Law Society of Ontario | Barreau de l'Ontario

21st Real Estate Law Summit

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Torkin Manes LLP

April 16, 2024
April 17, 2024

CLE24-0040700-A-REG

Law Society of Ontario | Barreau de l'Ontario

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Library and Archives Canada
Cataloguing in Publication

21st Real Estate Law Summit

ISBN 978-1-77345-711-6 (PDF)
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April 16, 2024
April 17, 2024

9:00 a.m. to 4:00 p.m.
Total CPD Hours = 9 h Substantive + 2 h Professionalism
+ 1 h EDI Professionalism

Law Society of Ontario
Donald Lamont Learning Centre
130 Queen St. W.
Toronto, ON

SKU CLE24-0040700

Agenda

DAY ONE: April 16, 2024

9:00 a.m. – 9:15 a.m. **Welcome**

Joel Kadish, Barrister and Solicitor

Sidney Troister, KC, LSM, *Torkin Manes LLP*

9:15 a.m. – 9:40 a.m.	***Lake* v. *Cambridge (City):* What this Case Means for Title Searching and Beyond (10 m P)** Alan Kay, *Pallett Valo LLP* Marc Whiteley, *Pallett Valo LLP*
9:40 a.m. – 10:05 a.m.	**Off-Title Searches** Andrew Fortis, C.S., *Hummingbird Lawyers LLP*
10:05 a.m. – 10:15 a.m.	**Question and Answer Session**
10:15 a.m. – 10:35 a.m.	**Break**
10:35 a.m. – 11:00 a.m.	**Conflicts of Interest (20 m P)** Glenn Stuart, Executive Director, Professional Regulation, *Law Society of Ontario*
11:00 a.m. – 11:30 a.m.	**Estate Conveyancing (10 m P)** Michele Allinotte, *Journey Law Professional Corporation* Maxim Piva, *Journey Law Professional Corporation*
11:30 a.m. – 11:55 a.m.	**Specific Performance - Is it Still a Thing / Time of the Essence Clauses - What are we Doing Here?** Doug Bourassa, *Torkin Manes LLP*
11:55 a.m. – 12:15 p.m.	**Question and Answer Session**
12:15 p.m. – 1:15 p.m.	**Lunch**

1:15 p.m. – 1:45 p.m.	**Toronto Pflag: Why Inclusivity Equals Talent Acquisition and How to be an Ally (30 m e)** Lisa Del Col, *Toronto Pflag* Joel Kadish, Barrister and Solicitor
1:45 p.m. – 2:40 p.m.	**Environmental Clauses in Agreements – Understanding Liability and Avoiding Drafting Pitfalls** Rosalind Cooper, C.S., *Fasken Martineau DuMoulin LLP* Jasmeen Kabuli, *Fasken Martineau DuMoulin LLP* Anna Lu, *Fasken Martineau DuMoulin LLP*
2:40 p.m. – 2:50 p.m.	**Question and Answer Session**
2:50 p.m. – 3:10 p.m.	**Break**
3:10 p.m. – 3:45 p.m.	**The Business of Law (20 m P)** Andrew Fortis, C.S., *Hummingbird Lawyers LLP*
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: April 17, 2024

9:00 a.m. – 9:05 a.m. **Welcome**

Joel Kadish, Barrister and Solicitor

Sidney Troister, KC, LSM, *Torkin Manes LLP*

9:05 a.m. – 9:35 a.m.	**Acting for a Borrower on an Alternative Mortgage: Giving ILA (30 m(P))** Mark Gelfand, *Keslassy Freedman Gelfand LLP* Jonas Rubinoff, *Rubinoff Law*
9:35 a.m. – 10:05 a.m.	**Real Estate Market Insights** Emily Cheung, Director, CPA, Data Analytics & Insights, *Teranet® Inc.*
10:05 a.m. – 10:20 a.m.	**Question and Answer Session**
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10:40 a.m. – 11:10 a.m.	**Handling Difficult Conversations and Other Things They Didn't Teach You in Law School (30 m(e))** Lana Saleh, Emotional Intelligence Training for Lawyers
11:10 a.m. – 11:35 a.m.	**Municipal Law Primer** Leo Longo, C.S*., Aird & Berlis LLP* Matthew Longo, *City of Toronto Legal Department*
11:35 a.m. – 12:00 p.m.	**No Take-Backsies! Understanding the Law of Repudiation in a Purchase and Sale** Simon Crawford, *Bennett Jones LLP*
12:00 p.m. – 12:15 p.m.	**Question and Answer Session**
12:15 p.m. – 1:15 p.m.	**Lunch**

1:15 p.m. – 1:40 p.m.	**Commercial Agreements of Purchase and Sale** Tamara Katz, *Gardiner Roberts LLP* Robert Schwartz, *Gardiner Roberts LLP*
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2:40 p.m. – 3:05 p.m.	**Issues in Condominium Conveyancing** Evan Holt, *Shibley Righton LLP* Audrey Loeb, LLM, LSM, OOnt, *Shibley Righton LLP*
3:05 p.m. – 3:25 p.m.	**An Overview of the Land Survey: Know "What" it Can (and Can't Do) and "When" to Consult it** Saša Krcmar, MBA, OLS, OLIP, Principal & Condo Specialist, *Krcmar Surveyors Ltd.*
3:25 p.m. – 3:50 p.m.	**Chat with Rosenblatt** Reuben Rosenblatt, LLD, KC, LSM Sidney Troister, KC, LSM, *Torkin Manes LLP*
3:50 p.m. – 4:00 p.m.	**Question and Answer/ Closing Remarks**
4:00 p.m.	**End of Program**

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21st Real Estate Law Summit

April 16, 2024 – DAY 1
April 17, 2024 – DAY 2

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Law Society of Ontario | Barreau de l'Ontario

TAB 1

21st Real Estate Law Summit

Lake and Tessaro v. Cambridge (City), 2023 ONSC 5200: By-Laws "Deregistering" Plans of Subdivision, Title Registration and the Impact of the Decision on Title Searching and Beyond

Appendix

Marc Whiteley
Pallet Valo LLP

Alan Kay
Pallet Valo LLP

April 16, 2024

cpd

Lake and Tessaro v. Cambridge (City), 2023 ONSC 5200:

By-Laws "Deregistering" Plans of Subdivision, Title Registration and the Impact of the Decision on Title Searching and Beyond

By: Marc Whiteley and Alan Kay

Pallett Valo LLP[1]

Prepared for the 21st Real Estate Law Summit April 16 and 17, 2024
Law Society of Ontario
Donald Lamont Learning Centre
130 Queen St. W.
Toronto, ON

[1] The authors acknowledge, with special thanks, their colleagues: 1. **Dylan Fisher**, for his assistance preparing and arguing the underlying Application, and his assistance with the paper, 2. **Pulkit Sahi** and **Guneet Saini**, students-at-law 2023/24, for their considerable contributions to the preparation of the paper, and 3. **Ray Mikkola** and **Steven Pordage**, for their invaluable contributions to both the paper and the preparation of the underlying case.

1. ***Overview***

a. ***Opening***

In *Lake v. Cambridge (City),* 2023 ONSC 5200, the Honourable Justice Broad found the Applicant homeowners' Transfer of the whole of a lot on a 1913 Plan of Subdivision (the "1913 Plan"), and their mortgage, to comply with the sub-division control provisions of the *Planning Act*.

The court reached this conclusion despite the Town of Preston, later the City of Cambridge (the "City"), having passed and registered a by-law in the 1950s deeming the 1913 Plan "not to be within a registered Plan of Subdivision for the purposes" of the relevant subdivision control provisions of the then in force *Planning Act*, and despite the subject parcel and the adjacent whole and part lots on the plan having had the same owners on conversion to *Land Titles*.

In arriving at this decision, Justice Broad is understood to have interpreted paragraph 44(1) 10 of the *Land Titles Act*, R.S.O. 1990 (the "*Land Titles Act*") for the first time, including as it relates to 1950s era subdivision control by-laws "de-registering" older plans of subdivision. Specifically, relying on the words of the statute, and principles from 1950s and 1970s era jurisprudence, Justice Broad concluded the "de-registering" by-law at issue in the case was an "encumbrance" within the meaning of the *Land Titles Act* and had to be registered on the *Land Titles* parcel register for title to have been taken subject to it.

Other parts of Justice Broad's decision are also noteworthy. First, it re-affirms the principle of the "indefeasibility" of the title acquired on registration under *Land Titles Act*. Relatedly, the *Lake* decision also highlights the important role actual notice of a "defect" can play in defeating someone's title, or mortgage, being as it is one of the limited number of exceptions to the "mirror principle". Given the potentially extreme consequence of a total failure of title in the *Land Titles* system, the *Lake* decision is also an example of a court applying the Court of Appeal's directive in *Stanbarr Services Limited v Metropolis Properties Inc*,[2] to strictly construe the doctrine of notice to situations where a party *actually knows* about the "defect". As a result, it remains insufficient that someone has become aware of facts that may suggest it should make inquiries around a

[2] 2018 ONCA 244 ("*Stanbarr*").

claimed title “defect”, since a court’s analysis on review of a “notice” argument is limited to a consideration of what the party knew, and not what it could have known had it made inquiries.

A final noteworthy aspect of Justice Broad’s decision in *Lake* is the conclusion that the 1950s by-law at issue was a “claim”, within the meaning of the *Registry Act*, against the title to the subject property, and the adjacent lot and part lot, which expired forty (40) years after its registration when no notice of claim was registered in respect of it prior to the expiry of the notice period.

It was the City’s contention on the Application that since virtually every municipality in the Province of Ontario has passed one or more by-laws deeming registered plans of subdivision not to be plans of subdivision for the purposes of subdivision control under the *Planning Act*, a myriad of conveyances of whole lots on such subdivisions, deemed by by-law not to be plans of subdivision, could be completed without municipal approval, thereby circumventing important planning policy throughout the Province. Notwithstanding this contention, no appeal of the *Lake* decision was taken by the City.

b. Brief Summary of Lake v. Cambridge (City)

In *Lake,* the Applicants were young first-time home buyers who were searching out and closing on their real-estate purchase at the start of the COVID-19 pandemic. They purchased a residential property located in the City advertised on MLS and known to them as 424 Eagle Street South, and whose legal description was Lot 15, Plan 237 (“424 Eagle”).

As noted above, on or about 1913, a plan of subdivision, in the then Municipality of the Town of Preston, was registered in the Waterloo County Registry Office pursuant to the version of the *Registry Act* then in force, which thereafter became known as Plan 237. Plan 237 was approved by the Mayor and Clerk of the Town of Preston, a predecessor municipality to the City, in 1913 and each of them assented to its filing in the Registry Office for the County of Waterloo.

Plan 237, however, was "deregistered" as a plan of subdivision for the purposes of the *Planning Act* via a municipal by-law passed in 1950 (the “1950 By-law”). The 1950 By-law was officially recorded on the title to Lot 15, along with other properties, while the land remained within the *Registry* system. Consequently, the 1950 By-law had the effect of nullifying the “entire lot on a

registered plan" exception, as outlined in the current section 50 of the *Planning Act*, for any subsequent land dealings involving Lot 15 as per the original plan. Importantly, it was established through evidence in the *Lake* decision that the Applicants did not possess any knowledge of the 1950 By-law.

Complicating matters, a previous vendor of Lot 15 had owned adjacent land known as Lot 16, along with a part of Lot 14, subsequent to their conversion to *Land Titles*. In this context, the City refused to recognize the transfer of Lot 15 to the Applicants, contending that the transfer was void as a result of a claimed breach of the subdivision control provisions in section 50 of the *Planning Act*.

A core tenet of the City's position on the Application was grounded in its one-time registration of the 1950 By-law while the land was governed by the *Registry Act*, despite its absence from the Applicants' *Land Titles* parcel register. Additionally, the City argued that there existed an obligation to trace the title back to the *Registry* system, asserting that such an investigation would have revealed the presence of the 1950 By-law.

The City not only took the position that one had to search behind the *Land Titles* parcel register to the *Registry* title records, but also one had to search back beyond the 40-year title search period under the provisions of the *Registry Act* to determine whether such a deemed deregistration by-law was ever registered.

2. ***Introduction – Summary of Paper***

The *Lake* decision is noteworthy in part because of some of the legal conclusions reached by the court, as well as the practical points it raises for conveyancing practice in Ontario. As is well known, in real estate transactions, lawyers in Ontario play a central role. As part of this role, lawyers are required to conduct due diligence, such as reviewing parcel registers and conducting on and off-title searches. Since most land in Ontario is governed by the *Land Titles Act*, an examination of title will most often involve an inspection of the electronically generated records maintained by Teraview for the Province of Ontario.

A primary aim of the *Land Titles Act*, like other land titles legislation, is to ensure public confidence in land ownership and reliance on the register, as well as the easy and efficient transferring of ownership, or registration of a mortgage. The *Land Titles Act* promotes these objectives by incorporating three well known principles, being:

i. The mirror principle;

ii. The curtain principle; and

iii. The insurance principle.

Adherence to these principles simplifies real estate transactions by providing a centralized and reliable method of recording land ownership and interests, with a single authoritative register which can be easily accessed, and which can be relied upon to accurately reflect the current state of title for a parcel of land.

This super-structure reduces the need for extensive, often expensive and time-consuming historical research and minimizes the risk of disputes over ownership. Additionally, the mechanism for guaranteeing the accuracy of the register and compensating parties who suffer losses due to errors or fraud, provides further assurance to users of the system.

However, issues can arise when certain instruments or encumbrances are not registered on title or are not carried forward from the *Registry* system in the conversion to *Land Titles*. In those circumstances, can the mirror and curtain principles still be relied upon? Are lawyers required to look behind the parcel register and carry out searches of *Registry* records? At least as it relates to 1950s era "de-registering" by-laws, the decision in *Lake* concludes, no.

This case also highlights the interplay, including historic interplay, between the *Registry Act*, the *Planning Act*, and the *Land Titles Act* as they relate to the registration requirements of subdivision control by-laws and their impact on subsequent purchasers and mortgagees.

In the pages to follow, we turn to putting the facts in issue in the *Lake* decision in somewhat further historical context. We also explain how courts have interpreted what can qualify as a registered plan of subdivision, address certain practical observations related to searching behind

the *Land Titles* register and the potential implications of doing so. Thereafter, there is also discussion of the implications and importance of signing the *Planning Act* "boxes", and, finally, the paper concludes with some considerations for municipalities whose planning interests may be implicated by the *Lake* decision.

3. ***Evolution of Subdivision Control in Ontario: From Early Legislation to the more Modern Planning Regime***

During the first twenty years of the 20th century, Ontario introduced legislation allowing municipalities to participate in urban land use planning for the first time. Prior to this time, municipal oversight of urban development was primarily confined to a set of specific regulations addressing nuisances, public health, and building standards.

Regulations of this era typically pertained to individual structures rather than broader urban land development or the control of various land use classifications. Property owners enjoyed considerable freedom to construct without significant restrictions. The dynamics of the land market dictated the urban development process without extensive regulatory intervention.

In the 1897 Revised Statutes of Ontario, only the *Municipal Act* and the *Public Health Act* contained provisions pertaining to public oversight of urban development.[3] The *Municipal Act* granted municipalities two primary forms of authority with some influence on urban development, being: 1) the regulation of new building construction, and 2) control over specific public nuisances.[4]

The first type of authority allowed municipalities limited oversight over building construction, including safety features such as scaffolding, elevators, doors, and walls.[5] These provisions, scattered throughout the *Municipal Act*, represented a rudimentary form of land use planning authority, though their implementation was discretionary.

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[3] Hulchanski, John David, "The evolution of Ontario's early urban land use planning regulations, 1900-1920" (1982) Centre for Urban and Community Studies, University of Toronto No 136, online: University of Toronto TSpace [https://hdl.handle.net/1807/94457].
[4] *Ibid.*
[5] *Ibid.*

The second type of authority, addressing public nuisances, offered a partial form of zoning authority.[6] For example, the *Public Health Act,* first enacted in 1873, contained provisions relating to urban development. This act granted municipalities with additional authority to regulate land uses, particularly if any use posed a potential public health risk.[7] Specifically, section 72 of the *Public Health Act* allowed a municipality to prohibit any "noxious or offensive trade, business, manufacture, or such as may become offensive".[8]

In 1904, at the request of the Toronto City Council, the Ontario Legislature amended the *Municipal Act* to grant cities authority over "the location, erection, and use of buildings for laundries, butcher shops, stores and manufactories".[9]

As urban development accelerated and immigration to cities surged, a new threat to residential areas was seen to emerge: apartment buildings, often housing immigrant workers.[10] The 1904 amendments to the *Municipal Act*, which allowed cities to regulate certain non-residential establishments, did not address the issue of protecting residential neighborhoods from apartment buildings.

Despite resistance from some members of the Provincial Legislature, lobbying efforts led to enabling legislation in 1912, limited initially to cities with populations over 100,000, which was primarily Toronto. This legislation granted Toronto the authority to regulate the location of apartment or tenement houses, defined as buildings with three or more separate units.[11]

In this incremental manner, Ontario's Legislature gradually introduced focused land use restrictions, implemented by municipalities as required. Unlike many other North American jurisdictions, comprehensive zoning authority was not conferred to municipalities by the Provincial Legislature until the mid-1940s.

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[6] *Ibid.*
[7] *Ibid.*
[8] *The Public Health Act,* RSO 1897, c 210, s 72.
[9] *Municipal Amendment Act,* RSO 1904, c 22, s 19; P W Moore, "Zoning and Planning: The Toronto Experience, 1904-1970" (1979) in A.F.J. Artibise and G.A. Stelter, eds., The Usable Urban Past: Planning and Politics in the Modern Canadian City, Toronto: Macmillan, pp 316-341.
[10] *Supra* note 2.
[11] *Ibid.*

Instead, specific zoning-related restrictions were continuously incorporated into the *Municipal Act*, empowering municipalities to regulate precise locational matters while minimizing interference with property values and development rights.

In 1911, another effort was made to introduce legislation for subdivision control. A proposed amendment to the *Registry Act* was presented, aiming to authorize municipalities to scrutinize subdivision plans for land within a five-mile radius of city boundaries. Under this proposal, a city council could raise objections to a plan based on two criteria: 1) objections related to the layout of streets or lots concerning potential city expansion and the need for coherent thoroughfares, and 2) broader considerations pertaining to city planning, taking into account urban growth and resident convenience.[12]

These objections would be evaluated by the Ontario Railway and Municipal Board (the "ORMB"), which had the authority to request modifications to the plan if deemed necessary.[13] Despite receiving more favorable consideration than in 1910, this legislation was ultimately not enacted.

Ontario's initial legislation enabling direct public oversight of urban development emerged with the 1912 *City and Suburbs Plans Act*[14] (the "1912 Act"). The 1912 Act, spanning just two pages, focused on regulating fundamental physical design aspects of subdivisions in and near major cities.[15] Its primary aim was to authorize a public entity to assess and synchronize street configurations and development plans for newly opened land parcels. Under the 1912 Act, the ORMB possessed the power to enact alterations deemed essential concerning: 1) the quantity and width of streets, 2) the alignment and positioning of streets within the subdivision, and 3) the dimensions and configuration of the lots.[16]

It is in the shadow of the 1912 Act, and in accordance with the then in force *Registry Act*, that the 1913 Plan at issue in the *Lake* decision was prepared, approved by municipal authorities, and registered.

