



January 1994 Vol. 3 No. 3

Taxes and common-law spouses

A number of claims related to the tax treatment of support payments made by common-law spouses serve as a reminder that practitioners should be aware of tax amendments in this area.

In the past, a court order was required for child or spousal support to be tax deductible in the case of common-law spouses. Some common-law spouses entered into paternity or separation agreements only to discover that the support payments made pursuant to these agreements were not tax deductible.

By virtue of the tax amendments, common-law spouses entering into agreements on or after January 1, 1993, are automatically entitled to deduct such payments in the same manner as married spouses. Conversely, the recipient spouse is required to include such payments in income and pay the applicable taxes.

The amendments have significance beyond the scope of support payments. Common-law spouses are now subject to the same anti-tax avoidance rules as married spouses. Principal residence exemptions may also be adversely affected if each spouse owns a home, since a family can only designate one principal residence. The amendments, while eliminating some potential claims, may also give rise to others.

Real estate program in the works

Many practitioners have contacted us requesting programs dealing with specific areas of law. As a result, we are beginning work on a project dealing with the practice of real estate law. Watch future bulletins for more details.

Loss prevention video: Update and Reminder

More than 5,200 members have returned the \$25 levy credit form included with the loss prevention video package that was sent to every sole practitioner and firm in the province.

What happened to the rest of you? Make the time to view the video or, better yet, use it as a focus for discussion in your firm. The deadline for returning the credit form has been extended to March 18, 1994, and the \$25 rebate will be applied to the second half of the levy.

The responses received so far indicate the video package is a useful tool for addressing loss prevention:

- 80 per cent agreed or strongly agreed that the program had a strong impact on their awareness of loss prevention.
- 88.9 per cent agreed that the material was presented in a manner convenient to their needs.
- 71.4 per cent agreed that they would make changes to their practices. Another 20 per cent were unsure.

Take the time to think about loss prevention. It pays.

New dangers in mortgage undertakings

The decisions in *Boehmers v. 794561 Ontario Inc.* (1993), 14 O.R. (3d) 781 (Gen. Div.) and the *Ron Miller Realty* case (1991), 4 O.R. (2d) 492 (Gen. Div.) starkly demonstrate the perils of a mortgagee advancing in the face of a registered lien. Basically, these cases stand for the proposition that a mortgagee cannot safely advance any mortgage money until all liens are off title. A lawyer should not accept an undertaking to discharge or vacate a lien when making an advance, but ensure it is discharged.

In the *Boehmers* case, Royal Life held a first mortgage for face amount for \$3,859,000. It was a construction mortgage to be advanced in stages. The first three advances were made by January 8, 1990, and totalled \$1,606,586. On January 25, 1990, a lien was registered. On February 2, 1990, the fourth advance in the amount of \$252,759.60 was made. On February 6, 1990, the lien was vacated. From February 28, 1990, to June 27, 1990, advances five, six, seven and nine, totalling \$1,259,000 were made.

On July 13, 1990, another lien was registered. On July 23 and August 16, 1990, advances 10 and 11 totalling \$419,485 were made. On August 28, 1990, the second lien was vacated. On September 28, 1990, the twelfth

advance in the amount of \$159,370 was made. Between October 20 and December 14, 1990, 16 further liens were registered. None were discharged, released or vacated.

Judge Killeen found that the priority of the advances and lien claims would be as follows:

1. Lien Claimants (holdback)	\$ 209,236.36
2. Royal Life Advances, 1, 2 and 3	1,684,151.02
3. Lien Claimants (to the amount of advance #4)	252,759.00
4. Royal Life Advances 5 to 9	1,319,853.46

It should be noted that, even though the lien in question was vacated prior to advances five through nine and before the other liens were registered, the subsequent liens still get priority to the value of the amount of the advance made when there was a lien registered against title at the time the advance was made. In effect, those lien claimants are permitted to shelter.

*Helen A. Rady
Claude Pensa, Q.C.
Pensa & Associates*