her finding at paragraph 1 that the Tenants "rented a house together." As well, as the Tenants never testified, there was no basis for the finding that each Tenant did not permit entry of the other Tenants into her room. That a Tenant may have desired privacy by excluding her roommates from her chosen bedroom also does equate to an intention to create a tenancy in common.
24. The logic in the Member's determinations is also inconsistent in her differing interpretations of the parties' attempts to resolve the arrears issue. For instance, the Member found that the Tenants' acknowledgment of their joint tenancy and assumption of the responsibility to rent out the vacated room was deemed mitigation, while the Landlords' similar conduct was interpreted as an intention to create a tenancy in common.
25. There were also unities of title, possession and interest present as the tenancy agreement granted the right of possession to the rental unit from the Landlords to all of the Tenants as of September 1, 2016. In the lease, the rental unit is described as "Main at 250 Fleming Dr." with no other qualifications to suggest any separate grant of exclusive use to individual Tenants. What the Tenants subsequently chose to do within the rental unit with respect to allocation of privacy was their own business and cannot convert their joint and several liability to a tenancy in common. Similarly, if a landlord attempts to resolve an issue with one of several tenants, regardless of the nature of that issue, this conduct does not convert the joint tenancy to a tenancy in common. Instead, this reflects a desire by the landlord to work with the tenants to resolve the issue, as tenants would reasonably expect their Landlords to do. This should not prejudice any of the parties through the arbitrary imposition of a tenancy in common.
26. In the recent case of *Onyskiw v. C.J.M. Property Management Ltd.*, the Ontario Court of Appeal directed the Board to adopt a contextual analysis of its home statute:

38. The current state of the law of statutory interpretation recognizes that meaning flows at least partly from context and that a statute's purpose is an integral element of that context: see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters, 2011), at p. 300-01.
39. The question as to how a statutory provision should be interpreted has been answered definitively by the Supreme Court of Canada. On numerous occasions, the court has adopted the approach to statutory interpretation espoused by E.A. Driedger as the only applicable approach, namely:

[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Canada 3000 Inc. (Re)*; *Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 36; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 108.⁵

40. Although the hearing Member relied on excerpts from the Fleming text and Interpretation Guideline 21, which suggests that the conduct of the parties may override and express intention to form a joint tenancy, I agree with the Landlords that the Member's failed to apply a proper contextual consideration of the relevant the law and misapplied the factual evidence to fit the constraints of the outdated Fleming analysis.
41. The Landlords relied on an earlier Board order, *Kosa v. Keet*, in which the reviewing Member considered the same excerpts from the Fleming text, but rejected this analysis to apply a more contextual interpretation of the facts, recognizing the context in which the facts and law arose.⁶
42. In *Kosa*, there was no written tenancy agreement for the parties to determine whether the parties intended a joint tenancy or tenancy in common. As in the present case, the tenants in *Kosa* allocated exclusive use of parts of the rental unit amongst themselves. As the Member found:
43. The evidence given by Ms. Van Dalen did not convince me that there was anything different than the usual renting of an apartment by two potential roommates. There was no discussion of any particulars of the tenancy agreement that would determine one way or the other that the parties agreed to a joint tenancy or a tenancy in common. Ms. Van Dalen admitted that there was no discussion with the landlord of dividing the rental unit. Each tenant was to have a bedroom for their exclusive use and share the common areas and services. Locks on the bedroom doors may have been discussed in the landlord's presence, but it was an arrangement between co-tenants rather than part of the tenancy agreement with the landlord.
44. There was a specific discussion that each tenant would pay an amount that was one-half of the rent and deposit. That is what happened. The tenants considered that each was responsible separately for her share, but the landlord did not agree to that. The landlord gave each tenant a receipt that stated that it was for "half" the rent and deposit.

⁵ 2016 ONCA 477 at paras. 38-39 (Ont. C.A.) ('*Onyskiw*').

⁶ TSL-23366, dated January 19, 2001 ('*Kosa*').