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[12] An Act to Amend the Registry Act, Ontario Legislature, Bill No 137, 1911, s 24 (in PAO, R.G. 8, Original Bills, I-7-H).
[13] *Ibid*, s 25.
[14] Ontario, Statutes, 1912, Chap 43.
[15] *Supra* note 1.
[16] *Ibid.*

A short time later, in 1916, the Commission of Conservation's Draft Planning Act (the "Draft Act") was introduced. The Draft Act encompassed significant sections pertaining to the regulation of all new developments, the establishment of planning by-laws and general plans, land acquisition and expropriation, and detailed provisions granting the province authority to enforce the Draft Act's provisions if localities failed to do so.[17] The subdivision control section aimed to govern all new development comprehensively, not just subdivision plans, prohibiting the creation or sale of streets, roads, or lots without approval from the Local Board.[18] Notably, the Draft Act emphasized street layout considerations.

Finally, in 1917, the government introduced "An Act Respecting Survey and Plans of Land in or near Urban Municipalities", known in short as *The Planning and Development Act* (the "Act").[19] In its final form, the Act consisted of 18 sections and focused on three key areas: 1) the adoption of general plans by municipalities, 2) subdivision controls, and 3) the establishment of local town planning commissions.[20]

The Act did not make planning mandatory or compel municipalities to undertake any new or different actions if they chose not to. It granted local councils the authority to adopt a general plan for their entire jurisdiction or specific areas within it, including an urban zone extending five miles for cities and three miles for towns and villages.[21]

The Act retained provisions for subdivision control from the 1912 Act. However, there were notable differences. While the ORMB maintained final veto power over any local decision, its role was reduced compared to the 1912 Act.[22] Instead of submitting subdivision plans directly to the ORMB, the Act required plans to be submitted to the local city, town, or village.[23] Local councils were given limited criteria to evaluate these plans, similar to those outlined in the 1912 Act,

[17] *Ibid.*
[18] *Ibid.*
[19] Ontario, Statutes, 1917, Chap 44.
[20] *Supra* note 2.
[21] *Supra* note 2; *Supra* note 18, s 4(2).
[22] *Supra* note 2.
[23] *Ibid.*

focusing on the number and width of highways, lot size, and conformity with existing general plans or neighbouring land layouts.[24]

Granting the authority to formulate a general plan and institute a town planning commission did not represent a groundbreaking or substantial initiative by the Province. City councils already had the freedom to establish such commissions or create general plans, albeit without additional legal authority beyond what municipalities already possessed. The ORMB had to approve any plan, and any town planning commission could only oversee activities concerning subdivisions and general plans as specified in the Act. In summary, the 1917 iteration of subdivision control had a narrow scope.

Just one year later, the Act was repealed by a subsequent *Planning and Development Act.*[25] This 1918 act was repealed by the *Planning Act, 1946,* the forerunner of the current legislation.

4. ***The Planning Act, 1946 and "Deregistering" By-Laws***

Since 1946, dealing with land, or any interest therein, is acceptable so long as the land is described in accordance with and is within a registered plan of subdivision.[26] Sidney Troister, author of *The Law of Subdivision Control in Ontario*, adds to this point in his text in the following way:

> This is an important and logical exception [to the subdivision control regulations in the Planning Act]. In order for land to be within a registered plan of subdivision, it must have been approved pursuant to section 51 of the Planning Act. If the purpose of the Act is to ensure the orderly division of land in accordance with municipal and other governmental requirements, such orderly division of land has been achieved on a plan of subdivision which is created through a governmental planning process. Once the government's "seal of approval" has been given to the plan of subdivision, planning and subdivision control for the lots and blocks created on the plans is no longer necessary. If the land is already within a registered plan of subdivision, the purpose of the Act, governmental control of planning, has already been fulfilled through compliance with s. 51.[27]

[24] *Supra* note 18, s 11(2).
[25] SO, 1918, c 38.
[26] Troister, Sidney H. *The Law of Subdivision Control in Ontario: A Practical Guide to Section 50 of the Planning Act / Sidney H. Troister*. Fourth ed. 2022. Print. Chap 4, p 85 ("Troister").
[27] Troister, Chap 4, p 85.

Having said this, since March 1949,[28] a council of a local municipality has had the power to designate any[29] plan of subdivision to be "deemed" not to be a registered plan of subdivision for the purposes of the *Planning Act.*[30] In this event, as Troister writes in his book on subdivision control:

> …[the plan of subdivision] does not cease to be a plan of subdivision for legal description or other purposes. The designation simply means that, for the purposes of section 50(3) and specifically, the exceptions in section 50 for land described in accordance with a registered plan of subdivision, it is deemed not to be such a plan. As a result, an owner may own the whole lots 1 and 2 on the plan but if the plan or the two lots have been deemed not to be on a plan of subdivision, the two lots are merged and the exception in section 50(3)(a) does not apply.[31]

5. ***"Registered Plan of Subdivision"?***

"Registered plan of subdivision" is not a defined term within the *Planning Act*. While it was not disputed that the plan in issue in the *Lake* decision was a registered plan of subdivision pursuant to section 50(3) of the *Planning Act*, it is helpful to understand the principles that have emerged from the jurisprudence regarding the issue of whether or not a plan is a registered plan of subdivision within the meaning of the *Planning Act.*

In *Elrick v. Town of Hespeler*,[32] the Court of Appeal considered a by-law passed by the Corporation of the Town of Hespeler in 1947, which designated the entire municipality as an urban development area under the *Planning Act*. The Ontario Court of Appeal overturned the decision of the trial judge, and concluded that the *composite plan* at issue in that case that had been registered under the *Registry Act* did not constitute a plan subdivision as defined in the *Planning Act*.

The Court of Appeal's reasoning in the case was said to principally rely on the wording of the statues, but also on the basis that such a "composite" plan did not subdivide into lots what was previously one parcel, but merely located and assigned a lot number to the parcel of land of each

[28] *Ibid.*
[29] Since 1970, that has been registered for 8 or more years (Troister, Chap 4, p 96).
[30] *Planning Act*, RSO 1990, c P 13, ss 50(4); see Planning Amendment Act, 1949, SO 1949, c 71, ss 7(1).
[31] Troister, Chap 4, p 94.
[32] [1967] 2 OR 448 ("*Elrick*").

registered owner. The Court of Appeal also noted that allowing the "composite" plan to be considered equivalent to a registered plan of subdivision would enable landowners to circumvent the by-law placing lands under subdivision control.

The *Elrick* decision was later distinguished in a series of cases which found that a "composite" plan which was registered before the coming into effect of the *Planning Act*, 1946 can be considered registered plans of subdivision. For example, in *Re Courneyea and Smith*,[33] Justice Maloney articulated the legislative purpose of the 1970 version of the *Planning Act* and specifically section 29, which aimed to control the unplanned subdivision of land by preventing subdivision without the approval of appropriate authorities. He went on to state:

> I can see no reason for defining 'registered plan of subdivision' as including one type of plan while excluding the other. As there is no definition of 'registered plan of subdivision' in the *Planning Act* itself, the term should be interpreted in a manner consistent with the legislative policy of that *Act*.[34]

Similarly, in *Theriault v. Beaulieu*,[35] the applicant sought to sell Lots 35 through 40 to the respondents, but faced a requisition from the respondents' solicitor for consent under the Act since Lot 34 was being retained by the applicant and adjacent to the lots being sold. The key question was whether Plan 15, which was a *composite* or *compiled* plan prepared by a municipal council in 1881, qualified as a registered plan of subdivision under the Act.

The applicant argued that since Plan 15 was registered before the enactment of the Act in 1946, it should be treated differently. The court considered this argument in light of previous case law, including *Re Courneyea and Smith*. Ultimately, the court determined that Plan 15 did not require consent under the Act, as it was intended that all lots on Plan 15 be transferred to the purchasers, and the municipality had not deregistered the plan under the Act's provisions. Therefore, the requisition for consent was deemed unnecessary.

[33] (1977) 16 OR (2d) 269.
[34] *Ibid* at para 6.
[35] 1982 CarswellOnt 633, 12 ACWS (2d) 537.

Mitoraj v. Patro[36] concerned an application under the *Vendors and Purchasers Act* to determine if the respondent's requisition was adequately addressed by the applicant. The decision involved an agreement for the sale of premises located in Gloucester, identified as Lot 82 Plan 652. Plan 652 was registered in 1956 under a Judge's Order pursuant to the *Registry Act*. The respondent requested consents to rectify *Planning Act* contraventions, but the applicant argued that consents were unnecessary as Plan 652 constituted a registered plan of subdivision. Drawing an analogy between judge-made plans and composite plans, the court concluded that Plan 652, though registered after the *Planning Act*, was deemed registered prior to its enforcement due to the absence of a municipal opt-in by-law until 1962.

Finally, *Tyrrell v. Pemberton*[37] also considered an application to determine the validity of an objection made by the purchaser regarding the vendors' title to certain lands. The purchaser agreed to buy Lot 163, Plan 5 in Bayfield, County of Huron, from the vendors, who also owned adjacent lots. The vendors asserted that no consent was required under the *Planning Act* since the property constituted the entirety of a lot within a subdivision plan. The court relied upon the broad interpretation of plans of subdivision in previous case law, including *Re Courneyea and Smith*, to conclude that Plan 5, even if a compiled plan, fell within the definition of a registered plan of subdivision.

6. Unregistered "Claims" Under the Land Titles Act – Subsection 44(1)

Despite the "doctrine of indefeasibility of title" and the "mirror principle" inherent in the *Land Titles* system, as intoned in cases like *Stanbarr*[38] and *Durrani v. Augier*,[39] there are still classes of cases in the *Land Titles* system where title can still be taken subject to so-called "unregistered claims". Subsection 44(1) of the *Land Titles Act* provides a listing of such "unregistered claims" that title is taken subject to, and reads in part as follows:[40]

> All registered land, unless the contrary is expressed on the register, is subject to such of the following *liabilities, rights and interests* as for the time being may be subsisting in reference

[36] 1989 CarswellOnt 2859, 15 ACWS (3d) 352.
[37] 1983 CarswellOnt 661, [1983] OJ No 2186.
[38] *Supra* note 1 at para 13.
[39] [2000] OJ No 2960, 2000 CanLII 22410 (ONSC) at para 43.
[40] *Land Titles Act*, RSO 1990, c L 5, ss 44(1).

> thereto, and such liabilities, rights and interests *shall not be deemed to be encumbrances within the meaning of this Act*: [emphasis added]

In effect, subsection 44(1) is a list of "liabilities, rights and interests" which do not need to be registered on title to the parcel of land as a precondition for title to be taken "subject to" them under the *Land Titles Act*.

It is important to note that paragraph 11 of subsection 44(1) expressly provides that all[41] *Land Titles* titles are taken subject to the subdivision control provisions of the *Planning Act* (sections 50 and 50.1), even if not set out expressly on the face of the parcel register.

Directly at issue in the *Lake* decision was paragraph 10 of subsection 44(1), which ensures that by-laws related to *use* of land are effective against an owner without any actual notice of the by-law, even if not expressly noted on the parcel register. It reads:

> 10. Any by-law heretofore passed under section 34 of the Planning Act or a predecessor of that section, *and any other municipal by-law heretofore or hereafter passed, affecting land that does not directly affect the title to land*. [emphasis added]

However, those "liabilities, rights and interests" arising from by-laws which do "directly affect" title to the land, do have to be registered on a *Land Titles* parcel register for title to be taken subject to them. That is a central holding of the *Lake* decision and it is in this area where the "mirror principle" – that the register is a perfect mirror of the state of title – operates to protect people who rely on the register from loss, including the total failure of their transfer or mortgage.

Several decisions have dealt with subsection 44(1) of the *Land Titles Act* in the context of unregistered interests, but there has not been much development in this area of the law. For instance, in *Bank of Montreal v. Smith*,[42] the court examined whether an unregistered 10-year lease was enforceable against a bank, acting as a mortgagee, due to its actual or constructive notice of the lease. This issue was considered against the backdrop of paragraph 4 of subsection 44(1), which provides an exception to the general rule that leases must be registered in order to

[41] Unless the contrary is expressed on the register.
[42] [2008] OJ No 2353.

encumber the interest of a purchaser. In that case, the court found that constructive notice was insufficient; actual notice of the nature and legal effect of the unregistered prior interest was required for it to be enforceable against subsequent encumbrancers.

Additionally, in *Hoggarth v. MGM Farms and Fingers Limited*,[43] a dispute arose between owners of lots on Plan 993 in the Township of Oro-Medonte, regarding the rights associated with certain designated areas on the plan, known as the "Slivers." The plan, registered in 1950, contained an endorsement dedicating specific lots as areas of common use for all property owners in the subdivision.

The applicants, who were some of the lot owners, supported by the Township of Oro-Medonte, argued that the dedication notation on the plan binds all lot owners, while the respondents claimed that any rights granted in 1950 had expired. The applicants sought a court order affirming that the subject lands remain subject to their rights and prohibiting the respondents from interfering with those rights.

The court went to find that subsection 44(1) of the *Land Titles Act* establishes that all registered land is subject to existing rights unless expressly stated otherwise in the register. In the context of this case, the court determined that the Slivers were subject to the subsisting rights created by Plan 993 and enjoyed by the applicants, Township of Oro-Medonte, and even the respondents themselves. These rights included any right of way, watercourse, right of water, and other easements as outlined in subsections 44(1) and (2) of the *Land Titles Act*. Therefore, the applicants' rights were preserved even after the conversion to Land Titles conversion qualified.

7. ***Lake v. Cambridge (City) – The Decision***

The court rejected the arguments made by the City and found that relance was entitled to be placed on the *Land Titles* parcel register for 424 Eagle under the *Land Titles* system. Additionally, it was held that there was not requirement to go behind the *Land Titles* parcel register to conduct a search to determine whether a by-law had ever been registered deeming Plan 237 not to be a

[43] 2015 ONSC 2494.

registered plan of subdivision for the purpose of the subdivision control provisions of the *Planning Act*.

In coming to its decision, the court provided the following reasons:

(a) *Registration of the 1950 By-law was required pursuant to the Registry Act and the Planning Act*

The 1950 By-law's validity hinged on its registration under both the *Registry Act* and the *Planning Act*. The *Registry Act* at the time stipulated that any "instrument" affecting land needed registration to be effective against subsequent purchasers or mortgagees. The Court of Appeal in *The Township of Trafalgar v. Hamilton*[44] established that even by-laws affecting land use, albeit not directly affecting title, required registration to safeguard against potential losses to subsequent purchasers. Subsequent amendments clarified that while by-laws regulating land use need not be registered, those directly affecting title, like subdivision control by-laws, must be.

The court confirmed this proposition in *Innes v. Van De Weerdhof.*[45] That case established that subdivision control by-laws, such as the 1950 By-law in question, must be registered to be effective against subsequent registrations like transfers and mortgages. This requirement, stemming from legislative policy objectives, has remained consistent since 1947, as mandated by both the *Registry Act* and the *Planning Act*. Subsequent amendments, such as those in the *Planning Act*, ensure that such by-laws must be registered in the proper land registry office. Notably, 424 Eagle was converted to *Land Titles* on August 18, 2003, placing it under the purview of *Land Titles Act* at the time of the Applicants' Transfer in July 2020.

(b) *The 1950 By-law was required to be registered in the Land Titles system for the Applicants to take title subject to it*

In order for the Applicants' title to 424 Eagle to have been taken subject to the 1950 By-law, either the by-law must have been officially recorded on the *Land Titles* parcel register, or the Applicants

[44] [1954] OR 81.
[45] [1970] 2 OR 334 (HCJ).

must have had actual notice of the by-law. The *Land Titles Act* principles, including the mirror principle, the curtain principle, and the insurance principle, necessitate registration of interests directly affecting title.

The court found that the effect of paragraph 44(1) 10 is that by-laws related to the use of land do not need to be registered on title to a *Land Titles* parcel register to be effective against a transferee or mortgagee without any actual notice of the by-law. However, the converse is also true. Those "liabilities, rights and interests" which do "directly affect" title to the land, such as subdivision control by-laws,[46] do have to be registered on the *Land Titles* parcel register for title to be taken subject to them.

The court found that a by-law which removes a person's right to transfer a lot in a manner that does not violate the subdivision control provisions of the *Planning Act*, or without governmental consent, does affect such a right in a straightforward way, by eliminating it. The 1950 By-law can thus be seen as a municipal by-law which does directly affect the title to the Applicants' land. The 1950 By-law was therefore an "encumbrance" within the meaning of the *Land Titles Act* and had to be registered on the *Land Titles* parcel register for title to have been taken by the Applicants subject to it.

(c) The Applicants did not have deemed actual notice of the 1950 By-law

The court found that the Applicants lacked actual notice of the 1950 By-law, aligning with the strict interpretation of the mirror principle. This lack of notice further underscored the necessity of registration to ensure transparency and protect the interests of subsequent purchasers or mortgagees.

(d) The 1950 By-law expired and had no further effect under the Registry Act

The Applicants argued that the 1950 By-law, falling under the definition of a "claim" in the *Registry Act*, expired on March 22, 1990, due to the failure of the Town of Preston, and later the City, to

[46] *Ibid.*

register a notice of claim regarding 424 Eagle. The court was persuaded that the "claim" of the City pursuant to the 1950 By-law expired effective March 22, 1990.

Pursuant to subsection 111(1) of the *Registry Act* a "claim" is defined broadly as any right, title, interest, or encumbrance affecting land and the 1950 By-law was found to meet this definition. Subsection 112(1) of the *Registry Act* stipulates a 40-year title search period for land dealings, except for claims specified under subsection 113(5), which includes certain Crown interests, municipal rights, and railway rights-of-way. The court found that subsection 113(5) did not have application in this case.

The court also looked at paragraph 113(5)(b) which provides exceptions for a "claim arising under any Act", noting there was no caselaw on point interpreting this provision. Accordingly, this was the first time a court determined whether a deregistering by-law fell under this exception. The court held that the City's "claim" deeming Plan 237 not to be a plan of subdivision did not fall within the exception for a "claim arising under any Act" since it arose under the 1950 By-law, and not under an Act of the legislature. This was distinguished from a claim against land arising under s. 349(3) of the *Municipal Act, 2001*[47] for example, which provides that municipal taxes are a special lien on land with priority. In respect of the 1950 By-law, the court commented that merely because a municipal by-law affecting land may be enacted by virtue of a power conferred on the municipality by statute, does not make the by-law "a claim arising under any Act."

Finally, the court looked to paragraph 112(3)(b), which clarifies that a chain of title is not affected by any instrument registered before the title search period unless it pertains to a claim with a valid notice of claim. Importantly, subsection 113(1) establishes that *a claim existing at the end of the notice period expires unless a notice of claim is registered*. Subsection 113(2) allows for the registration of a notice of claim within the notice period or after expiration but before a conflicting claim is registered. As such, the court held that the City could have protected its interest by registering a notice of claim before the expiry of the notice period in 1990 or before the conversion to *Land Titles*. A one-time registration of the by-law in 1950 was not sufficient to

[47] SO 2001, c. 25

maintain its priority over subsequent purchasers without notice beyond the 40-year notice period.

Based on these provisions of the *Registry Act*, the court found the 1950 By-law expired on March 22, 1990, as no notice of claim was registered before or after its expiration and before the conversion to *Land Titles*.

Ultimately, the court's decision validated the transfer of Lot 15 to the Applicants, given that the absence of the 1950 By-law from the *Land Titles* parcel precluded its effectiveness against them, despite the 1950 By-law deregistering the 1913 Plan. As a result, the Transfer was not void, but rather complied with the subdivision control provisions of the *Planning Act*. It was held that subdivision control by-laws, including those which designate a plan of subdivision not to be a registered plan of subdivision, must be registered on title to property on the parcel register, or a notice of claim must be registered, to be effective against *bona fide* purchasers without notice, such as the Applicants. This is because subdivision control by-laws directly affect title to property and are thus "encumbrances" within the meaning of the *Land Titles Act* and are "claims" within the meaning of the *Registry Act.*

8. Conveyancing Implications

a. Imputation of Knowledge

The Applicants in the *Lake* decision had no actual notice of the 1950 By-law. However, an issue that may arise is when a purchaser or the purchaser's lawyer has notice of a "defect" in title to the property. In this case, can a purchaser still rely on the mirror and curtain principles? Moreover, does the lawyer's knowledge of the defect become imputed to their client?

The Ontario Court of Appeal in *Stanbarr* clarified the distinction between actual and constructive notice regarding "defects" in title, and confirmed that courts must insist on actual notice of a defect, with constructive knowledge being insufficient.[48] Even so, in a footnote the Court of Appeal in *Stanbarr* declined to comment on whether willful blindness might, or could, act as a

[48] *Supra* note 1 at para 26.

surrogate for actual knowledge in this context, and it appears there is more to develop in this area of the law.[49]

Additionally, it is trite law that the knowledge of an agent is imputed to his principal.[50] This doctrine operates under the assumption that an agent will relay their knowledge to their principal as it is their duty to do so.[51] Nonetheless, this assumption does not hold when it can be demonstrated that the agent harbors motives that incentivize them to withhold the truth from their principal.[52] This rule also applies to imputing knowledge of a solicitor to his or her client.[53]

Given that it would be highly unlikely that a lawyer will have a motivation to conceal the truth from a client, the actual knowledge of a lawyer that there is a defect in title will be imputed to that lawyer's client and may be implicated in a "notice" analysis, even if the lawyer does not actually disclose their "knowledge" to their client.

The decision in *Stanbarr* and other cases dealing with the "notice" exception to the mirror principle protect a purchaser, and thereby protect a purchaser's lawyer, from claims relating to unregistered encumbrances other than those that are excepted by subsection 44(1) of the *Land Titles Act* and those for which there is actual knowledge. This said, a lawyer's knowledge was not at issue in the *Lake* decision, but the issue remains a point to be mindful of, as it could have an impact on cases where "notice" of a claimed defect is at issue.

The authorities emphasize that lawyers can and should rely on the parcel register and should not go behind the parcel register. The "curtain principle" which underlies the *Land Titles Act,* holds that *a purchaser need not investigate the history of past dealings with the land or search behind the title as depicted on the register*.[54] Looking behind the curtain runs more of a risk, as this may lead to actual notice of a "defect" and require the lawyer to make disclosure.

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[49] *Ibid*.
[50] *Durbin v Monserat Investments Ltd.*, (1978) 20 OR (2d) 181 ("*Durbin*"); *Vescio v Peterman*, [1990] OJ No 4039.
[51] *Ibid.*
[52] *Ibid.*
[53] *Shinder v Shinder*, 2018 ONCA 717.
[54] *Supra* note 1 at para 47.

b. Sign the Boxes

In the *Lake* decision, the *Planning Act* "boxes" were not signed. Had they been signed, it is unlikely the case would ever have been before the Court. Therefore, it is important to be mindful of the importance and power of the curative provisions in the *Planning Act*, subsection 50(22) of which provides that where a deed or transfer containing the three prescribed statements set out in clauses 50(22)(a), (b), and (c) (the "Prescribed Statements") is registered under the *Land Titles Act* or the *Registry Act*, then

> any contravention of [section 50 of the *Planning Act*] or a predecessor thereof or of a by-law passed under a predecessor of this section or of an order made under clause 27 (1) (b), as it existed on the 25th day of June, 1970, of The Planning Act, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor thereof, *does not and shall be deemed never to have had the effect of preventing the conveyance of or creation of any interest in the land*, but this subsection does not affect the rights acquired by any person from a judgment or order of any court given or made on or before the day the deed or transfer is registered.
>
> [*emphasis added*]

Authorities on this section make it clear that absent fraud, the statements in a transfer cure *Planning Act* violations. What is more, the courts will not go behind the statements to invalidate the curative provisions. For example, in *Reeve-Burns v. Pelkman*,[55] the property in that case was conveyed without consent in 1968 when the then vendor owned abutting land. The conveyance contravened the *Planning Act* since the property was then subject to subdivision control. The current owners acquired title of the same parcel in 1988 and their deed contained the three *Planning Act* statements. It was argued that the statements should not be applied in situations where the contravention of the Act was one that a prudent lawyer could have determined from a careful search of title. The court concluded otherwise, saying that:

> There is no ambiguity in the 1984 amendment (referring to Section 50(22)) which might justify my giving it some narrow or specialized reading. Equally, I conclude that the amendment does not allow a court to go behind the signed statements in a deed absent, perhaps, a showing of fraud—something not suggested here. Thus, I am driven to hold that deed No. 102380 does, in fact,

[55] (1989), 70 OR (2d) 113 (Dist Ct).

> activate the curative or remedial effect of s.[50(22)] and validates the otherwise defective Oxbow deed No. 45826.

This decision was followed in *Imrisek v. D'Ermo*,[56] which found that if a transfer includes the Prescribed Statements, the title is valid even if, subsequently, it is discovered that there was a prior *Planning Act* breach in the title chain.

Moreover, in *Mihaylov v. 11659976 Ontario Inc.*,[57] a case involving the grant of an easement for a water pipe by the owners of A in favour of neighbour B, no consent was obtained for the grant of easement, but the agreement was registered on title to both A, the servient tenement, and B, the dominant tenement. The original parties to the grant were no longer the owners of their respective properties. When the owner of A, the servient tenement, transferred it to the plaintiff, the *Planning Act* statements were executed.

The issue before the Court of Appeal was whether the transfer of A with the *Planning Act* statements validated the easement that was benefitting B, even though the grant of easement over B was not in compliance and B had not been subsequently transferred with the *Planning Act* statements. The Court of Appeal upheld the lower court's reasoning that the transfer with the *Planning Act* statements of A subject to the easement validated the easement in favour of B. Specifically at para. 35 the Court of Appeal stated:

> Section 50(22) (the "curative provision") can remedy historical breaches of the subdivision control sections of the *Planning Act* where subsequent deeds or transfers contain certain prescribed statements by the grantor, the grantor's solicitor, and the grantee's solicitor. After the enactment of what is now s. 50(22), the various pre-printed forms of transfers, deeds, etc. that are used to convey real property in Ontario have included passages that contain the statements contemplated in the statute, so that they may be signed or completed by the parties. It is intended that when the statements are completed, they will trigger the application of s. 50(22).

The courts have upheld that if the transfer includes the statements, the transfer is valid, even if there was a prior *Planning Act* breach. The court has clearly stated that Section 50(22) is a curative provision and can remedy historical breaches.

[56] (1993) 14 OR (3d) 774 (Gen Div).
[57] 2017 ONCA 116.

Had the transfer to the Applicants in the *Lake* decision included the Prescribed Statements, then the contravention of the *Planning Act*, as alleged by the City, would have been deemed never to have had the effect of preventing the conveyance of or creation of any interest in the land. That would have been a bar to the City's allegation that the transfer to the Applicants, or their mortgage, was void.

Many conveyancing lawyers are reluctant to sign the Prescribed Statements or take the position that they are not necessary when the transfer relates to a whole of a lot on a plan of subdivision. The *Lake* decision shows that a purchaser is better served by inclusion of the Prescribed Statements even when the transfer purports to convey a whole of a lot on a plan of subdivision.

In this regard, clause 50(22)(c) (the "Third Prescribed Statement") and subsection 50(23) of the *Planning Act* set out the standard that is expected of a transferee's lawyer prior to making the Third Prescribed Statement. With the *Lake* decision, a lawyer should now be more confident in making the Third Prescribed Statement by making the required searches in reliance upon the parcel registers under the *Land Titles* system and the applicable 40-year search period under section 112 of the *Registry Act* for properties in the *Registry* system.

However, at least in relation to properties registered in the *Land Titles* system, a lawyer may be precluded from making the Third Prescribed Statement if the lawyer has actual knowledge of a by-law passed under subsection 50(4) of the *Planning Act*. And further, a lawyer who knowingly makes a Third Prescribed Statement is guilty of an offence and may be liable for the penalty set out in subsection 50(25).

c. What Should Municipalities Do?

As noted earlier, a by-law passed under subsection 50(4) of the *Planning Act* deeming a plan of subdivision to not be a registered plan of subdivision for the purposes of section 50 is either an "encumbrance" for the purposes of the *Land Titles Act*, or a "claim" for the purposes of the *Registry Act*, and must be registered on title to the affected parcels of land in the *Land Titles* system or must be registered on title and with subsequent notices of claim for land in the *Registry* system.

Registration or re-registration of a by-law or a notice of claim ("Reregistration") will not affect the interests of purchasers or mortgagees that were acquired without notice of the by-law, but will affect the interests of owners and mortgagees from and after the date of Reregistration.

Municipalities are in a uniquely preferred position in that they can register a by-law passed under subsection 50(4) of the *Planning Act* without the consent of the owners of the properties affected by such by-law. The fact that a previously registered by-law has "expired" does not affect the ability of Reregistration. For example, there is no limit on the power of the City to register the 1950 By-law today.

Registration of the 1950 By-law today, or another by-law which may be implicated by the *Lake* decision, will not have retroactive effect. It will remove the *whole of a lot on a registered plan of subdivision* exemption going forward. Meaning, if others who own whole lots on "deregistered" plans of subdivision with an "expired" by-law were to acquire any abutting lands (including other whole lots), those whole lots and other lands will merge for the purposes of the subdivision control provisions of the *Planning Act* and those whole lots will no longer be able to be conveyed using the *whole of a lot on a registered plan of subdivision* exemption.

APPENDIX

LEGISLATION

The Public Health Act, RSO 1897, c 210, s 72.

Municipal Amendment Act, RSO 1904, c 22, s 19

An Act to Amend the Registry Act, Ontario Legislature, Bill No. 137, 1911, s 24 (in PAO, R.G. 8, Original Bills, I-7-H).

City and Suburbs Plans Act, Ontario, Statutes, 1912, Chap 43.

The Planning and Development Act, Ontario, Statutes, 1917, Chap 44.

Planning and Development Act, SO, 1918, c 38.

Planning Act, RSO 1990, c P 13.

Land Titles Act, RSO 1990, c L 5.

JURISPRUDENCE

Stanbarr Services Limited v Metropolis Properties Inc, 2018 ONCA 244.

Elrick v. Town of Hespeler, [1967] 2 OR 448.

Re Courneyea and Smith, (1977) 16 OR (2d) 269.

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Durbin v Monserat Investments Ltd., (1978) 20 OR (2d) 181.

Vescio v Peterman, [1990] OJ No 4039.

Shinder v Shinder, 2018 ONCA 717.

Reeve-Burns v Pelkman, (1989), 70 OR (2d) 113 (Dist Ct).

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Mihaylov v 11659976 Ontario Inc., 2017 ONCA 116.

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Law Society of Ontario | Barreau de l'Ontario

TAB 2

21st Real Estate Law Summit

Off-Title Searches

Andrew Fortis
Hummingbird Lawyers LLP

April 16, 2024

cpd

URBAN PROPERTIES	COTTAGE PROPERTIES	VACANT LAND
☐ Execution Searches ☐ Corporate Status ☐ Realty Taxes* ☐ Water Account* ☐ Local Improvements* ☐ Hydro Arrears ☐ Unregistered Hydro Easements ☐ Gas ☐ Geothermal Systems ☐ Building and Zoning Compliance ☐ Work Orders* ☐ Electrical Safety Authority* ☐ Technical Standards and Safety Authority (elevators) ☐ Aboveground/Underground Fuel Oil Storage Tanks ☐ Fire Protection and Prevention Act* ☐ Occupancy Permits ☐ Tarion ☐ Bankruptcy ☐ Waste Disposal ☐ Heritage Designation ☐ Compliance with Registered Agreements* ☐ Airport Zoning ☐ Development Charges* ☐ Underground Utility Facilities ☐ Vacant Home Tax* ☐ *Personal Property Security Act*	☐ Execution Searches ☐ Corporate Status ☐ Realty Taxes* ☐ Water – potability and quantity of flow ☐ Wells and Welldriller's ☐ Sewage systems, permits ☐ Local Improvements* ☐ Hydro Arrears ☐ Unregistered Hydro Easements ☐ Gas/Propane ☐ Building and Zoning Compliance ☐ Work Orders* ☐ Electrical Safety Authority* ☐ Fire Protection and Prevention Act* ☐ WETT Certificates ☐ Occupancy Permits ☐ Bankruptcy ☐ Waste Disposal ☐ Highway entrances ☐ Controlled access to highways ☐ Local Roads Boards ☐ Conservation Authorities Act ☐ Drainage Act ☐ Beds of Navigable Waters Act ☐ 66-Foot Reserves ☐ Reservations in the Crown Patent ☐ Boat Houses/Docks in water ☐ Shoreline Property Assistance Act	☐ Execution Searches ☐ Corporate Status ☐ Realty Taxes* ☐ Local Improvements* ☐ Unregistered Hydro Easements ☐ Zoning ☐ Work Orders* ☐ Bankruptcy ☐ Waste Disposal ☐ Compliance with Registered Agreements* ☐ Airport Zoning ☐ Environmental Searches ☐ Underground Utility Facilities ☐ Drainage Act

DISCLAIMER: The information contained herein is of a general nature and is not intended to be legal advice or to address the circumstances of any particular transaction, The above list is not exhaustive, and users are cautioned to tailor their off-title searches as necessary, as these will vary based upon the type of property, purchaser, vendor and the surrounding circumstances of the pending transaction.

* Will form a lien on title if it remains unpaid or unremedied

Law Society of Ontario | Barreau de l'Ontario

TAB 3

21st Real Estate Law Summit

Conflicts of Interest in Real Estate Practice (PPT)

Glenn Stuart, Executive Director, Professional Regulation
Law Society of Ontario

April 16, 2024

21st Real Estate Summit – April 16, 2024

Conflicts of Interest in Real Estate Practice

Glenn Stuart, Professional Regulation

Law Society of Ontario | Barreau de l'Ontario

The Premise

- The notion of conflicts of interest – or avoiding those conflicts – is fundamental to our role as lawyers because it is the manifestation of a key duty for all lawyers: the duty of loyalty.

Broad Implications

- Clients want to know – and an objective observer should agree – that you are doing your best for them, without other influences.

- Conceived in that way, conflicting interests permeates most ethical problems we encounter:
  - client-client
  - client-lawyer
  - lawyer-self

The Basic Rule

- Rule 3.4-1:

  A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

- Too much or not enough?

The Basic Principles

- Client may not know that a conflicting interest exists.
  - There is a need to ensure that they are properly informed.

- Do not assume the clients know
  - Even if they are related or they have been longstanding clients (who create an additional obligation if part of the conflict)

- Communication with a client about these issues (or any issues) is always better in writing – and has to be here

When is a Conflict Not a Conflict?

- Consent

- Rule 3.4-2 :

  A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be **fully informed and voluntary after disclosure**, from all 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.

Key Rules For Real Estate Practice (1)

- Rule 3.4-12

Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

Exceptions (3.4-14):

- Institutional lenders
- Vendor takebacks
- Remote and no options
- Under $75,000
- Non-arm's length parties

Key Rules for Real Estate Practice (2)

- Rule 3.4-15

> When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, **all material information** that is relevant to the transaction.

Key Rules For Real Estate Practice (3)

- Rule 3.4-16.7

Subject to rule 3.4-16.8, an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

Exceptions (3.4-16.8/16.9):

- Different lawyers in firm
- Same lawyer where *LRRA* permits, or where between related persons, or remote and “undue inconvenience”
- **But** must otherwise comply with rule 3.4

Doing Business with Clients: Proceed with Caution

- Rule 3.4-28

  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

  Except for borrowing from a regulated lender or from a related person, a lawyer shall not borrow from a client.

- Rule 3.4-28.2

  A lawyer shall not do indirectly what the lawyer is prohibited from doing directly under Rules 3.4-28 to 3.4-36.

Conflicts Bear Fruit (1): Mortgage Fraud

- Conflicts (notably conflicts where representing more than one party) do not cause mortgage fraud
  - But they give it fertile ground to grow

- Mortgage fraud arises when material information is not disclosed
  - That is much easier when acting for more than one party and not paying attention to conflicts

Conflicts Bear Fruit (2): Syndicated Mortgages

- Lawyers can encounter many problems with syndicated mortgages
  - Engage without FSRA registration and outside exemption
  - Not provide competent advice

- But, conflicts of interest almost invariably involved in the problems
  - Many roles in a syndicated mortgage
  - More hats, more problems
  - Acting for more than one party is central problem

- Form 9D – only a partial remedy

What to Do When There is A Problem?

- Be alert – but sometimes that is not enough
- Reporting error to LawPro
- Reporting to LSO
- What to expect when there is a complaint or self-report

Resources

- Practice Supports and Resources: https://lso.ca/lawyers/practice-supports-and-resources
  - Coach and Advisor Network
  - Real Estate Transaction Practice Guidelines
  - Practice Management Hotline

- https://www.practicepro.ca/category/malpractice-errors/conflicts-of-interest/

- Members Assistance Program

Questions?

Law Society of Ontario | Barreau de l'Ontario

TAB 4

21st Real Estate Law Summit

Estate Conveyancing – Learn From Our Mistakes

Electronic Registration Procedures Guide
Estate Module

Appendices

Estate Conveyancing – Learn From Our Mistakes (PPT)

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April 16, 2024

cpd

Estate Conveyancing – Learn From Our Mistakes

Maxim Piva and Michele Allinotte

Journey Law Professional Corporation

Introduction

We have a combined experience of over 25 years in conveyancing, and we still make mistakes on estate conveyancing. There are very specific rules and requirements for the death of owner registrations.

In many cases, our colleagues have not received notice of returned instruments. When those instruments are returned, entire deals can be in jeopardy, or deals that closed long ago are deregistered.

If you learn nothing else from our presentation and paper, please go to Teraview and sign up for email notifications when instruments are returned. See Appendix 1 for instructions.

Secondly, use the Procedures Guide, Supplements and Bulletins. The LRO is giving shorter turnaround times for corrections, and will not send a document back more than three times in our experience. If you use these tools as you are preparing your document, you are less likely to have a returned document.

Thirdly, don't be afraid to report to Law Pro when an error is made that jeopardizes the client's interests.