45. In *Kosa*, the Tenants' counsel also relied upon the excerpt from Fleming and took the position that in the absence of a written tenancy agreement, section 13 of the C.L.P.A. imposes the presumption of a tenancy in common. The reviewing Member in that case dismissed this argument as well as the suggestion that locked bedrooms within the unit breached the unity of possession:
7. I cannot agree with this submission. The *Tenant Protection Act, 1997* provides that it applies despite any other Act, and the *Conveyancing and Law of Property Act* is limited to a particular situation. It would be improper to expand its application to other situations. Without a statutory presumption in favour of tenancy in common, we are left with Mr. Fleming's analysis that joint tenancy requires four "unities", being: title, time, interest and possession.
 8. There is no doubt that the co-tenants have unity of title as renters of the same rental unit, unity of time in that they rented the unit together, and unity of interest in that they became parties to the same tenancy agreement. The only area in which Mr. Fleming's analysis throws doubt on joint tenancy in this fact situation is unity of possession. He suggests that "each must take possession of the undivided whole of the premises (no joint tenant may exclude any other joint tenant from any part of the property)." It is here that I must disagree with the learned author.
 9. There are many living arrangements other than married couples living together for which the law must provide. Many unrelated persons now share accommodation in a variety of circumstances. In the case of *Quann v. Pajelle Investments Ltd.* (1975), 7 O.R. (2d) 769, the Court referred to the "urban lease of an apartment in a substantial building" "in our day and age". The laws that were developed by the courts of equity to protect tenants from the exigencies of the common law, usually in commercial leases, must be considered in the context of modern residential tenancies, protected by the Act. However, the important principles behind the decisions cited by Mr. Fleming are important to maintain and apply.⁷
46. The reviewing Member in *Kosa* also explained in some detail how the ordinary realities of modern rental living cannot be broadly interpreted as conduct indicating an intention to create a tenancy in common:
10. It is now a common occurrence that roommates rent a unit with the intention of sharing the rent, each having exclusive use of a bedroom and shared use of the other rooms. Sometimes even the refrigerator is divided into exclusive use areas. Those are personal lifestyle decisions about which the landlord has no need to know. The co-tenants in such a case would never agree to the landlord finding another tenant to live in the same space with them, at least without their veto. That is inconsistent with the principle of separate tenancies. It is not a tenancy in common simply because there is exclusion for limited purposes within the rented unit. Such a case must be distinguished from the case in which co-tenants move in with co-tenants move in with the known intention of dividing the rented premises into two parts, with total exclusion of each other.
 11. I find the presumption of modern urban Ontario to be different than that of many years ago. The law should distinguish between situations in which common sense dictates a different result. One distinction is whether a party dealt separately and individually with the landlord, or as multiple person acting together. The other way to analyse the facts is whether the landlord would be acting reasonably in assuming that the multiple prospective tenants were proposing one or more tenancies. There is also the question of

⁷ *Ibid.* at paras. 7-9.

whether the landlord acted in such a way as to imply that separate tenancies were offered.⁸

47. Lastly, *Kosa* illuminates the strong public policy rationale against applying the presumption of a tenancy in common in a vacuum:

15. ...The law should not discourage the landlord from renting to multiple tenants for fear that they will have to look only to the remaining individual where the joint occupation becomes untenable for any reason. The expectation of the tenants, as stated by Ms. Van Dalen in her request for review, was that the landlord would only proceed against each for her share of the rent. However, this does not answer the question from a reasonable landlord's perspective as to why he or she would make such an agreement, exposing himself or herself to the potential loss of revenue when either party suddenly decided to abandon their separate "tenancy".⁹

48. If tenancies in common were presumed as a matter of general policy, landlords would likely refuse to rent to multiple tenants who wish to share the rental unit for affordability, but also desire privacy over their own space within the unit. Under the reasoning of the Member's order, the Tenants would be free to unilaterally alter the joint and several nature of the tenancy as agreed at signing, allowing each vacating Tenant to reduce the monthly rent by the amount of her departing portion. Conversely, if the tenancy is presumed a tenancy in common, the Landlords would be free to re-rent the vacated room to whomever they choose, regardless of the remaining Tenants' preferences for a "good fit." The Member's analysis therefore invites abuse by tenants and security risks and future conflicts from the imposition of strangers inserted into vacated rooms of the unit by landlords attempting to mitigate their losses.

49. As well, Parliament has signalled a clear legislative intent to limit the circumstances in which a tenant may terminate his or her interest in joint tenancy. Even where the joint tenancy is terminated, the legislature has deemed through recent amendments such as subsection 47.2 of the Act that the remaining tenants are responsible for payment of the full rent under the tenancy agreement and retain the last month's rent deposit.