The First Dealings Exemption

Where the registered owner of a property in Ontario dies without any surviving joint tenants, the general assumption is that their interest in the land passes to their estate, requiring a Certificate of Appointment of Estate Trustee ("probate"). An application must be submitted and estate administration taxes paid before the property may be transferred to another party. One exception to this general requirement for probate is where the property benefits from a "First Dealings exemption".

The current requirements for a First Dealings Exemption come from sections 123 and 124 of the Land Titles Act as amended by the Red Tape Reduction Act, 2000

The *Red Tape Reduction Act, 2000*, which came into force 6 December 2000 amended the *Land Titles Act* to allow the Director of Titles to specify the required registered evidence necessary to take advantage of the First Dealings Exemption.

Bulletin No. 2000-6, dated 20 December 2000, attached as Appendix 2 outlines the documentation and law statements required, including where no application for a certificate of appointment of estate trustee has been made.

To register such an application requires:

i. The property must be a Ministry conversion from Registry to Land Titles;
ii. The transaction must be the first dealing after the conversion of the property;
iii. Disclosure of the value of the estate;
iv. The same evidence as under the Registry Act regarding the execution of a will and proof of death;
v. An assurance that the will is the last will and that a certificate of appointment of estate trustee has not been sought;
vi. Assurance that the testator was of the age of majority when the will was executed and that the will has not since been revoked; and
vii. In all cases, a covenant to indemnify the Land Titles Assurance Fund must be provided. These covenants will be discussed later in the presentation.

The current Estates Module of the Electronic Registration Procedures Guide and its supplements set out the general availability of the exemption as well as more specific instances of when the First Dealings Exemption will and will not be available. The supplement to the Procedures Guide is attached as Appendix 3.

The First Dealings Exemption is generally available if:

i. The deceased owner acquired the property when it was registered under the *Registry Act*;
ii. The property was converted to Land Titles as LTCQ, and *remains* LTCQ;
iii. The deceased owner still owned the property at the time of their death; and
iv. The deceased owner died with a will.

The First Dealings Exemption is generally not available for LT Absolute or Absolute Plus PINs. The requirement for LTCQ will generally disqualify condominiums from a First Dealing Exemption.

In most areas of Ontario, condominium construction has arisen on LT Absolute or Absolute Plus land. Where the condominium is located on an LTCQ parcel, such as may be more likely in southwest Ontario, a First Dealings Exemption may be available. Confirming the LCTQ status of condominium lands will be especially critical in dealing with estate conveyances involving condominiums.

Establishing continuous ownership from Registry to Land Titles

Establishing whether or not ownership has changed since the first conversion from Registry is somewhat trickier. Many PINs contain an information statement under the legal description which appears as follows:

RECENTLY:
FIRST CONVERSION FROM BOOK

This is **not** to be relied upon. Instead, the conversion date is found in the body of the PIN as an entry marked by asterisks and followed by a date:

**DATE OF CONVERSION TO LAND TITLES: ##-##-####

Or, alternatively, by the PIN creation date indicated on the top right of the PIN.

Those dates, when compared to the date of the registered transfer to the deceased owner, will determine whether the requirement for the First Dealings Exemption is met.

The First Dealings Exemption requires maintenance of ownership from Registry to the date of death with no intervening "dealings"

The maintenance of ownership may cause significant confusion as to the availability of the exemption. It is important to note that legal and not beneficial ownership of the fee simple is what is integral to availability of the exemption, and the acquisition by other parties of an interest in the land may not sufficiently infringe on the owner's fee simple title to preclude the First Dealings Exemption.

For example, the registration of a charge or subsequent discharge against the land is not a sufficient infringement on the Fee Simple to constitute a "dealing'. Similarly, nor is a change in the capacity of ownership severing a joint tenancy considered a "dealing" which would render the exemption unavailable. Likewise, the transfer of a property to a former spouse from joint ownership following divorce, despite being a more distinct change of ownership, is not a "dealing" sufficient to disqualify the property from the First Dealings Exemption. Neither do leases, various notices, survivorship applications constitute dealings which disallow a First Dealings Exemption.

The Estates Module of the Electronic Registration Procedures Guide offers some clarity on this point. According to the Procedures guide, intervening instruments "less than a transfer" are permitted. This covers the above-mentioned mortgages, notices, leases, but also restrictive covenants or easements. If the instrument falls short of transferring the owner's title in fee simple, it will generally not prevent a First Dealings Exemption.

The First Dealings Exemption will not be available where legal ownership of the Fee Simple has been conveyed since conversion to Land Titles

The most obvious example of a dealing or change of ownership which would be a transfer to an unrelated party. Sometimes, however, it's not so simple. It should be carefully noted that non-arm's length transfers or transfers to a related party or where the consideration is nominal; as a gift or for "natural love and affection" will render the First Dealings Exemption unavailable. Perhaps a good rule would be that if the registered owner changes at all, further inquiry is required.

Attached as Appendix 4 is a PIN that to some may seem to qualify as a first dealings, but it is not. This PIN shows the following:

- Spouse acquires property in 1986; second spouse is not on title

- PIN creation date is 2008
- Owner spouse dies in 2021 and property is transferred to second spouse, first as Estate Trustee (ET) on a Transmission by Personal Representative and then personally via a Transfer by Personal Representative
- Second spouse dies later in 2021

Many lawyers and realtors think that this scenario is a first dealing since the second to die spouse acquired their interest from the owner spouse on death. Sadly, it does not. This is confirmed in the supplement attached as Appendix 3.

Transfers After Conversion

Generally, a transfer of the owner's fee simple interest after conversion to LTCQ ends the First Dealings Exemption for the transferor. The transferee, not having acquired the property while under the Registry Act, never had a First Dealings Exemption in the first place. The First Dealings Exemption does not run with the land for the benefit of the transferee.

Non-Arms' Length Transfers, Related Parties, Gifts, etc.

The transfer of the owner's fee simple interest after conversion from the Registry Act to LTCQ ends the First Dealings Exemption, even if the transferee is otherwise non-arms' length or a related party, and/or the transfer is for nominal consideration, as a gift, or for "natural love and affection". For example, if a deceased owner acquired the property while under the Registry Act, and then transferred that property to a spouse or child after conversion to LTCQ, then the spouse/child, as transferee, does not have the benefit of a First Dealings Exemption (since he or she did not "acquire while in Registry"). There is no general passing-along of the First Dealings Exemption to related transferees.

There are as well multiple scenarios where property maybe be subject to a "dealing" through a modification to the PIN which would render the exception unavailable.

For instance, the First Dealing Exemption is not necessarily available in cases where the owner acquires abutting lands already registered in Land Titles. If the abutting lands become merged through the operation of the *Planning Act* or through the doctrine of merger, only the original parcel of LTCQ land would qualify for the exemption, not the merged abutting parcels.

Recall as well that the Land Titles system will not recognize trusts; ownership cannot be registered in the capacity of a trustee. If legal ownership is transferred while the property is in LTCQ, even where beneficial ownership is not, the First Dealings Exemption will not be available.

There are specific circumstances where the First Dealings Exemption is preserved

If you're looking at a property where a recent transfer in Land Titles is present, it should already be apparent that determining whether the First Dealings Exemption is available should merit some further inquiry except in very obvious scenarios.

Some situations, despite an apparent interest having vested in Land Titles, will not undermine the First Dealings Exemption. Being clear about these more specific

circumstances will potentially allow you to preserve your client's interests, even where it is not immediately apparent that a First Dealings Exemption is available.

As already noted, it is legal ownership of the fee simple that matters, not necessarily the tenure or capacity of that ownership. In situations where the owners maintain the fee simple, but register a self-to-self transfer to change tenure, the exemption is still available.

A similar situation arises where an owner acquires an undivided share while the property was in Registry. If that same owner later acquires a further share after the property has been converted to Land Titles (LTCQ), the first dealings exemption will still apply to the totality of the undivided interest.

For clarity, this may be the case where two owners purchased a property in Registry as tenants in common, each as to a 50% share. If one co-tenant predeceases, leaving their 50% interest to the surviving tenant in common, the subsequent acquisition by the survivor of the additional 50% interest would not prevent their estate from claiming a First Dealings Exemption, even if the latter 50% interest were acquired after the property had been converted to Land Titles.

A similar, though far rarer, exception exists under the *Veterans' Land Act*. It may be the case that a veteran received lands under the *Veteran's Land Act* while the land was in Registry, but under that act the land was required to subsequently be returned to the Department of Veterans Affairs. If the property was converted to Land Titles while owned by the Department of Veterans Affairs and then subsequently transferred back to the same original owner after the conversion, that subsequent conveyance will not bar the original owner in this scenario from using the First Dealings Exemption, despite that there was a transfer of the fee simple after conversion. This is a very specific qualification as the property must be re-conveyed to the exact veteran. If the property is instead conveyed to a relative or other party, the First Dealings Exemption will not apply; the legal ownership is not perfectly reflective of the ownership as it previously existed in Registry.

Transmission Applications (with and without CAET) and Covenants

A Transmission Application by Personal Representative (Transmission PR) simply registers the real property into the name of the Estate Trustee (ET). It does not transfer the property to the estate trustee personally. A Transfer by Personal Representative is needed to convey the property to an individual.

Our practice is to register the Transmission Application as early as we can, especially if the estate is either unsure about what will happen with the property, or if they are very sure they are selling it as soon as possible.

You cannot register this application if the deceased died intestate. A will or Certificate of Appointment (CAET) without a Will is required.

Where the deceased had a will, this application can be registered without a CAET in two circumstances:

1. The transfer would qualify as a first dealings; or
2. The value of the estate is less than $50,000 and no application was made for CAET.

Transmission with First Dealings Exemption

Appendix 5 is a PIN that qualifies for the First Dealings Exemption (FDE). You can see that the PIN was created in 2009, while the deceased acquired the property in 1989.

We prepared and registered the Transmission PR earlier this month, attached as Appendix 6. The required elements of the registration are:

- Statement re debts
- That no application for CAET was made, this is the first dealing after the property was converted to LT and the value of the estate
    - Value of the estate refers to the entire estate, not just the value of the real property in question
- Confirmation that the last will was properly executed and is not revoked
- Covenant to Indemnify the Land Titles Assurance Fund (discussed below)
- Clear execution search on the deceased with certificate number inserted into the statement confirming there are no writs against the deceased, must be dated the day of registration
- No spousal statement is needed because a Transmission PR is not vesting property in the ET

Transmission Application with CAET

Appendix 7 is a Transmission PR that was registered after a CAET was obtained. The PIN for the property is attached as Appendix 4 and was discussed earlier in this paper.

This document is slightly different than a Transmission PR where you are relying on an FDE. The requirements for this type of registration are:

- Statement re debts
- Confirmation that a CAET was obtained, including court file number and date of the CAET and that it is still of full force and effect
- Clear execution search against the deceased dated the day of registration

No covenant to indemnify is needed and no statements about the validity of the will are required.

Covenant to Indemnify the Land Titles Assurance Fund

A covenant is attached to Appendix 6. We also have a covenant attached to Appendix 10, which was drafted by a colleague. Our covenant is slightly shorter than the one prepared

by our colleague, and has been accepted by the LRO, but a longer and more detailed covenant is also appropriate.

In our experience, the LRO will request that the covenant be made by the ET personally and in their capacity as ET. We have had registrations returned when the covenant omitted that portion. Alternatively, if you don't refer to the capacity of the ET, the LRO will accept it.

When you are preparing the covenant, use a standard form that includes the form of indemnity the province requires. We have ours as a template now and we just insert the relevant information. The information to be inserted is:

- Why the covenant is required?
    - The covenant prepared by our colleague contains more detail on that point. We simply have stated the Registrar has requested the indemnity, as the registration is the first dealing
- Reference to the deceased owner, as well as the ET who is signing the covenant
- Must be signed in ink, witnessed, and the name of the signatory must appear under their signature
    - E signature or not witnessed will not be accepted
    - If the name of the signatory is not under their signature, it will be returned

Surviving Joint Tenant Applications

A Survivorship Application is attached as Appendix 8 and the PIN for that property is attached as Appendix 9.

This is the simplest of deceased owner registrations. You need to review the PIN to confirm that the property was owned by the deceased and the surviving owner as joint tenants.

You should also review to confirm if there are any mortgages or encumbrances on the file. In many cases, the mortgage may be paid off and not discharged. I generally have clients confirm with the bank that we are proceeding to register the Survivorship Application when there is a mortgage with a balance owing on title. You may need to do additional registrations if the bank requires it.

The Survivorship Application itself is pretty straightforward. The required elements are:

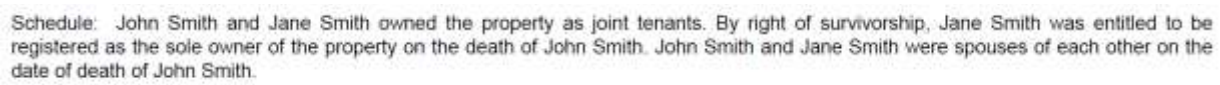
- A spousal statement is required, which most often is that the deceased and the surviving joint tenant were spouses
- The surviving spouse as applicant confirms they held the property as joint tenants with the deceased and by right of survivorship, they are entitled to be the owner as the surviving joint tenant

- There is no need to do a writ search in advance, but one will be generated on registration

Combined Transmission/Surviving Joint Tenant Applications

Appendix 10 is a combined Transmission/Surviving Joint Tenant Application which was prepared by our colleague, Liam Rafferty.

This application is the same as Transmission PR, but the joint tenancy and survivorship statements are included in the Schedule/Statement 61. This statement needs to address all the statements required on a Survivorship Application (see above). Below is what your statement needs to include:


Schedule: John Smith and Jane Smith owned the property as joint tenants. By right of survivorship, Jane Smith was entitled to be registered as the sole owner of the property on the death of John Smith. John Smith and Jane Smith were spouses of each other on the date of death of John Smith.

If you don't include all the required statements, your document will be bounced back. If you have set up the Teraview notifications, you can correct it and re-register it. If you don't get the notification, you will have a problem with the transactions that follow it.

Vesting

In our practice, vesting is rare. It shouldn't be relied upon as a mechanism to transfer property, but after time has passed, it may be the most inexpensive option for the beneficiaries.

The authority for the "automatic" vesting of property comes from s. 9 of the *Estates Administration Act* (EAA), which provides that real property that is not "disposed of, conveyed to, divided or distributed" among the persons beneficially entitled to such real property within 3 years of the date of death automatically vests in the beneficiaries without any conveyance by the personal representative, unless the personal representative registers a "caution" on title. If a caution is registered, then the real property will not automatically vest in the beneficiaries until 3 years from the date of registration of the caution, which can be renewed for additional 3-year periods.

But, you need to continue reading s. 10 of the EAA. In *909403 Ontario Ltd. v. DiMichele*, 2014 ONCA 261 the Court of Appeal section 9 did not apply, and automatic vesting did not occur, because the will at issue gave the executor the power to sell the property "at such time or times, in such manner and upon such terms as my Trustee in his discretion may decide upon" and also permitted the trustee to postpone the sale. If you are relying on automatic vesting where there is a will, you may be out of luck.

Appendix 11 contains a Transmission Devisee/Heir at Law. The actual Transfer of the vested property is attached as Appendix 12.

As with all deceased owner registrations, the Transmission is the first instrument to register. The difference with a vested property is that you are not transferring to the ET, you are transferring to the beneficiaries legally entitled.

The statements required for each beneficiary legally entitled on a Transmission Devisee/Heir At Law are:

- The applicant is entitled to be the owner as Devisee/Heir at Law
- The interest is vested in all the beneficiaries of the estate of the deceased owner (pursuant to the EAA, SLRA and FLA)
- Clear writs against the deceased
- Covenant to Indemnify or reference to the CAET

The law statements for this application are:

- Spousal statement
- Statement re debts
- Law statement regarding vesting

Once the Transmission is completed, the property may need to be transferred to a third party or to one of the beneficiaries.

The statements on a Transfer by Devisee/Heir at law are unique. If you have multiple beneficiaries, on the Transfer to a third party (or to one of the beneficiaries), there are two unique statements:

- Statement 3646 which is in the “other statements” for a Transferor – this statement says “all my interest to my co-owners"
    - This closes the loop, so to speak so that all co-owners are transferring their interest to the other co-owners while they are all conveying the property to the third party
- The second statement is required by the Transferee, confirming that the Transferee is not aware of any specific debts against the deceased
    - Statement 20 in the general transfer statement second
    - Presumably required to avoid fraudulent transactions to defeat creditors

Conclusion

We hope this paper and our presentation has helped you with your estate conveyancing matters.

As a reminder, some of our tips at the beginning of this paper are:

1. Sign up to get notified of Teraview messages so if you do make a mistake, you can correct it immediately;

2. Use the Procedures Guide, Supplements and Bulletins and other resources like this paper when you are preparing your documents; and,
3. Don’t be afraid to call Law Pro if an error in a death of owner application risks your client’s interests.

The following supplement is hereby added to the Estates Module of the Electronic Registration Procedures Guide, immediately following "First Dealings After Property Converted to Land Titles"

Determining if the First Dealings Exemption is Available

The general requirement under the Land Titles Act is that, upon the death of an owner, the estate trustee must obtain a certificate of appointment of estate trustee with a will (hereinafter referred to as "Probate") or, where there is no will, a certificate of appointment of estate trustee without a will. There has been a long-standing exemption for the requirement for Probate in respect of estates that are $50,000 or less in total value. However, since automation and administrative conversion of properties from the Registry Act to Land Titles Conversion Qualified ("LTCQ"), the Ministry has provided another exemption from the requirement for Probate for properties that are LTCQ. Land Registrars are authorized to exempt the requirement of a certificate of appointment of estate trustee when a transmission application is registered following the procedures set out above in the Electronic Registration Procedures Guide as "First Dealings After Property Converted to Land Titles" (hereinafter the "First Dealings Exemption").

First Dealings Exemption, General Availability

The First Dealings Exemption is available, generally, if:

(i) the deceased owner acquired the property when it was registered under the Registry Act;

(ii) the property was converted to LTCQ, and remains in LTCQ; and

(iii) the deceased owner still owned the property at the time of his/her death and died with a will.

Effect of the First Dealings Exemption

When the First Dealings Exemption is available, then the estate of the deceased owner may convey the land in accordance with Registry Act rules, where Probate is not required for dealings with the land.

Land Titles Absolute

As noted above, the First Dealings Exemption is only available for lands that have been converted from the Registry Act into LTCQ. This LTCQ status should be evident by reviewing the "Estate/Qualifier" field on the parcel register. For greater certainty, the First Dealings Exemption is not available for any lands that are LT Absolute (there is an exception for certain specific crown leases on LT Absolute PINs) or LT Absolute Plus (see below). The term "first conversion from book" on the parcel register does not necessarily mean that the property has been converted from the Registry Act to LTCQ. The term "first conversion from book" simply refers to the transition from paper to an automated parcel register. A property that has always been LT Absolute may have been converted from paper to an automated parcel register.

Upgrading Title to Land Titles Absolute Plus

The First Dealings Exemption is not available for any lands that are LT Absolute Plus. If an owner who is otherwise entitled to a First Dealings Exemption then decides to upgrade his/her title from LTCQ to LT Absolute Plus, the benefit of the First Dealings Exemption will be lost. Owners should consider this consequence before upgrading title.

Upgrading Registry to LTCQ

An upgrade from LTCQ to LT Absolute Plus is not to be confused with the upgrade from the Registry Act to LTCQ by the owner. Some "non-convert" properties are subsequently converted from the Registry Act to LTCQ by way of deposit from the owner, following resolution of the issues which prevented administrative conversion. How a property was converted from the Registry Act to LTCQ (whether by administrative conversion or by way of deposit by the owner) is irrelevant to the application of the First Dealings Exemption. The fact that a property becomes LTCQ by way of deposit does not disqualify it from potential First Dealings Exemption status if the circumstances otherwise meet the criteria.

Condominiums Generally Ineligible

The First Dealings Exemption is rarely available for condominium units since most condominium units in the province are constructed on lands that are LT Absolute or LT Absolute Plus. There are, however, a few LTCQ condos, especially in southwest Ontario, so the First Dealings Exemption may apply to those LTCQ condos.

Intestacy Ineligible

The First Dealings Exemption is only available as an exemption from Probate for testate owners. There is no equivalent or analogous exemption for deceased intestate owners. A certificate of appointment of estate trustee without a will is required in every instance of a deceased intestate owner under the Land Titles Act.

Transfers After Conversion

Generally, a transfer of the owner's fee simple interest after conversion to LTCQ ends the First Dealings Exemption for the transferor. The transferee, not having acquired the property while under the Registry Act, never had a First Dealings Exemption in the first place. The First Dealings Exemption does not run with the land for the benefit of the transferee.

Non-Arms' Length Transfers, Related Parties, Gifts, etc.

The transfer of the owner's fee simple interest after conversion from the Registry Act to LTCQ ends the First Dealings Exemption, even if the transferee is otherwise non-arms' length or a related party, and/or the transfer is for nominal consideration, as a gift, or for "natural love and affection". For example, if a deceased owner acquired the property while under the Registry Act, and then transferred that property to a spouse or child after conversion to LTCQ, then the spouse/child, as transferee, does not have the benefit of a First Dealings Exemption (since he or she did not "acquire while in Registry"). There is no general passing-along of the First Dealings Exemption to related transferees.

Transfer of Part of Lands Only

If a deceased owner acquired a property while it was registered under the Registry Act, and then validly transferred part of the property after conversion to LTCQ, the First Dealings Exemption would be lost as to the lands transferred but would still be available with respect to any retained lands.

Intervening Instruments Less than a Transfer

Certain conveyances and other dealings on the parcel register fall short of transferring the owner's fee simple title (such as mortgages, discharges of mortgage, notices, leases, restrictive covenants, easements, etc.) and will not jeopardize the First Dealings Exemption, no matter how many of these subsequent instruments there are, and whether such instruments are registered before or after conversion to LTCQ. For example, if the deceased owner acquired the property while it was under the Registry Act, and then mortgaged the property and/or leased the property and/or granted restrictions or easements over the property, etc., at the same or different times, before dying, such intervening instruments will not jeopardize the First Dealings Exemption otherwise available to that deceased owner because these intervening instruments do not constitute a transfer of the fee simple after conversion from the Registry Act to LTCQ.

Joint Tenants

If the deceased owner acquired the property while it was registered under the Registry Act, together with another owner as joint tenants, and then the property was converted to LTCQ, the death of one joint tenant and the registration of a survivorship application by the other joint tenant does not involve the First Dealings Exemption at all. Dying as a joint tenant gives rise to survivorship rights so the property does not form part of the estate of the deceased owner and would not require Probate. Furthermore, the survivorship will not vitiate the First Dealings Exemption for the survivor. The surviving joint tenant will enjoy the benefit of the First Dealings Exemption for the whole of the undivided interest in the property when that surviving joint tenant eventually dies.

Tenants in Common

If the deceased owner acquired the property while it was under the Registry Act, together with another owner as tenants in common, upon the death of each owner and the registration of a transmission application on their behalf, the estate will qualify for a First Dealings Exemption.

Self-to-Self Transfers to Change Tenure Allowed

Typically, a transfer after conversion to LTCQ will end the First Dealings Exemption for the transferor (see below), but an exception to this rule exists for self-to-self transfers made by co-owners to themselves strictly for the purposes of changing tenure (e.g., from joint tenancy to tenancy-in-common or vice versa). For example, if two or more owners acquired property while it was under the Registry Act as joint tenants but then one or both of the joint tenants subsequently decides after conversion to LTCQ to sever the joint tenancy, either joint tenant (or both of them) can transfer the property back to themselves as tenants-in-common thereby severing the joint tenancy. One or more self-to-self transfers made to change tenure will not jeopardize the First Dealings Exemption available to any of the now tenants-in-common when they die.

Undivided Share Acquired While in LTCQ Allowed

In the unusual scenario where an owner acquires an undivided interest in a property while it is registered under the Registry Act and then acquires another undivided interest in the same property after the property has been converted to LTCQ, the owner's estate may claim the First Dealings Exemption in respect of all of his/her undivided fractional interests in the same property (even though some of those undivided fractional interests may not properly have been "acquired while in Registry"). For example, consider the scenario where a husband and

wife acquire title when the land is registered under the Registry Act, as tenants-in-common, each as to an undivided 50% interest. The property is then converted to LTCQ, and the husband dies, but gives his 50% interest to his wife pursuant to the terms of his will. The husband's estate has the benefit of a First Dealings Exemption as to his 50% undivided interest in the property. The wife, in theory, has a First Dealings Exemption only as to her original 50% undivided interest -- the second 50% undivided interest came from her husband after conversion to LTCQ (i.e. not "acquired while in Registry"). Notwithstanding the foregoing, in this limited circumstance, the wife will be entitled to claim a First Dealings Exemption for the entirety of her undivided fractional interests in the property even though a part of her fractional undivided interest was acquired while already in LTCQ.

No "Tacking On" of First Dealings Exemption by Merger

There are situations where an owner acquires a property when it is registered under the Registry Act (the "Original Parcel") and then acquires abutting lands which are already registered under the Land Titles Act (the "Abutting Parcels"). While title to the Abutting Parcels may have merged with title to the Original Parcel due to the common law doctrine of merger and/or for the purposes of the Planning Act, only the Original Parcel is eligible for the First Dealings Exemption. The subsequently acquired Abutting Parcels were not "acquired while in Registry" so never qualified for a First Dealings Exemption in the first place. The owner is not permitted to "tack on", through the common law doctrine of merger, a First Dealings Exemption to lands which would not, on their own, have qualified for the First Dealings Exemption. This is the case whether the Abutting Parcels were acquired before or after the Original Parcel is converted into LTCQ. This is the case even if the Original Parcel and the Abutting Parcels have since been consolidated into a single PIN. This is also the case even if the Original Parcel is the "main" or "principal" parcel, and the Abutting Parcels are ancillary or de minimus relative to the Original Parcel. For example, consider the scenario where a deceased owner acquired the "main house" as his/her Original Parcel while it was registered under the Registry Act, then acquired an abutting closed laneway in Land Titles as an Abutting Parcel. The Original Parcel (in this example, the house) would be eligible for a First Dealings Exemption, but the Abutting Parcel (in this example, the laneway) would not be eligible for a First Dealings Exemption (since it was always in Land Titles), notwithstanding that the two parcels have since merged at law.

Exception for Veterans' Land Act

From time to time, we will see a veteran receiving Registry lands under the Veterans' Land Act but for reasons set out in this act, the lands are returned to the Department of Veterans Affair and then re-conveyed back to the veteran at a later date. If this re-conveyance to the veteran occurs after conversion to LTCQ, then the veteran will technically have acquired the lands while in LTCQ. The veteran, in theory, has no First Dealings Exemption for the property since his/her interest in the property came after conversion to LTCQ (i.e. not "acquired while in Registry"). Notwithstanding the general rule that requires the deceased to have acquired his/her interest while the property was registered under the Registry Act, in this limited circumstance the veteran will be entitled to claim a First Dealings Exemption for the property acquired, even though he/she may have acquired the property after it was already in LTCQ. Note that the reconveyance in this scenario must be to the exact veteran who first acquired an interest in the land in Registry (not to a relative or other party).

No Trusts Recognized in Land Titles

The test for the First Dealings Exemption is based on the legal owner only. The Land Titles Act does not recognize trusts, so, even if the beneficial owner may have qualified for a First Dealings Exemption, if the entitlement for a First Dealings Exemption cannot be established based on the legal ownership, then there will be no First Dealings Exemption Available.

Required Statements for First Dealings Exemption

Although Probate is not required where the property qualifies for the First Dealings Exemption, there are still specified statements and the requirement of a covenant to indemnify the Land Titles Assurance Fund to transmit the property of the deceased owner. These procedures are set out immediately above in this Electronic Registration Procedures Guide.

Probate Notwithstanding an Available First Dealings Exemption

One of the prescribed law statements required for the First Dealings Exemption is "no application was made for a certificate of appointment of an estate trustee, as this transaction is the first dealing after the property was converted from Registry to Land Tiles by the Ministry…". This reflects the fact that, in most cases, where a property is eligible for a First Dealings Exemption, the estate will not be seeking the court appointment of an estate trustee. In some cases, however, such as in dual will scenarios, the estate trustee may be applying for the appointment of an estate trustee, even though some or all of the deceased owner's real estate may be entitled to the benefit of the First Dealings Exemption. Under these scenarios, a solicitor cannot technically make the statement that "no application was made for a certificate of appointment of an estate trustee" since, in fact, an application has been made for Probate. The appropriate process under this scenario is to make the full prescribed law statement required for the First Dealings Exemption, but then to make a supplemental clarification statement in Statement 62 confirming that an application was in fact made for a certificate of appointment of Estate Trustee but has not yet completed and is not being relied upon. A similar rule would apply if an application was made for a certificate of appointment but was then withdrawn or in the process of being withdrawn.

Successor Estate Trustees

If the estate of a deceased owner is otherwise entitled to a First Dealings Exemption but his/her named estate trustee dies or is otherwise replaced, the succeeding estate trustee is also entitled to use the First Dealings Exemption (and so on if that succeeding estate trustee also dies or is replaced). The First Dealings Exemption attaches to the estate of the deceased registered owner who acquired the right to the exemption and may be invoked by successor trustees of that deceased owner.

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29
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Ontario

Bulletin No. **2000-6**	*Land Titles Act*

Ministry of Consumer
and Commercial Relations

Date: December 20, 2000	

Registration Division

To: All Land Registrars	**ESTATE DOCUMENTS**

The *Red Tape Reduction Act, 2000*, which was proclaimed December 6, 2000, amended sections 123 and 124 of the *Land Titles Act* which are the sections that deal with applications for survivorship and transmission applications. The amendment revokes the requirement to produce evidence in the prescribed manner and substitutes it with the requirement to register evidence specified by the Director of Titles. This will allow estate documents to be registered in a non-electronic format using statements made by a solicitor instead of filing evidence.

Pursuant to sections 123 and 124, it is hereby specified that evidence in the following manner must be registered:

I. SECTION 123 – SURVIVORSHIP APPLICATION

1) The current requirements for an application for survivorship i.e. completion of Forms 42 and 43 of Regulation 690.

OR

2) Use of the following statements:

i. The applicant(s) held the property as (a)joint tenant(s) with the deceased, or
ii. The applicant held the charge on joint account with right of survivorship with the deceased.
iii. By right of survivorship, the applicant(s) is(are) entitled to be the owner(s), as a surviving joint tenant(s).
iv. The date of death was (insert date).

Family Law Act Statements:

v. Section 26(1) of the *Family Law Act* provides that if a spouse dies owning an interest in a family residence as a joint tenant with a third party (and not their spouse), joint tenancy is deemed to have been severed immediately prior to the time of death. As a result, if the death occurred on or after March 1st, 1986, the application for survivorship must be supported by one of the following statements:

- The deceased and (insert name), a(the) surviving joint tenant, were spouses of each other when the deceased died.
- The deceased was not a spouse at the time of death.
- The property was not a matrimonial home within the meaning of the *Family Law Act* of the deceased at the time of death.

The above statements are consistent with those required for the electronic registration of an application for survivorship and can only be made by a solicitor. The solicitor must sign these statements.

II. SECTION 124 – TRANSMISSION APPLICATION

1) The current requirements for a transmission application pursuant to section 36(2) of Regulation 690 which provides for:

An application in Form 40 or Form 41 which is to include the required evidence pertaining to:

i. dower rights;
ii. spousal rights under the *Family Law Act*;
iii. the sex of the deceased;
iv. debts of the estate;
v. the heirs of the deceased; and
vi. such other matters as the Director of Titles may specify.

OR

2) Use of the following statements:

(a) Transmission by Personal Representative:

A transmission application by an estate trustee (with or without a will), executor or administrator must contain the following information in the form of a statement:

i. The applicant is entitled to be the owner by law, as estate trustee, executor or administrator of the estate of the deceased owner.
ii. Name and date of death of registered owner.

One of the following:

iii. The applicant is appointed as Estate Trustee with a will by (*enter name of Court),* under (*enter File number*), dated (*enter date*) which is still in full force and effect, or
iv. The applicant is appointed as Estate Trustee without a will by (*enter name of Court),* under *(enter File number),* dated (*enter date)* which is still in full force and effect, or
v. No application was made for a certificate of appointment of an Estate Trustee, as the total value of the estate of the deceased owner is not more than $50,000.
vi. Documentation regarding the death of (enter the deceased's name) which is sufficient to deal with this transaction, is attached to registration number (enter registration number).

Note: Statement (vi) is to be used where the documentation has been registered in the Registry Division of a land registry office and the property has subsequently been converted to Land Titles Converted Qualified. (See Section III below)

If no application for a certificate of appointment was made, a covenant to indemnify the Land Titles Assurance Fund is required to be filed with the office of the Director of Titles using the prescribed form 54 from Regulation 690.

AND

vii. The property is subject to the debts of the deceased, or
viii. The debts of the deceased are paid in full.

b) Transmission by Devisee/Heir at Law:

A transmission application by a devisee or heir-at-law must contain the following information in the form of a statement:

i. The name and date of death of the owner.
ii. The applicant(s) is entitled to be the owner, as Devisee or Heir-at-Law.
iii. The interest of the deceased is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the *Estates Administration Act*, the *Succession Law Reform Act* and the *Family Law Act.*
iv. The property is subject to the debts of the deceased, or
v. The debts of the deceased are paid in full.
vi. Title to the land is not subject to spousal rights under the *Family Law Act*, or
vii. Title to the land is subject to spousal rights of the spouse (enter applicable name)

c) Transfer by Personal Representative:

A transfer by an estate trustee (with or without a will), executor or administrator must contain the following information in the form of a statement:

i. A statement that the transferor is entitled to transfer the land affected by the document under the terms of the will, if any, the *Estates Administration Act* and the *Succession Law Reform Act*, or
ii. This transfer is authorized by (enter name of Court), under (enter File number) dated (enter date) which is still in full force and effect.

iii. Title to the land is not subject to spousal rights under the *Family Law Act* with respect to the deceased, or
iv. Title to the land is subject to spousal rights of the spouse of (enter applicable Name).

v. The transferor has obtained the consent of all required parties, or
vi. No consents are required for this transfer.

Solicitors are responsible for ensuring that the provisions of the *Estates Administration Act* and the *Succession Law Reform Act* have been met and therefore it is not necessary to state the purpose of the transfer, e.g. for the purpose of paying debts or distributing the estate.

If it is necessary to obtain consents of any beneficiaries, the name(s) of the beneficiaries must be set out in the application since a search for executions is required for any beneficiary. spousal status

The above statements are consistent with those required for the electronic registration of a transmission application or transfer by a personal representative or devisee/heir-at-law and can only be made by a solicitor. The solicitor must sign the statements.

III.ee FIRST DEALINGS AFTER PROPERTY CONVERTED TO LAND TITLESee

The following procedures may be used for transmission applications for the first dealing after the property has been converted to the Land Titles system where no application for a certificate of appointment of estate trustee has been applied for. Land Registrars are authorized to exempt the requirement of a certificate of appointment of estate trustee and the following must be included in the supporting affidavit by the applicant, or by way of statements from a solicitor:

i. the property is a Ministry conversion from Registry to Land Titles;ee

ii. the transaction is the first dealing after the conversion of the property;ee

iii. the value of the estate is (enter value of estate);

iv. the same evidence as under the *Registry Act* with regard to the execution of the will and proof of death. If an affidavit of execution cannot be provided, a statement or affidavit made by someone who knew the deceased's handwriting may be used in lieu of the affidavit of execution. This should be someone of good standing within the community and must be someone who can state that they knew the handwriting of the testator. For example, a bank manager, an employer, or those individuals who can attest to an application for a passport. It cannot be a family member, a beneficiary or someone who can benefit from the estate;

v.ee that the will is the last will and that a certificate of appointment of estate trustee was not appliedee for; and,ee

vi. that the testator was of the age of majority at the time of the execution of the will, and that the willee has not been revoked by the marriage of the testator or otherwise. (This is the current requirementee in the Land Titles Procedural Guide (page 35,165) for situations where a certificate has not beenee applied for).ee

In all cases a covenant to indemnify the Land Titles Assurance Fund must be provided.

Katherine M. Murray
Director of Titles

The following supplement is hereby added to the Estates Module of the Electronic Registration Procedures Guide, immediately following "First Dealings After Property Converted to Land Titles"

Determining if the First Dealings Exemption is Available

The general requirement under the Land Titles Act is that, upon the death of an owner, the estate trustee must obtain a certificate of appointment of estate trustee with a will (hereinafter referred to as "Probate") or, where there is no will, a certificate of appointment of estate trustee without a will. There has been a long-standing exemption for the requirement for Probate in respect of estates that are $50,000 or less in total value. However, since automation and administrative conversion of properties from the Registry Act to Land Titles Conversion Qualified ("LTCQ"), the Ministry has provided another exemption from the requirement for Probate for properties that are LTCQ. Land Registrars are authorized to exempt the requirement of a certificate of appointment of estate trustee when a transmission application is registered following the procedures set out above in the Electronic Registration Procedures Guide as "First Dealings After Property Converted to Land Titles" (hereinafter the "First Dealings Exemption").

First Dealings Exemption, General Availability

The First Dealings Exemption is available, generally, if:

(i) the deceased owner acquired the property when it was registered under the Registry Act;

(ii) the property was converted to LTCQ, and remains in LTCQ; and

(iii) the deceased owner still owned the property at the time of his/her death and died with a will.

Effect of the First Dealings Exemption

When the First Dealings Exemption is available, then the estate of the deceased owner may convey the land in accordance with Registry Act rules, where Probate is not required for dealings with the land.

Land Titles Absolute

As noted above, the First Dealings Exemption is only available for lands that have been converted from the Registry Act into LTCQ. This LTCQ status should be evident by reviewing the "Estate/Qualifier" field on the parcel register. For greater certainty, the First Dealings Exemption is not available for any lands that are LT Absolute (there is an exception for certain specific crown leases on LT Absolute PINs) or LT Absolute Plus (see below). The term "first conversion from book" on the parcel register does not necessarily mean that the property has been converted from the Registry Act to LTCQ. The term "first conversion from book" simply refers to the transition from paper to an automated parcel register. A property that has always been LT Absolute may have been converted from paper to an automated parcel register.