50. While the Tenants' Legal Representative relied on two past Board orders in which the hearing Member found that the tenancy was a tenancy in common, I find that both cases are distinguishable based on critical factual differences from the present situation. In *Re TNL-69323-15-IN*, issued on October 6, 2015, the respondent tenants moved into the rental unit at a different time than some of the "original co-tenants," thereby violating the unit of possession.¹⁰ As well, in that case, the landlord, not the tenants, installed a lock on the door to one of the bedrooms and refused to provide a key to that lock to any of the other tenants. As a result, the conduct of the landlord in that case established exclusive possession of one tenant over the others.

51. In *Re EAL-60651-16*, the written terms of the lease assigned each tenant to a room and set a separate rent for each of these rooms.¹¹ Each unit was self-contained and none of

⁸ *Ibid.* at paras. 10-11.

⁹ *Ibid.* at para. 15.

¹⁰ 2015 Canlii 79109.

¹¹ 2016 Canlii 88051.

the tenants had access to any of the other units. While the written lease characterized the tenancy as joint and several, the Member in that case found that the landlord's amendment to the tenancy agreement altered the tenancy such that he dealt with each tenant separately:

15. Throughout the five years that the Tenant and Mr. Wallace occupied the residential complex, their conduct reflected their intention to have separate tenancies. The Landlord's conduct also reflected his intention to treat the two units as separate tenancies, including the fact that he accepted separate rent payments from the Tenant and Mr. Wallace.
52. By contrast, I find that in the present case, the parties were consistent in their conduct by treating the tenancy as joint and several.
53. Ultimately, I find that the hearing Member made serious errors of law through misapplication of the C.L.P.A. to these facts and that the resulting determination that a tenancy in common had been created was founded upon a flawed legal analysis.
54. This order contains all of the reasons in this matter and no further reasons will issue.

It is ordered that:

1. The Landlords' request to review order SWL-02916-17 issued on November 24, 2017 is granted. That order is cancelled.
2. The application is adjourned for a hearing *de novo*.

March 5, 2018
Date Issued


Kevin Lundy
Member, Landlord and Tenant Board

South West-RO
150 Dufferin Avenue, Suite 400, 4th Floor
London ON N6A5N6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.



15TH ANNUAL Real Estate Law Summit

Does Good Faith Trump Certainty?

Reuben Rosenblatt, Q.C., LSM
Minden Gross LLP

April 19, 2018

Does Good Faith Trump Certainty?

**15th Annual Real Estate Law Summit
The Law Society of Upper Canada**

**Wednesday, April 18, 2018
Thursday, April 19, 2018**

By: Reuben M. Rosenblatt, Q.C., LSM
Partner, Minden, Gross LLP

Certainty is generally illusion¹ (paraphrased)

Is a Final Order of Foreclosure Final?

In an appeal by a mortgagor of an order that declined to set aside a default judgment for foreclosure, Blair J.A., speaking on behalf of the Court of Appeal in *Winters v. Hungking*², stated that the mortgagor “Ray Hungking did everything wrong”³.

After borrowing \$350,000 from a lender on the security of his farm, Mr. Hungking made no payments on the mortgage and did not pay taxes as he had agreed. When the lender commenced the foreclosure action, he did not defend nor did he file a request to redeem or a request for sale. He waited 12 months after being served with the final order of foreclosure before bringing a motion to set aside the default judgment requesting the right to redeem or to convert the foreclosure to a judicial sale. His motion was dismissed by the motions judge.

In describing the factual background, the Court of Appeal stated:

¹ Oliver Wendell Homes Jr.

² 2017 ONCA 909

³ Ibid at para. 2

A 61-year old bachelor in ill health, Mr. Hungking is a low-income, illiterate, and physically disabled man, clinging unrealistically to his heritage and life as a farmer. According to medical information on the record, he is also severely mentally challenged and on daily doses of morphine for the chronic pain he endures, something that affects his reaction time and ability to respond to circumstances. He has lived on the mortgaged family homestead his entire life, acquiring it from his parents who, in turn, acquired it from his grandparents. It is apparent that he cannot continue in that capacity, and his doctor strongly suggests that he move into assisted living.⁴

The appraised value put the property at between \$825,000 and \$900,000.

Although acknowledging that careful consideration is to be given to the motion judge's reasons and the exercise of his discretion, Blair J. A. was troubled by the magnitude of the potential windfall to the lender and the severe prejudice to the borrower.