Upgrading Title to Land Titles Absolute Plus

The First Dealings Exemption is not available for any lands that are LT Absolute Plus. If an owner who is otherwise entitled to a First Dealings Exemption then decides to upgrade his/her title from LTCQ to LT Absolute Plus, the benefit of the First Dealings Exemption will be lost. Owners should consider this consequence before upgrading title.

Upgrading Registry to LTCQ

An upgrade from LTCQ to LT Absolute Plus is not to be confused with the upgrade from the Registry Act to LTCQ by the owner. Some "non-convert" properties are subsequently converted from the Registry Act to LTCQ by way of deposit from the owner, following resolution of the issues which prevented administrative conversion. How a property was converted from the Registry Act to LTCQ (whether by administrative conversion or by way of deposit by the owner) is irrelevant to the application of the First Dealings Exemption. The fact that a property becomes LTCQ by way of deposit does not disqualify it from potential First Dealings Exemption status if the circumstances otherwise meet the criteria.

Condominiums Generally Ineligible

The First Dealings Exemption is rarely available for condominium units since most condominium units in the province are constructed on lands that are LT Absolute or LT Absolute Plus. There are, however, a few LTCQ condos, especially in southwest Ontario, so the First Dealings Exemption may apply to those LTCQ condos.

Intestacy Ineligible

The First Dealings Exemption is only available as an exemption from Probate for testate owners. There is no equivalent or analogous exemption for deceased intestate owners. A certificate of appointment of estate trustee without a will is required in every instance of a deceased intestate owner under the Land Titles Act.

Transfers After Conversion

Generally, a transfer of the owner's fee simple interest after conversion to LTCQ ends the First Dealings Exemption for the transferor. The transferee, not having acquired the property while under the Registry Act, never had a First Dealings Exemption in the first place. The First Dealings Exemption does not run with the land for the benefit of the transferee.

Non-Arms' Length Transfers, Related Parties, Gifts, etc.

The transfer of the owner's fee simple interest after conversion from the Registry Act to LTCQ ends the First Dealings Exemption, even if the transferee is otherwise non-arms' length or a related party, and/or the transfer is for nominal consideration, as a gift, or for "natural love and affection". For example, if a deceased owner acquired the property while under the Registry Act, and then transferred that property to a spouse or child after conversion to LTCQ, then the spouse/child, as transferee, does not have the benefit of a First Dealings Exemption (since he or she did not "acquire while in Registry"). There is no general passing-along of the First Dealings Exemption to related transferees.

Transfer of Part of Lands Only

If a deceased owner acquired a property while it was registered under the Registry Act, and then validly transferred part of the property after conversion to LTCQ, the First Dealings Exemption would be lost as to the lands transferred but would still be available with respect to any retained lands.

Intervening Instruments Less than a Transfer

Certain conveyances and other dealings on the parcel register fall short of transferring the owner's fee simple title (such as mortgages, discharges of mortgage, notices, leases, restrictive covenants, easements, etc.) and will not jeopardize the First Dealings Exemption, no matter how many of these subsequent instruments there are, and whether such instruments are registered before or after conversion to LTCQ. For example, if the deceased owner acquired the property while it was under the Registry Act, and then mortgaged the property and/or leased the property and/or granted restrictions or easements over the property, etc., at the same or different times, before dying, such intervening instruments will not jeopardize the First Dealings Exemption otherwise available to that deceased owner because these intervening instruments do not constitute a transfer of the fee simple after conversion from the Registry Act to LTCQ.

Joint Tenants

If the deceased owner acquired the property while it was registered under the Registry Act, together with another owner as joint tenants, and then the property was converted to LTCQ, the death of one joint tenant and the registration of a survivorship application by the other joint tenant does not involve the First Dealings Exemption at all. Dying as a joint tenant gives rise to survivorship rights so the property does not form part of the estate of the deceased owner and would not require Probate. Furthermore, the survivorship will not vitiate the First Dealings Exemption for the survivor. The surviving joint tenant will enjoy the benefit of the First Dealings Exemption for the whole of the undivided interest in the property when that surviving joint tenant eventually dies.

Tenants in Common

If the deceased owner acquired the property while it was under the Registry Act, together with another owner as tenants in common, upon the death of each owner and the registration of a transmission application on their behalf, the estate will qualify for a First Dealings Exemption.

Self-to-Self Transfers to Change Tenure Allowed

Typically, a transfer after conversion to LTCQ will end the First Dealings Exemption for the transferor (see below), but an exception to this rule exists for self-to-self transfers made by co-owners to themselves strictly for the purposes of changing tenure (e.g., from joint tenancy to tenancy-in-common or vice versa). For example, if two or more owners acquired property while it was under the Registry Act as joint tenants but then one or both of the joint tenants subsequently decides after conversion to LTCQ to sever the joint tenancy, either joint tenant (or both of them) can transfer the property back to themselves as tenants-in-common thereby severing the joint tenancy. One or more self-to-self transfers made to change tenure will not jeopardize the First Dealings Exemption available to any of the now tenants-in-common when they die.

Undivided Share Acquired While in LTCQ Allowed

In the unusual scenario where an owner acquires an undivided interest in a property while it is registered under the Registry Act and then acquires another undivided interest in the same property after the property has been converted to LTCQ, the owner's estate may claim the First Dealings Exemption in respect of all of his/her undivided fractional interests in the same property (even though some of those undivided fractional interests may not properly have been "acquired while in Registry"). For example, consider the scenario where a husband and

wife acquire title when the land is registered under the Registry Act, as tenants-in-common, each as to an undivided 50% interest. The property is then converted to LTCQ, and the husband dies, but gives his 50% interest to his wife pursuant to the terms of his will. The husband's estate has the benefit of a First Dealings Exemption as to his 50% undivided interest in the property. The wife, in theory, has a First Dealings Exemption only as to her original 50% undivided interest -- the second 50% undivided interest came from her husband after conversion to LTCQ (i.e. not "acquired while in Registry"). Notwithstanding the foregoing, in this limited circumstance, the wife will be entitled to claim a First Dealings Exemption for the entirety of her undivided fractional interests in the property even though a part of her fractional undivided interest was acquired while already in LTCQ.

No "Tacking On" of First Dealings Exemption by Merger

There are situations where an owner acquires a property when it is registered under the Registry Act (the "Original Parcel") and then acquires abutting lands which are already registered under the Land Titles Act (the "Abutting Parcels"). While title to the Abutting Parcels may have merged with title to the Original Parcel due to the common law doctrine of merger and/or for the purposes of the Planning Act, only the Original Parcel is eligible for the First Dealings Exemption. The subsequently acquired Abutting Parcels were not "acquired while in Registry" so never qualified for a First Dealings Exemption in the first place. The owner is not permitted to "tack on", through the common law doctrine of merger, a First Dealings Exemption to lands which would not, on their own, have qualified for the First Dealings Exemption. This is the case whether the Abutting Parcels were acquired before or after the Original Parcel is converted into LTCQ. This is the case even if the Original Parcel and the Abutting Parcels have since been consolidated into a single PIN. This is also the case even if the Original Parcel is the "main" or "principal" parcel, and the Abutting Parcels are ancillary or de minimus relative to the Original Parcel. For example, consider the scenario where a deceased owner acquired the "main house" as his/her Original Parcel while it was registered under the Registry Act, then acquired an abutting closed laneway in Land Titles as an Abutting Parcel. The Original Parcel (in this example, the house) would be eligible for a First Dealings Exemption, but the Abutting Parcel (in this example, the laneway) would not be eligible for a First Dealings Exemption (since it was always in Land Titles), notwithstanding that the two parcels have since merged at law.

Exception for Veterans' Land Act

From time to time, we will see a veteran receiving Registry lands under the Veterans' Land Act but for reasons set out in this act, the lands are returned to the Department of Veterans Affair and then re-conveyed back to the veteran at a later date. If this re-conveyance to the veteran occurs after conversion to LTCQ, then the veteran will technically have acquired the lands while in LTCQ. The veteran, in theory, has no First Dealings Exemption for the property since his/her interest in the property came after conversion to LTCQ (i.e. not "acquired while in Registry"). Notwithstanding the general rule that requires the deceased to have acquired his/her interest while the property was registered under the Registry Act, in this limited circumstance the veteran will be entitled to claim a First Dealings Exemption for the property acquired, even though he/she may have acquired the property after it was already in LTCQ. Note that the reconveyance in this scenario must be to the exact veteran who first acquired an interest in the land in Registry (not to a relative or other party).

No Trusts Recognized in Land Titles

The test for the First Dealings Exemption is based on the legal owner only. The Land Titles Act does not recognize trusts, so, even if the beneficial owner may have qualified for a First Dealings Exemption, if the entitlement for a First Dealings Exemption cannot be established based on the legal ownership, then there will be no First Dealings Exemption Available.

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Successor Estate Trustees

If the estate of a deceased owner is otherwise entitled to a First Dealings Exemption but his/her named estate trustee dies or is otherwise replaced, the succeeding estate trustee is also entitled to use the First Dealings Exemption (and so on if that succeeding estate trustee also dies or is replaced). The First Dealings Exemption attaches to the estate of the deceased registered owner who acquired the right to the exemption and may be invoked by successor trustees of that deceased owner.

NOT FIRST DEALINGS

Ontario ServiceOnario

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

LAND REGISTRY OFFICE #52

60207-0117 (LT)

PREPARED FOR Prishanthy01
ON 2021/11/03 AT 14:02:02

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: PT LT 10 CON 4 CORNWALL PT 1 52R2396; S/T TC20239, TC30605; SOUTH STORMONT

PROPERTY REMARKS:

ESTATE/QUALIFIER:
FEE SIMPLE
LT CONVERSION QUALIFIED

RECENTLY:
FIRST CONVERSION FROM BOOK

PIN CREATION DATE:
2008/02/19

OWNERS' NAMES [redacted] deceased

CAPACITY SHARE
ROWN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2008/02/15 **						
**SUBJECT, ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:						
** SUBSECTION 44(1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES *						
** AND ESCHEATS OR FORFEITURE TO THE CROWN.						
** THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF						
** IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY						
** CONVENTION.						
** ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.						
**DATE OF CONVERSION TO LAND TITLES: 2008/02/19 **						
TC20239	1931/05/19	TRANSFER EASEMENT			THE BELL TELEPHONE COMPANY OF CANADA	C
TC30605	1947/08/02	TRANSFER EASEMENT			THE BELL TELEPHONE COMPANY OF CANADA	C
S75308	1971/03/30	NOTICE OF CLAIM				C
52R2396	1985/05/09	PLAN REFERENCE				C
S176637	1986/03/27	TRANSFER		*** COMPLETELY DELETED ***	[redacted] purchase by spouse	
S189189	1987/05/27	NOTICE OF CLAIM				C
REMARKS: TC30605						
ST21625	2009/08/11	CHARGE		*** COMPLETELY DELETED *** [redacted]	ROYAL BANK OF CANADA	
ST32448	2010/10/18	CHARGE		*** COMPLETELY DELETED *** [redacted]	THE BANK OF NOVA SCOTIA	

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.

4-27

4-28

Ontario ServiceOntario

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

LAND REGISTRY OFFICE #52

60207-0117 (LT)

PREPARED FOR Prishanthy01
ON 2021/11/03 AT 14:02:02

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
ST33438	2010/11/19	DISCH OF CHARGE		*** COMPLETELY DELETED *** ROYAL BANK OF CANADA		
REMARKS: ST21625.						
ST122261	2021/04/27	TRANSMISSION-LAND		*** COMPLETELY DELETED *** [redacted] deceased spouse	[redacted] deceased acquires ptg from deceased spouse as ET [redacted] - ESTATE	
ST122262	2021/04/27	TRANS PERSONAL REP	$1	[redacted] deceased as ET	[redacted] deceased acquires personal ownership.	C
ST122783	2021/05/10	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE BANK OF NOVA SCOTIA		
REMARKS: ST32448.						

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.

FIRST DEALINGS PIN

Ontario ServiceOntario

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

LAND REGISTRY OFFICE #14

67153-0087 (LT)

PAGE 1 OF 1
PREPARED FOR Michele1
ON 2023/09/07 AT 13:30:41

4-29

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: LT 11 E OF CHISHOLM ST, 12 E OF CHISHOLM ST, 13 E OF CHISHOLM ST, 14 E OF CHISHOLM ST BLK G PL 10; LT 15 BLK G S OF CHURCH ST E OF CHISHOLM ST PL 10; PT LT 1 N OF GRAVEL ST, 7 S OF CHURCH ST BLK G PL 10 AS IN AR65314; NORTH GLENGARRY

PROPERTY REMARKS:

ESTATE/QUALIFIER:
FEE SIMPLE
LT CONVERSION QUALIFIED

RECENTLY:
FIRST CONVERSION FROM BOOK

PIN CREATION DATE:
2009/10/19

OWNERS' NAMES [redacted]

CAPACITY SHARE
ROWN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2009/10/16 **						
**SUBJECT, ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:						
** SUBSECTION 44(1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES *						
** AND ESCHEATS OR FORFEITURE TO THE CROWN.						
** THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF						
** IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY						
** CONVENTION.						
** ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.						
**DATE OF CONVERSION TO LAND TITLES: 2009/10/19 **						
GPL10	1883/08/13	PLAN SUBDIVISION				C
AR65314	1986/06/27	TRANSFER	$135,000		[redacted] deceased aquires property	C
AR65315	1986/06/27	CHARGE	$96,250		THE ROYAL BANK OF CANADA	C
GL29741	2018/11/30	CERTIFICATE		*** COMPLETELY DELETED *** THE CORPORATION OF THE TOWNSHIP OF NORTH GLENGARRY		
	REMARKS: TAX ARREARS					
GL33531	2020/03/23	APL (GENERAL)		*** COMPLETELY DELETED *** THE CORPORATION OF THE TOWNSHIP OF NORTH GLENGARRY		
	REMARKS: GL29741					

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.

TRANSMISSION without CAET - FIRST DEALINGS

LRO # 14 **Transmission By Personal Representative-Land**

Receipted as GL45498 on 2023 10 04 at 15:37

The applicant(s) hereby applies to the Land Registrar.

yyyy mm dd Page 1 of 3

Properties

PIN 67153 - 0087 LT

Description LT 11 E OF CHISHOLM ST, 12 E OF CHISHOLM ST, 13 E OF CHISHOLM ST, 14 E OF CHISHOLM ST BLK G PL 10; LT 15 BLK G S OF CHURCH ST E OF CHISHOLM ST PL 10; PT LT 1 N OF GRAVEL ST, 7 S OF CHURCH ST BLK G PL 10 AS IN AR65314; NORTH GLENGARRY

Address [redacted]
GLEN ROBERTSON

Deceased(s)

Name [redacted] name of deceased

Address for Service [redacted]
ON K6H 5R6

Date of death was 2023/08/30

Applicant(s)

	Capacity	*Share*
Name [redacted] name of ET	Estate Trustee With A Will	

Address for Service [redacted]

The applicant is entitled to be the owner by law, as Estate Trustee of the estate of the deceased owner.

This document is not authorized under Power of Attorney by this party.

This transaction is not subject to any writs of execution. Execution search(s) completed on 2023/10/04. Clear execution number(s) [redacted], 48137630-6908540B. I Michele Allinotte confirm the appropriate party(ies) were searched.

Statements

The debts of the deceased are paid in full

No application was made for a certificate of appointment of an Estate Trustee, as this transaction is the first dealing after the property was converted from Registry to Land Titles by the Ministry. The value of the estate is $450,000.00.

The will is the last will and was properly executed and witnessed and that a certificate of appointment of estate trustee was not applied for. The testator was of the age of majority at the time of the execution of the will, and that the will has not been revoked by the marriage of the testator or otherwise.

Covenant to Indemnify the Land Titles Assurance Fund See Schedules

Signed By

Michele Rachel Joyce Allinotte	101-132 Second Street East Cornwall K6H1Y4	acting for Applicant(s)	Signed	2023 10 04

Tel 613-933-7720

Fax 866-566-9584

I have the authority to sign and register the document on behalf of the Applicant(s).

Submitted By

Journey Law Professional Corporation	101-132 Second Street East Cornwall K6H1Y4	2023 10 04

Tel 613-933-7720

Fax 866-566-9584

Fees/Taxes/Payment

Statutory Registration Fee	$69.00
Total Paid	$69.00

FORM 54

COVENANT TO INDEMNIFY THE LAND TITLES ASSURANCE FUND

Land Titles Act

Re: Transmission Application for PIN 67153-0087

(Section 55 of the Act)

This Agreement made September 26, 2023

BETWEEN:

deceased name of ET

[redacted], by her Estate Trustee, [redacted], personally and as Estate Trustee, of the City of Cornwall, County of Stormont, Province of Ontario

-and-

HIS MAJESTY in right of Ontario,

WHEREAS the Registrar has requested an indemnity to register this Transmission Application, since this transaction is the first dealing since the property was converted to Land Titles.

The said Estate Trustee in consideration of the registration of this Transmission Application, for the covenantor, the covenantor's administrators, executors and assigns, covenants with HIS MAJESTY in right of Ontario, represented By the Director of Titles, that the said deceased [redacted], Estate of deceased [redacted] and ET [redacted] shall keep indemnified HIS MAJESTY in the right of Ontario, his successors and assigns, from and against all loss or dimunition of the assurance fund under the *Land Titles Act,* or established or continued under any other Act of the Province of Ontario, in respect of any valid claim that may hereafter be made on account of the circumstances set out above and also against all costs in respect thereof and will pay such amount as anyone claiming as aforesaid may be adjudged to be entitled to recover in respect of the premises and costs.

IN WITNESS WHEREOF I (We), have hereunto set my (our) hand(s) and seal(s).

In the presence of:

Mallmotti

[redacted]

[redacted], by her Estate Trustee

deceased

[redacted], as Estate Trustee
estate trustee
and personally

TRANSMISSION WITH CAEI

LRO # 52 **Transmission By Personal Representative-Land**

Receipted as ST129168 on 2021 11 17 at 12:05

The applicant(s) hereby applies to the Land Registrar.

yyyy mm dd Page 1 of 1

Properties

PIN 60207 - 0117 LT

Description PT LT 10 CON 4 CORNWALL PT 1 52R2396; S/T TC20239, TC30605; SOUTH STORMONT

Address [redacted]
LONG SAULT

Deceased(s)

Name [redacted] name of deceased

Address for Service c/o [redacted]
[redacted]
Beaconsfield, QC
H3W 5J2

Date of death was 2021/05/01

Applicant(s)

	Capacity	Share
Name [redacted] estate trustee		
Address for Service [redacted] Beaconsfield, QC H3W 5J2		

The applicant is entitled to be the owner by law, as Estate Trustee of the estate of the deceased owner.

This document is not authorized under Power of Attorney by this party.

This transaction is not subject to any writs of execution. Execution search(s) completed on 2021/11/17. Clear execution number(s) 43774794-6939261B for [redacted] and 43774794-6939261B for [redacted] I Michele R. Allinotte confirm the appropriate party(ies) were searched.

Statements

The debts of the deceased are paid in full

The applicant is appointed as Estate Trustee with a will by Ontario Superior Court of Justice Court, under file number 21-281, dated 2021/11/17 and is still in full force and effect.

Signed By

Michele Rachel Joyce Allinotte	160 Pitt Street, Unit 202 Cornwall K6J 3P4	acting for Applicant(s)	Signed	2021 11 17

Tel 613-933-7720

Fax 613-933-4877

I have the authority to sign and register the document on behalf of the Applicant(s).

Submitted By

Journey Law Professional Corporation	160 Pitt Street, Unit 202 Cornwall K6J 3P4	2021 11 17

Tel 613-933-7720

Fax 613-933-4877

Fees/Taxes/Payment

Statutory Registration Fee	$66.30
Total Paid	$66.30

SURVIVING JOINT TENANT.

LRO # 52 **Survivorship Application -Land** **Receipted as ST147208** on 2023 10 04 at 15:29

The applicant(s) hereby applies to the Land Registrar. yyyy mm dd Page 1 of 1

Properties

PIN 60210 - 0022 LT

Description PT E1/2 LT 18 CON 3 CORNWALL AS IN S248327; CORNWALL

Address [redacted]
CORNWALL

Deceased(s)

Name [redacted] deceased

Address for Service [redacted] Cornwall
ON K6H 5R6

Date of death was 2023/08/30

The deceased and [redacted] a/the surviving joint tenant, were spouses of each other when the deceased died.

spouse / JT

Applicant(s)

	Capacity	*Share*
Name [redacted]	Registered Owner	
Address for Service [redacted] Dr Cornwall ON K6H 5R6		

This document is not authorized under Power of Attorney by this party.

The applicant(s) held the property as joint tenants with the deceased.

By right of survivorship, the applicant(s) is entitled to be the owner(s), as a surviving joint tenant(s).

Signed By

Michele Rachel Joyce Allinotte	101-132 Second Street East Cornwall K6H1Y4	acting for Applicant(s)	Signed	2023 10 04

Tel 613-933-7720

Fax 866-566-9584

I have the authority to sign and register the document on behalf of the Applicant(s).

Submitted By

Journey Law Professional Corporation	101-132 Second Street East Cornwall K6H1Y4	2023 10 04

Tel 613-933-7720

Fax 866-566-9584

Fees/Taxes/Payment

Statutory Registration Fee	$69.00
Total Paid	$69.00

SURVIVING JOINT TENANT

Ontario ServiceOntario

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

LAND REGISTRY OFFICE #52

60210-0022 (LT)

PREPARED FOR Michele1
ON 2023/09/07 AT 13:27:40

4-35

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: PT E1/2 LT 18 CON 3 CORNWALL AS IN S248327; CORNWALL

PROPERTY REMARKS:

ESTATE/QUALIFIER:
FEE SIMPLE
LT CONVERSION QUALIFIED

RECENTLY:
FIRST CONVERSION FROM BOOK

PIN CREATION DATE:
2006/11/20

OWNERS' NAMES

[redacted] spouse deceased

CAPACITY SHARE
JTEN
JTEN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2006/11/17 **						
**SUBJECT, ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:						
** SUBSECTION 44(1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES *						
** AND ESCHEATS OR FORFEITURE TO THE CROWN.						
** THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF						
** IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY						
** CONVENTION.						
** ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.						
**DATE OF CONVERSION TO LAND TITLES: 2006/11/20 **						
S248328	1993/07/30	CHARGE		*** COMPLETELY DELETED ***	RETIREMENT PLAN FOR THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITE	
S288930	1999/01/21	AGREEMENT		*** COMPLETELY DELETED ***		
REMARKS: S248328						
S346508	2006/01/09	TRANSFER		*** COMPLETELY DELETED ***	1034822 ONTARIO INC.	
ST7138	2007/12/20	TRANSFER		*** COMPLETELY DELETED *** 1034822 ONTARIO INC.	UNITED ASSOCIATION OF PLUMBERS AND STEAM FITTERS, LOCAL 71 BUILDING INC. L'ASSOCIATION UNIE DES PLOMBIERS ET TUYAUTEURS, LOCAL 71 BATISSE INC.	

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
ST7372	2008/01/14	DISCH OF CHARGE		*** COMPLETELY DELETED *** RETIREMENT PLAN FOR THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITE		
	REMARKS: RE: S248328					
ST42714	2011/11/30	TRANSFER	$145,900	L'ASSOCIATION UNIE DES PLOMBIERS ET TUYAUTEURS, LOCAL 71 BATISSE INC. UNITED ASSOCIATION OF PLUMBERS AND STEAM FITTERS, LOCAL 71 BUILDING INC.	[redacted] [redacted]	C
	REMARKS: PLANNING ACT STATEMENTS					
ST42715	2011/11/30	CHARGE	$128,720	[redacted]	CAISSE POPULAIRE DE LA VALLEE INC.	C
ST141396	2023/01/13	LIEN	$15,480	HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE		C

Properties

PIN 111111 - 1111 LT

Description LT 1 PL 1 THURLOW; BELLEVILLE ; COUNTY OF HASTINGS

Address 1 MAIN STREET
BELLEVILLE

Deceased(s)

Name SMITH, JOHN
Address for Service c/o 2 Main Street
Belleville, ON K8P 5A5

Date of death was 2019/08/01

Name SMITH, JANE
Address for Service c/o 2 Main Street
Belleville, ON K8P 5A5

Date of death was 2023/08/01

Applicant(s) | *Capacity* | *Share*

Name SMITH, PETER JOHN — Estate Trustee With A Will

Address for Service 2 Main Street
Belleville, ON K8P 5A5

The applicant is entitled to be the owner by law, as Estate Trustee of the estate of the deceased owner.

This document is not authorized under Power of Attorney by this party.

This transaction is not subject to any writs of execution. Execution search(s) completed on 2023/09/13. Clear execution number(s) 48004278-7936120B - SMITH, John. I Liam D. Rafferty confirm the appropriate party(ies) were searched.

Statements

The debts of the deceased are paid in full

No application was made for a certificate of appointment of an Estate Trustee, as this transaction is the first dealing after the property was converted from Registry to Land Titles by the Ministry. The value of the estate is $789,000.

The will is the last will and was properly executed and witnessed and that a certificate of appointment of estate trustee was not applied for. The testator was of the age of majority at the time of the execution of the will, and that the will has not been revoked by the marriage of the testator or otherwise.

Schedule: John Smith and Jane Smith owned the property as joint tenants. By right of survivorship, Jane Smith was entitled to be registered as the sole owner of the property on the death of John Smith. John Smith and Jane Smith were spouses of each other on the date of death of John Smith.

Covenant to Indemnify the Land Titles Assurance Fund See Schedules

Signed By

Liam Donald Thomas Rafferty — 204-365 North Front Street, Belleville, K8P 5A5 — acting for Applicant(s) — Signed 2023 09 13

Tel 613-969-7292

Fax 613-969-7293

I have the authority to sign and register the document on behalf of the Applicant(s).

Submitted By

RAFFERTY LAW — 204-365 North Front Street, Belleville, K8P 5A5 — 2023 09 13

Tel 613-969-7292

Fax 613-969-7293

Fees/Taxes/Payment

Statutory Registration Fee $69.00

Total Paid $69.00

File Number

Deceased Client File Number :	00001
Applicant Client File Number :	00002

Covenant to Indemnify the Land Titles Assurance Fund (under section 55 of the *Land Titles Act*)

Land Titles Act
(Re: See Transmission Application to which the within Covenant is attached)

This Agreement made the 12th day of September, 2023

BETWEEN:
REDACTED of Belleville, Ontario (the "Covenantor")

-and-

HIS MAJESTY in right of Ontario,

WHEREAS REDACTED (the "deceased") died on REDACTED, 2023.

AND WHEREAS on the date of death of the deceased, the deceased was possessed of lands legally described as Lot REDACTED County of Hastings, municipally known as REDACTED Belleville, Ontario, being all of PIN REDACTED (LT) (the "subject lands").

AND WHEREAS the deceased left a valid, unrevoked Last Will and Testament appointing REDACTED as Estate Trustee of the **ESTATE OF** REDACTED the "Estate").

AND WHEREAS the Transmission Application to which the within Covenant is attached (the "Instrument") would constitute the first dealing with the subject lands since conversion from Registry to Land Titles by the Ministry.

AND WHEREAS there are no other assets of the Estate that would necessitate obtaining a Certificate of Appointment of Estate Trustee with a Will and the Covenantor is desirous to avoid incurring the costs of an Application for such a Certificate, including the Estate Administration Tax, and is further desirous to deal with the subject lands as soon as possible.

THEN THEREFORE, in consideration of permitting the registration of the Instrument without the need to obtain a probate of the Will of the deceased, and other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged by the Covenantor, the Covenantor, for the Covenantor, the Covenantor's administrators, executors, and assigns, covenants with His Majesty in right of Ontario, represented by the Director of Titles as follows:

That the said REDACTED shall keep indemnified His Majesty in right of Ontario, his successors, and assigns, from and against all loss or diminution of the assurance fund under the *Land Titles Act*, or established or continued under any other Act of the Province of Ontario, in respect of any valid claim that may hereafter be made on account of the circumstances set out above and also against all costs in respect thereof and will pay such amount as anyone claiming as aforesaid may be judged to be entitled to recover in respect of the premises and costs.

IN WITNESS WHEREOF I have hereunto set my hand and seal.

SIGNED, SEALED, AND DELIVERED)
in the presence of)

REDACTED

TRANSMISSION - VESTING

LRO # 52 **Transmission Devisee/Heir At Law-Land** **Receipted as ST130339** on 2021 12 21 at 10:41

The applicant(s) hereby applies to the Land Registrar. yyyy mm dd Page 1 of 4

Properties

PIN 60137 - 0055 LT

Description PT LT 37 CON 9 CORNWALL AS IN S286038; SOUTH STORMONT

Address [redacted]
LUNENBURG

Consideration

Consideration $1.00

Deceased(s)

Name [redacted] deceased

Address for Service c/o [redacted]
103 Sydney Street
Cornwall, ON K6H 3H1

Date of death was 2009/07/01

Applicant(s)

		Capacity	Share
Name	[redacted] beneficiary	Registered Owner	12.5%
Date of Birth	1989 10 02		
Address for Service	[redacted] Williamsburg Ontario K0C2H0		

This document is not authorized under Power of Attorney by this party.

The applicant is entitled to be the owner, as Devisee/ Heir-at-Law.

The interest is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the Estates Administration Act, the Succession Law Reform Act and the Family Law Act.

This transaction is not subject to any writs of execution. Execution search(es) completed on 2021/12/21. Clear execution number(s) Certificate number 44051789-3953830B [redacted] I Michele Allinotte confirm the appropriate party(ies) were searched.

		Capacity	Share
Name	[redacted] beneficiary	Registered Owner	12.5%
Date of Birth	1982 07 11		
Address for Service	[redacted] K0K1Z0		

This document is not authorized under Power of Attorney by this party.

The applicant is entitled to be the owner, as Devisee/ Heir-at-Law.

The interest is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the Estates Administration Act, the Succession Law Reform Act and the Family Law Act.

This transaction is not subject to any writs of execution. Execution search(es) completed on 2021/12/21. Clear execution number(s) Certificate number 44051789-3953830B [redacted] I Michele Allinotte confirm the appropriate party(ies) were searched.

		Capacity	Share
Name	[redacted] beneficiary	Registered Owner	12.5%
Date of Birth	1993 06 13		
Address for Service	[redacted] Lunenburg Ontario K0C 1R0		

This document is not authorized under Power of Attorney by this party.

The applicant is entitled to be the owner, as Devisee/ Heir-at-Law.

The interest is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the Estates Administration Act, the Succession Law Reform Act and the Family Law Act.

This transaction is not subject to any writs of execution. Execution search(es) completed on 2021/12/21. Clear execution number(s) Certificate number 44051789-3953830B [redacted] I Michele Allinotte confirm the appropriate party(ies) were searched.

		Capacity	Share
Name	[redacted] beneficiary	Registered Owner	12.5%
Date of Birth	1986 01 27		
Address for Service	[redacted] Owen Sound Ontario N4K 2I5		

This document is not authorized under Power of Attorney by this party.

The applicant is entitled to be the owner, as Devisee/ Heir-at-Law.

The interest is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the Estates Administration Act, the Succession Law Reform Act and the Family Law Act.

This transaction is not subject to any writs of execution. Execution search(es) completed on 2021/12/21. Clear execution number(s)

Applicant(s)	*Capacity*	*Share*

Certificate number 44051789-3953830B-[redacted]. I Michele Allinotte confirm the appropriate party(ies) were searched.

Statements

Title to the land is not subject to spousal rights under the Family Law Act

The debts of the deceased are paid in full

I Michele Allinotte solicitor make the following law statement The property has vested in the applicants and they are entitled to be owners as Devisees/Heirs at Law..

Signed By

Michele Rachel Joyce Allinotte	160 Pitt Street, Unit 202 Cornwall K6J 3P4	acting for Applicant(s)	Signed	2021 12 21

Tel 613-933-7720

Fax 613-933-4877

I have the authority to sign and register the document on behalf of the Applicant(s).

Submitted By

Journey Law Professional Corporation	160 Pitt Street, Unit 202 Cornwall K6J 3P4	2021 12 21

Tel 613-933-7720

Fax 613-933-4877

Fees/Taxes/Payment

Statutory Registration Fee	$66.30
Provincial Land Transfer Tax	$0.00
Total Paid	$66.30

TRANSFER OF VESTED PROPERTY

LRO # 52 **Transfer** **Receipted as ST130342** on 2021 12 21 at 10:59

The applicant(s) hereby applies to the Land Registrar. yyyy mm dd Page 1 of 3

Properties

PIN 60137 - 0055 LT *Interest/Estate* Fee Simple

Description PT LT 37 CON 9 CORNWALL AS IN S286038; SOUTH STORMONT

Address [redacted]
LUNENBURG

Consideration

Consideration $1.00

Transferor(s)

The transferor(s) hereby transfers the land to the transferee(s).

Name [redacted] beneficiary

Address for Service [redacted], Ontario
K0K1Z0

I am at least 18 years of age.

The property is not ordinarily occupied by me and my spouse, who is not separated from me, as our family residence.

This document is not authorized under Power of Attorney by this party.

All my interest to co-owner(s).

This transaction is not subject to any writs of execution. Execution search(s) completed on 2021/12/21. Clear execution Number(s) Certificate # 44051789-3953830B [redacted]. I Michele Allinotte confirm the appropriate party(ies) were searched.

Name [redacted] beneficiary

Address for Service [redacted] Williamsburg
Ontario K0C2H0

I am at least 18 years of age.

The property is not ordinarily occupied by me and my spouse, who is not separated from me, as our family residence.

This document is not authorized under Power of Attorney by this party.

All my interest to co-owner(s).

This transaction is not subject to any writs of execution. Execution search(s) completed on 2021/12/21. Clear execution Number(s) Certificate # 44051789-3953830B [redacted]. I Michele Allinotte confirm the appropriate party(ies) were searched.

Name [redacted] beneficiary

Address for Service [redacted] Lunenburg Ontario
K0C 1R0

I am at least 18 years of age.

I am not a spouse

This document is not authorized under Power of Attorney by this party.

All my interest to co-owner(s).

This transaction is not subject to any writs of execution. Execution search(s) completed on 2021/12/21. Clear execution Number(s) Certificate # 44051789-3953830B [redacted] I Michele Allinotte confirm the appropriate party(ies) were searched.

Name [redacted] beneficiary

Address for Service [redacted] und Ontario
N4K 2I5

I am at least 18 years of age.

The property is not ordinarily occupied by me and my spouse, who is not separated from me, as our family residence.

This document is not authorized under Power of Attorney by this party.

All my interest to co-owner(s).

This transaction is not subject to any writs of execution. Execution search(s) completed on 2021/12/21. Clear execution Number(s) Certificate # 44051789-3953830B [redacted]. I Michele Allinotte confirm the appropriate party(ies) were searched.

Transferee(s) C/L

Name	*Capacity*	*Share*
[redacted] spouse of deceased	Registered Owner	

Date of Birth 1959 10 10

Address for Service [redacted]
Lunenburg, ON

Statements

The transferee(s), who is purchasing from a devisee/heir-at- law, is not aware of any specific debts against the deceased.

Signed By

Michele Rachel Joyce Allinotte	160 Pitt Street, Unit 202 Cornwall K6J 3P4	acting for Transferor(s)	Signed	2021 12 21

Tel 613-933-7720

Fax 613-933-4877

I am the solicitor for the transferor(s) and the transferee(s) and this transfer is being completed in accordance with my professional standards.

I have the authority to sign and register the document on behalf of all parties to the document.

Michele Rachel Joyce Allinotte	160 Pitt Street, Unit 202 Cornwall K6J 3P4	acting for Transferee(s)	Signed	2021 12 21

Tel 613-933-7720

Fax 613-933-4877

I am the solicitor for the transferor(s) and the transferee(s) and this transfer is being completed in accordance with my professional standards.

I have the authority to sign and register the document on behalf of all parties to the document.

Submitted By

Journey Law Professional Corporation	160 Pitt Street, Unit 202 Cornwall K6J 3P4	2021 12 21

Tel 613-933-7720

Fax 613-933-4877

Fees/Taxes/Payment

Statutory Registration Fee	$66.30
Provincial Land Transfer Tax	$0.00
Total Paid	$66.30

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Michele Allinotte

Journey Law Professional Corporation

What is a First Dealings Exemption?

- The general assumption where the registered owner of property passes without surviving joint tenants:
  - The interest in the land passes to the estate of the deceased owner
  - Further transfers require a Certificate of Appointment of Estate Trustee (“Probate”).

The Requirements

- Bulletin No. 2000-6, dated 20 December 2000 outlines the required documentation and law statements:
  - The property must be a Ministry Conversion from Registry to Land Titles;
  - The transaction must be the "first dealing" after the conversion of the property to LTCQ;
  - The value of the estate of the registered owner must be disclosed;
  - Evidence regarding both the execution of a will and proof of death must be submitted;
  - Applications must contain an assurance that the will is the last will and that a Certificate of Appointment of Estate Trustee has not been sought;
  - The will must have been executed by the testator when they were the age of majority and must not have been revoked; and
  - In all cases, a covenant to indemnify the Land Titles Assurance Fund must be included.

General Availability of a First Dealings Exemption:

- First Dealings Exemption will generally be available where:
  - The deceased owner acquired the property when it was registered under the Registry Act;
  - The property has since been converted to LTCQ and *remains* LTCQ in Land Titles
  - The deceased owner passed *with* a will.

LTCQ is a Requirement

- The First Dealings Exemption is only available where title is registered as LTCQ – not for LT Absolute or LT Absolute Plus.
- Note: This requirement will generally disqualify condominiums in Ontario.
  - In most of Ontario, condominium development has occurred on LT Absolute of LT Absolute Plus land. Condominiums located on LTCQ land are going to be more likely limited to southwest Ontario, if at all.

Verifying Continuous Ownership

- When searched in Teraview, all PINs contain in the body of the PIN a line which reads as follows:

  **DATE OF CONVERSION TO LAND TITLES: ##-##-####

- The transfer to the deceased owner must predate the date of conversion.