Here – based on the appraisal evidence – there is every likelihood that, through a sale of the property, the respondent mortgagees will be completely reimbursed and thereby suffer no prejudice, other than a certain inconvenience. The property has not been sold, and there are no other third-party rights that may be adversely affected. On the other hand, the appellant will suffer severe prejudice. He will lose over one-quarter of a million dollars in equity built up on the family homestead by him and his parents and grandparents for over a century. Over one-quarter of a million dollars that would provide a much-needed source of support over the rest of his life. Over one-quarter of a million dollars that would fall as a complete windfall to the respondent mortgagees who will have suffered no prejudice.⁵

Blair J. A. concluded that setting aside the default judgment for foreclosure and ordering that the foreclosure proceedings be converted to an immediate judicial sale was what the justice of the case required.

⁴ *Ibid* at para 6.

⁵ *Ibid* at para 41.

Unable or Unwilling?

In *1954294 Ontario Ltd. v. Gracegreen Real Estate Development Ltd.*⁶ Gracegreen, the seller, sold its property in Maple, Ontario to the buyer for \$5,300,000. The property was a residential lot with an old house on it. The buyer intended to redevelop the lot to build a number of townhouses.

Before closing the seller was approached by a third party who was prepared to purchase the property for approximately \$8,000,000.

The seller's lawyer, in a letter written to the buyer's lawyer (the "**Repudiation Letter**"), took the position that because of certain defects in the agreement of purchase and sale (the "**Agreement**"), the Agreement was rendered invalid.

One of the issues in the Repudiation Letter related to a construction lien for \$117,500 and a mortgage for \$1,159,900 which were registered on title. The seller's position was that the phrase "and which the Seller is unable or unwilling to remove" gave the seller full discretion to decide if it is unable or unwilling to remove the encumbrances. According to the seller's lawyer, the seller was not required to provide any reasons to the buyer for its unwillingness to remove the charge or lien from the title to the property.

Charney J. concluded that the seller could not use its unilateral refusal to discharge the mortgage and vacate the lien as grounds to terminate the Agreement for two reasons: the first being that the mortgage and lien are matters of conveyance because they can be discharged by the seller as of right and the annulment clause relates to matters of "title to the property" and not to matters of conveyance. The trial judge therefore held that the seller cannot rely on the "unable or unwilling" provision relating to registered mortgages

⁶ 2017 ONSC 6369

and liens because they do not constitute defects in title but rather are matters of conveyance.

The second reason is that the phrase “which the seller is unable or unwilling to remove” has been subject to judicial interpretations which have consistently held that a seller “must exercise his rights reasonably and in good faith – not capriciously or arbitrarily. The provision ‘was not intended to make the contract one which the vendor can repudiate at his own sweet will’ (*Hurley v. Roy (1921), 50 O.L.R. 281 (Ont. C.A.)*)”⁷

The leading case on the matter is the Supreme Court of Canada’s decision in *Freedman v. Mason* [1958] S.C.R. 483 (S.C.C.) at p. 487, which interpreted the phrase “unable or unwilling” in an agreement of purchase and sale. The court found that the vendor “cannot take advantage of his own default and use the clause to escape his obligation”.⁸

The Supreme Court held that the phrase “unable or unwilling” imposed on the vendor a duty to make a genuine effort to obtain what was necessary to carry out the contract and did not justify a “capricious or arbitrary repudiation”.⁹

Having considered the nature of the property, the related question of the inadequacy of damages as a remedy and the behaviour of the parties, the trial judge concluded that this was an appropriate case in which to grant specific performance.

The Representation Was True When Made

In *Beatty v. Wei*¹⁰, the agreement of purchase and sale (the “**Agreement**”) contained a representation and warranty which stated “...that to the best of the Seller’s knowledge and belief, the use of the property and the buildings and structures thereon has never been for the growth or manufacture of illegal substances (“**Illegal Substances Clause**”)...”¹¹.

⁷ *Ibid* at para. 133

⁸ *Ibid* at para 134.

⁹ *Ibid* at para 136.

¹⁰ 2017 ONSC 3478.

¹¹ *Ibid* at para 3.

The statement in the Illegal Substances Clause that the Property had never been used for the growth or manufacture of illegal substances was expressly made “to the best of the Seller’s knowledge and belief”.¹²

After the Agreement was made and before closing, the buyer learned that the property had previously been used to grow marijuana. The buyer’s lawyer notified the seller’s lawyer providing evidence that the property was used to produce marijuana and that the police had previously attended at the property in 2004 and seized 265 marijuana plants.

Mr. Justice P.J. Cavanagh concluded

...that where a representation has been made in the *bona fide* belief that it is true, and the party who made it discovers that it is untrue, such party cannot remain silent. Silence which follows a representation can found an action for misrepresentation where the silence continues after the representor learns that the representation is no longer true or was never true: *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* 1991 CarswellOnt. 146 (Div. Ct.) at paras. 14-16. This principle applies even where a representation made at the time a contract is signed becomes untrue before or at the time of completion: *Sevidal v. Chopra*, 1987 CarswellOnt 226 at paras 90-95.¹³

Justice P.J. Cavanagh concluded, “Upon acquiring knowledge that the Property had been used to grow marijuana, the Sellers could no longer honestly give the representation in the Illegal Substances Clause”.¹⁴ Justice Cavanagh therefore concluded that the purchaser was entitled to the remedy of rescission and the return of the deposit.

Does Good Faith Trump Time is of the Essence?

*In 2336574 Ontario Inc. v. 1559586 Ontario Inc.*¹⁵ Morgan J. dealt with a closing date which was missed by one day.

¹² *Ibid* at para 18.

¹³ *Ibid* at para 21.

¹⁴ *Ibid* at para 22.

¹⁵ 2016 ONSC 2467, 2016 CarswellOnt 5580

The Vendor's obligation here was to have the Condominium ready to transfer to the Purchaser and to set the final closing date. The Purchaser's obligation was to have the closing funds ready on the closing date and to pay them to the Vendor. The Purchaser did not have an obligation to take less than full title or to get title a day or two late; likewise, the Vendor did not have an obligation to take a few less dollars or to take the closing money a few days late. Given the relationship of Vendor and Purchaser in a discreet real estate deal, good faith meant sticking to the contract, not bending the contract – even just a little bit – to one side's will.¹⁶

In *Deangelis v. Weldan Properties Inc.*¹⁷, Ricchetti J. dealt with a closing date which was three days late.

On November 23, 2012 the parties entered into an agreement for the purchase of a townhouse in a condominium development. The purchase price was \$359,900.

The unit was built over the next few years. On July 31, 2016 Deangelis took possession of the property by way of an interim occupancy. The value of the property had significantly increased since the purchase agreement was entered in 2012. The closing funds were not available on August 23, 2016, the final closing date. There is no suggestion that the vendor caused or contributed to the reason for the purchaser's lack of funds on the closing date (the mortgage approval came late in the day before closing). The funds were available three days later.

In dealing with the obligation to act in good faith which requires the parties to be honest with each other in relation to the performance of their contractual obligations, Ricchetti, J. stated:

It would be tempting to let principles of fairness and equity direct a finding that a three day delay in the closing in the four year history of the Agreement, is a minor breach resulting in a financial windfall to the builder and, therefore, the Agreement should be upheld.¹⁸

¹⁶ Ibid at para. 25

¹⁷ 2017 ONSC 4155, 2017 CarswellOnt 10326

¹⁸ Ibid at para. 41

However, in my view, it would be wrong in law to find that insisting on compliance with a term of the agreement agreed to by both parties with the assistance of counsel, amounts to bad faith depriving a party of the ability to strictly enforce an agreement where time is of the essence. Such a determination would mean that no party could insist on strict compliance of the terms of an agreement because to do so would or might amount to bad faith. This would throw the law of contract into chaos by creating uncertainty in the enforcement of contracts.¹⁹

In arriving at his decision, Ricchetti, J. relied on *1473587 Ontario Inc. v. Jackson*²⁰ and *Union Eagle Ltd. v. Golden Achievement Ltd.*²¹

Good Faith and Obligation to Disclose

The case of *Empire Communities Ltd. v. Ontario*²² arises out of the sale of government lands in the City of Brantford within an area known as the *Haldimand Tract* to real estate developers who wished to build a substantial number of residential houses on the land.

Between 1980 and 1995, the Six Nations of the Grand River band of Indians submitted twenty-nine (29) claims to the Government of Canada in respect of portions of the Haldimand Tract under a programme that offered monetary compensation for certain aboriginal claims. In 1995 the Six Nations of the Grand River sued the federal and provincial governments for mismanagement and breach of fiduciary duties concerning Six Nations' lands within the Haldimand Tract including the lands later sold by the defendants to the plaintiffs which are the subject matter of this proceeding.²³

The vendor did not disclose the existence of the Six Nations' claims or a 1995 lawsuit to the purchasers.

After closing on January 27, 2009 the plaintiff's development was blockaded by a group of protesters which lasted for approximately two weeks. Although the purchasers

¹⁹ Ibid at para. 42

²⁰ Supra

²¹ Supra

²² 2015 ONSC 4355, 2015 CarswellOnt 10280

²³ Ibid at para. 4

continued their construction and sold their houses, they claimed that the lands were stigmatized and, as a result of the construction delays and stigmatization, they suffered losses of between \$18 million and \$25 million compared to what they had expected to make on their development project.

The purchasers alleged that the defendants (vendors) “were dishonest in failing to disclose the Six Nations’ claims and lawsuit.”²⁴ After referring to the law of caveat emptor for hidden or latent defects and the exception to the law of caveat emptor, the court held that:

The Six Nations’ claims and lawsuit were perhaps relevant to the assessment of profitability or economic feasibility of the plaintiffs’ (purchasers) plans. But they did not prevent the lands from being used as intended. The plaintiffs have presented no precedent for the proposition that in the absence of a contractual requirement, a vendor must disclose information that might affect a buyer’s assessment of the profitability of the intended use.²⁵

In granting summary judgment dismissing the action, Myers, J. stated:

Certainty, predictability, and freedom of contract have long been recognized as fundamentally important elements of commercial practice. Absent express agreement by the parties, all of the prevailing policies require rejection of a duty of disclosure concerning the desired profitability of the buyer as opposed to defects that go to use, habitability, and dangerousness of the subject matter of the transaction.²⁶

Time is of the Essence – Relief from Forfeiture

In *Shah v. Southdown Towns Ltd.*²⁷ five applicants each entered into agreements of purchase and sale (the “**Agreements**”) to purchase five pre-construction condominium units and a parking unit from the seller which was the developer of the condominium project. The purchase prices ranged from approximately \$600,000 to \$700,000 per unit.

²⁴ Ibid at para. 27

²⁵ Ibid at para. 40

²⁶ Ibid at para. 40

²⁷ 2017 ONSC 5391.

Each agreement contained a financing clause which obligated each purchaser to provide the seller with confirmation of mortgage approval from his or her lender within ten (10) days after acceptance of the Agreements.

Although approvals were obtained, the seller took the position that the buyers failed to provide the financial information within the timeframes set out in the Agreements and terminated the Agreements. (The units had gone up in value.)

The buyers sought an order relieving them from forfeiture under Section 98 of the *Courts of Justice Act* which gives the Court broad jurisdiction to relieve against forfeitures on such terms as are considered just.

Although the purchasers argued that the gravity of their breach of the Agreements was trivial or minor in nature and that the sellers had not provided evidence of any prejudice or damages suffered as a result, Emery J. held that the buyers could not succeed on their claim for relief from forfeiture.

Emery J. held that each purchaser knew that the Agreements contained a “time was of the essence” provision which the buyers or through their agent chose to ignore and did not give the serious attention it deserved. This failure amounted to a substantial breach of the Agreements.

One of the conditions necessary for the Court to exercise jurisdiction to grant relief from forfeiture is whether the buyers had made diligent efforts to comply with the terms of the Agreements which they could not comply with through no default of their own. “...Relief from forfeiture is a form of equitable relief the court may grant to remedy unfairness or misfortune where the justice of the case requires.”²⁸

²⁸ *Ibid* at para 62.

Emery, J. found that the applicant buyers did not come to Court seeking an equitable remedy with clean hands; they had not exercised reasonable diligence to comply with the Agreements and therefore relief from forfeiture was not available to any of them.

Although the applicants submit that each of them will lose between \$150,000 and \$200,000 in potential increases to the fair market value if relief from forfeiture is not granted, the Court held:

The applicants have no pre-constructed home at risk of losing here. All they have at risk are contractual rights to purchase a residential unit to be built, along with a related parking unit. That right was contingent upon the fulfillment of contractual terms and compliance with occupancy requirements prior to a closing date to be determined at a time after July 31, 2018. For the reasons I have already given, I find that the breach of those contractual terms amounted to a substantive breach of the Agreements.²⁹

²⁹ *Ibid* at para 71.