Intervening “Dealings”

- But not everything qualifies as a “dealing” sufficient to undermine the continuity of ownership required.

The First Dealing will apply despite various registrations:

- Charge/Mortgage – or Discharge of same
- Notices
- Leases
- Survivorship Applications
- Severing a joint tenancy
- Transfers to former spouses following divorce/separation.

Be Careful with Abutting Lands and Trusts!

- Where an owner acquires abutting lands only the original LTCQ land would qualify for the exemption – not the merged abutting parcels.
- The Land Titles system does not recognize trusts with the result that it can be difficult to distinguish between legal and beneficial ownership.
  - If Legal ownership is transferred, even if beneficial ownership is not, the First Dealings Exemption will likely not be available.

Special Circumstances – Preserving the Exemption

- Legal ownership of the Fee Simple is what matters most.
  - A self-to-self transfer to change tenure does not undermine the First Dealings Exemption.
- Acquisition of a further interest does not undermine the exemption.
  - The First Dealings Exemption will apply to the totality of the undivided interest.
- The *Veterans' Land Act* creates a special, though rare, specific consideration.

More Information:

- A comprehensive list of the requirements for a First Dealings Exemption, including special circumstances and the effect of intervening dealings can be found in the Estates Module of the Teraview Procedures Guide on Teraview.ca.

Transmission Applications

- Requirements for a Transmission Application on a First Dealings
  - Statement re debts
  - No application for CAET was made & this is the first dealing after the property was converted to LT
  - Value of the estate refers to the entire estate, not just the value of the real property in question
  - Confirmation that the last will was properly executed and is not revoked
  - Covenant to Indemnify the Land Titles Assurance Fund (discussed below)
  - Clear execution search on the deceased, must be dated the day of registration
- Requirements for a Transmission Application with a Certificate of Appointment of Estate Trustee
  - Statement re debts
  - Confirmation that a CAET was obtained, including court file number and date of the CAET and that it is still of full force and effect
  - Clear execution search against the deceased dated the day of registration

Covenants

- Ministry has a standard format
- Information that you need to add:
  - Why the covenant is required?
    - Can be simple, such as Registrar has requested the indemnity, as the registration is the first dealing, or contain more info and recitales
  - Reference to the deceased owner, as well as the ET who is signing the covenant
  - Must be signed in ink, witnessed, and the name of the signatory must appear under their signature
    - E signature or not witnessed will not be accepted
    - If the name of the signatory is not under their signature, it will be returned

Survivorship Applications & Combined Transmission and Survivorship Applications

- Survivorship Application
  - The required elements are:
    - Spousal statement
    - Applicant confirms they held the property as joint tenants with the deceased and by right of survivorship, they are entitled to be the owner as the surviving joint tenant
    - No need to do a writ search in advance, but one will be generated on registration
- Combined Survivorship and Transmission
  - Same as a regular Transmission, but must include the Survivorship Application statements in the Schedule/Statement 61

Schedule: John Smith and Jane Smith owned the property as joint tenants. By right of survivorship, Jane Smith was entitled to be registered as the sole owner of the property on the death of John Smith. John Smith and Jane Smith were spouses of each other on the date of death of John Smith.

Vesting

- Review both s. 9 and 10 of the *Estates Administration Act* to confirm vesting applies
- Transmission Devisee/Heir At Law is required with these statements:
  - Applicant is the beneficiary(s) legally entitled
  - Statement that the applicant is entitled to be the owner as Devisee/Heir At Law
  - Statement that interest has now vested in all the beneficiaries of the estate
  - Clear writ search against deceased
  - Covenant to Indemnify signed by all beneficiaries legally entitled
  - Additional law statements:
    - Spousal statement
    - Statement re debts
    - Law statement re vesting

Vesting

- Transfer by Devisee/Heir At Law to transfer to a third party needs these statements:
  - Statement 3646 "all my interest to my co-owners" if more than one beneficiary
  - Statement 20 by Transferee confirming the Transferee has no knowledge of any specific debts against the deceased
  - Statement that interest has now vested in all the beneficiaries of the estate

Questions?


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TAB 5

21st Real Estate Law Summit

Time of the Essence and Specific Performance
The Law Still Has Some Teeth

Doug Bourassa
Torkin Manes LLP

April 16, 2024

cpd

Time of the Essence and Specific Performance
The Law Still Has Some Teeth

Doug Bourassa, Torkin Manes LLP

As sure as night follows day and day follows night, real estate spawns litigation. Whether the market is riding up, and people are chasing profits, or the market is trending down, and people are trying to avoid losses, real estate transactional work generates disputes.

This paper will address two particular issues that have attracted some measure of attention in the current marketplace: (1) the impact of time-of-the-essence clauses; (2) the measure of damages connected to a question of specific performance.

The Ontario Court of appeal has seen fit to opine on both of these topics in the relatively recent past. Their decisions are both terrifying and instructive. Terrifying because both of these decisions illustrate the enormous consequences that can flow from seemingly innocuous issues, and instructive because they offer direction on how to avoid these outcomes. The general trend in jurisprudence has been towards a softening of the harshness of the common law. Each of the two decisions that will be discussed in this paper stand as a rejoinder to that softward migration. Each of these decisions is remarkable for their harshness, and their strictness.

Preiano v. Cirillo[1]

The facts in this decision are relatively straightforward. It is a failed real estate transaction where the plaintiff agreed to sell the property to the defendant. Purchase price was $480,000 on closing, which was set for November 20, 2013. The vendor refused to close and the purchasers brought an action for specific performance, or in the alternative damages.

[1] Preiano v. Cirillo, 2024 ONCA 206 (CanLII), https://canlii.ca/t/k3ls1

The matter meandered through the civil litigation system for 11 years, until finally, the Court of Appeal resolved the matter on March 21, 2024.

The trial court judge decided that the vendor was wrong in refusing to close the transaction, and accordingly found in favour of the purchaser. The judge refused to grant specific performance, as the property in question was intended to be occupied for only a short period of time. Apparently, the purchasers intended to live in the property only while, they were rebuilding a new home on their existing property. As such, he concluded, the property was not unique, and specific performance was not an appropriate remedy.

But here's where things get interesting. In assessing damages, the judge accepted the purchasers' expert who opined that the property had risen in value by $1 million while the action was being disputed. Consequently, the judge awarded damages of $1 million to the purchasers for a property that they had agreed to buy for $480,000.

One cannot but note that most vendors would be shocked to learn that the measure of a purchaser's loss includes any appreciation in the property, subsequent to the failed closing. On the one hand, had the transaction proceeded as expected the purchaser would of had the benefit of the appreciation of that property. On the other hand, the vendors have been maintaining this property for eleven years while the dispute meandered its way through the court system. They paid taxes. They paid the mortgage. And they did not have the benefit of the purchase monies over that time frame.

Once one has made an omelette, it is truly difficult to unscramble the egg.

Had the trial judge's decision remain undisturbed, the extent of the risk faced by a vendor in refusing to close would be substantial. However, the Court of Appeal did not leave the decision

undisturbed. Instead, the Court of Appeal reversed the trial judge's decision and instead of a judgment of $1 million, the purchasers obtained a judgement of $45,000, or slightly more than the small claims court limit.[2]

Having litigated the matter for some 11 years, one suspects that the ultimate result was likely dwarfed by the legal fees it took to get there. The costs decisions of the trial court and the Court of Appeal are not publicly available. But eleven years of litigation will grind through $45,000 awfully quickly.

The important question for the purpose of this paper is why the judge was overturned. The Court of Appeal held that the correct measure of damages was the value of the property *on the date of closing*, minus the agreed-upon purchase price. This is to be contrasted with the value of the property *at the date of trial*.

Thus, the issue is one of timing. Should the loss be calculated at the date the contract was breached, or the date of trial? The Court of Appeal offered an interesting justification for choosing the date of closing rather than the date of trial.

The court of appeal held that the judge erred in his application of *Semelhago v. Paramedevan*[3] and *Sivasubramaniam v. Mohammed*[4], two leading decisions on the law of specific performance. In each of those decisions, the Supreme Court on the one hand, and the Ontario Court of Appeal on the other, held that damages in lieu of specific performance are assessed as at the date of trial. The trial judge here relied on that assessment and was incorrect in so doing.

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[2] Technically, the $1 million judgment was reduced to $975,000 when the $25,000 deposit was applied. Similarly, the purchasers judgment was for $70,000, but after the return of the deposit, the net judgment amount was $45,000.
[3] *Semelhago v. Paramadevan,* 1996 CanLII 209 (SCC)
[4] *Sivasubramaniam v. Mohammad*, 2018 ONSC 3073 aff'd, 2019 ONCA 242

The difference between those two leading decisions and the *Preiano* case was that in those decisions, the court would have ordered specific performance.

Thus, the fact that the court would not order specific performance in the *Preiano* case, meant that the damages were not *in lieu* of specific performance, but were damages for a simple breach of contract.

So the million dollar question is whether or not the purchaser can prove a claim for specific performance. Even where damages are sought, if those damages are sought in lieu of specific performance, and if the court would, but for the purchaser's election, award specific performance, then the correct damage assessment entitles the purchaser to the benefit of any appreciation in the property between the date of breach and date of trial.

Now to the purchasers in the *Preiano* case, the Court of Appeal's distinction changed a significant victory to what is almost certainly a significant loss.

The lesson for litigants is that the remedy of specific performance has significant and substantial value, even where the purchaser elects damages in lieu of specific performance. While it is common for efficiency's sake to forego claims for specific performance as they raise the bar regarding what must be proved, this decision is a stark reminder that the question of specific performance has real and tangible value to a purchaser's claim. Your negotiating leverage as a purchaser is significantly stronger while the prospect of specific performance lingers over the conduct of the action.

Time of the Essence Clauses

In *Di Millo v. 2099232 Ontario Inc.*[5], the Court of Appeal explained the purpose of 'time-of-the-essence' clauses:

> A "time is of the essence" clause is engaged where a time limit is stipulated in a contract. The phrase "time is of the essence" means that a time limit in an agreement is essential such that breach of the time limit will permit the innocent party to terminate the contract.
>
> […]
>
> [A] "time is of the essence" clause does not serve to impose a time limit but rather dictates the consequences that flow from failing to comply with a time limit stipulated in an agreement.

Accordingly, this type of clause does not tell the court when an obligation must be met, but rather, that it must be met without delay. But it begs the question…do they really mean no delay at all? Would 1 minute late be too late? How about 35 minutes?

Well, the Court of Appeal has answered that question – 35 minutes is too late.

In *3 Gill Homes Inc. v. 5009796 Ontario Inc. (Kassar Homes)*[6], the Court of Appeal was faced the following fact pattern. The parties entered into an APS for the purchase of residential homes to be newly constructed by the vendor. There were three agreements in total. The first two closed without incident. The third did not.

The third transaction was set to close on August 31, 2021, however, due to construction delays, the vendor was not a position to complete the transaction at that time. To accommodate the vendor's delay, the parties entered into an amendment to the agreement that changed the closing date from

[5] *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051 at paras. 31 & 35
[6] 3 Gill Homes Inc. v. 5009796 Ontario Inc. (Kassar Homes), 2024 ONCA 6 (CanLII), <https://canlii.ca/t/k20lq

August 31, 2021 to January 28, 2022. The amendment included a ‘time is of the essence’ clause and required that the purchase monies be paid by 3 PM (rather than the more common 5 or 6 PM) on January 28, 2022.

On the day of closing, the purchaser’s lawyer advised at 2:47 PM that ‘funds had been attained and the banking was being dealt with.’ Ultimately the funds were delivered at 3:35 PM. The lawyer for the vendor rejected the funds and deemed the transaction terminated

The Court of Appeal found in favour of the vendor. It held that the ‘time is of the essence’ clause meant that the parties had a shared understanding that the closing date and time was to be enforced. The court noted "while the outcome for the respondent was indeed harsh, it was not unconscionable or unfair."

No one will argue that the Court got it wrong in recognizing the harshness of its decision. Particularly in light of the fact that the new closing date was itself an accommodation by the purchaser to the vendor. Recall that when the vendor was unable to deliver in August 2021, the parties negotiated a new date and the transaction was extended by several months. By contrast, when the purchaser saw a 35 minute extension, it was refused.

The Court of Appeal was clear that because of the ‘time is of the essence’ clause, the timelines in the agreement were to be strictly enforced. The court did recognize that there is some residual equitable jurisdiction to relieve against the breach of a time provision, but no such exercise of discretion was appropriate in this case. The Court of Appeal held that in order to exercise its equitable jurisdiction to relieve against the consequences of the breach, the party seeking relief would need to demonstrate some unfair or unjust action on the part of the counterparty. In finding

that there was no such unfairness, the court noted that the correspondence between the parties revealed clear and repeated reminders about the closing date and time.

One can question whether the court should encourage admittedly harsh outcomes. But as the application judge noted:

> If the Court were to excuse the default in this case, when would a person in the position of Kassar Homes be permitted to terminate the agreement? One hour after the stipulated time? Two hours? One day? Intervention by the court in the face of contractual language agreed to by capable contracting parties is the beginning of a slippery and precarious slope.
>
> I decline to rewrite the parties' bargain. They could have contractually agreed to a period within which a monetary or other default could have been cured. They did not do so.

So what lesson should be gleaned from this decision? Time of the essence clauses are enforceable and can be relied upon. The decision also encourages the practice of sending warning letters in advance of a closing date to prepare the record for an ultimate dispute. For a purchaser, these clauses create minefields and obstructions to be avoided. Funds must be arranged well in advance as same day banking delays are common and unavoidable. For vendors, a harsh rule such as this can afford an escape clause where a purchaser can falter (often through no fault of their lawyer) and a vendor can terminate. The consequences are significant. As a solicitor, you must consider these clauses carefully, lest the admittedly harsh outcomes be visited upon your unsuspecting client.

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TAB 6

21st Real Estate Law Summit

Toronto Pflag: Why Inclusivity Equals Talent Acquisition and How to be an Ally

Lisa Del Col
Toronto Pflag

Joel Kadish
Barrister and Solicitor

April 16, 2024

cpd

Toronto Pflag:

Why Inclusivity Equals Talent Acquisition and How to be an Ally

Lisa Del Col, *Toronto Pflag*

Joel Kadish, Barrister and Solicitor

Resources:

Toronto Pflag

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https://pflagcanada.ca

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TAB 7

21st Real Estate Law Summit

Tips and Traps for Negotiating and Drafting Robust Environmental Clauses in Agreements

Rosalind Cooper, C.S.
Fasken Martineau DuMoulin LLP

Jasmeen Kabuli, Associate
Fasken Martineau DuMoulin LLP

Julia Chung, Articling Student
Fasken Martineau DuMoulin LLP

Real Estate Summit 2024 – Environmental Pitfalls & Liabilities in Commercial Leases

Rosalind Cooper, C.S.
Fasken Martineau DuMoulin LLP

Anna Lu, Associate
Fasken Martineau DuMoulin LLP

Julia Chung, Articling Student
Fasken Martineau DuMoulin LLP

April 16, 2024

cpd

TIPS AND TRAPS FOR NEGOTIATING AND DRAFTING ROBUST ENVIRONMENTAL CLAUSES IN AGREEMENTS

Authors: Rosalind Cooper, Partner, Fasken Martineau LLP
Jasmeen Kabuli, Associate, Fasken Martineau LLP
Julia Chung, Articling Student, Fasken Martineau LLP

A key objective of any agreement of purchase and sale of a property is to allocate risks as between the purchaser and the seller. Representations, warranties and indemnities are prime clauses used to allocate risks. Precise drafting of these clauses can help reduce, if not avoid, liability arising from disputes amongst the contractual parties. This is particularly true in the context of environmental clauses involving real estate. Exposure to environmental liability depends, among other things, on the property type, risks associated with such properties and the activities conducted thereon.

As a rule of thumb, a purchaser acquiring a fee simple interest in a property would seek to, at a minimum, minimize its exposure to environmental liability for any existing contamination on the property, whereas a vendor selling a fee simple interest would seek to sell the property as-is-where-is without any obligations whatsoever. The purpose of this paper is to provide guidance for counsel negotiating and drafting environmental representations, warranties and indemnities in fee simple agreements of purchase and sale, with the goal to provide practical tools to reduce a client's (be it a purchaser or a seller) exposure to liability arising from environmental risks.

1. Scope of Environmental Representations and Warranties for a Purchaser and a Seller

Representations and warranties allocate the risks that arise with a transaction.[1] Generally speaking, a representation is a statement made before or at the time the contract is executed, "in regard to some past or existing fact, circumstance, or state of facts pertinent to [the] contract, which is influential in bringing about the agreement".[2] A misrepresentation is a statement about the subject matter of a contract that is not true and that has some legal significance.[3] Remedies for misrepresentation are rescission and/or damages. A warranty is "an undertaking or promise or stipulation that a certain fact…is or shall be as it is stated or promised in the agreement and provides protection to the purchaser against loss if the fact is or becomes untrue".[4] A breach of warranty entitles the recipient of the warranty to damages for breach of contract.[5]

The scope of environmental representations and warranties will in large part depend on the type of property, activities carried thereon, risk tolerance of the parties, and results of due diligence of the purchaser or disclosure by the seller (where available), and will cover a broad range of matters, among other things, in respect of:

- the absence of pollutants, contaminants, hazardous substances/materials, adverse soil conditions, gasoline, oil, urea formaldehyde foam insulation, arsenic, asbestos or asbestos-

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[1] Angela Swan, Nicholas C Bala & Jakub Adamski, *Contracts: Cases, Notes and Materials*, 10th ed (Toronto: LexisNexis Canada Inc, 2020) "7.3 CONTRACTUAL PLANNING: REPRESENTATIONS AND WARRANTIES".

[2] *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc*, 2000 CanLII 22663 (ONSC) at para 203.

[3] Angela Swan, Nicholas C Bala & Jakub Adamski, *Contracts: Cases, Notes and Materials*, 10th ed (Toronto: LexisNexis Canada Inc, 2020)

[4] Barry D Lipson & Leonard D Rodness, *Art of Drafting the Commercial Contract*, "Representations and Warranties" (1.II) at § 2:5.

[5] Practical Law Canada Commercial Transactions, "Representations, Warranties, Covenants and Conditions" (Thomson Reuters Practical Law).

containing materials, polychlorinated biphenyls, radioactive substances and/or storage systems (the "**hazardous substances**");

- the use of the property has not and does not involve hazardous substances;
- the property has not been used as a landfill/waste disposal site, including the absence of waste at the property;
- the absence of any underground storage tanks at the property;
- the absence of any notices of violation of environmental laws or any other applicable laws, claims, order or warnings, including, among other things, the requirement to take action to comply with environmental laws or perform environmental closure, decommissioning, rehabilitation, restoration or post-remedial investigations; and/or
- confirmation of compliance with environmental laws or any other applicable laws with respect to the property.

Generally speaking, in giving and receiving such representations and warranties, counsel for a seller client should consider ways to limit the scope and extent of the client's exposure by, among other things, pushing-back on environmental liability for future contamination and limiting liability to *existing* contamination (if any) *caused by the seller* at the subject property. For the seller, an ideal transaction would involve the property being sold on an "as is, where is" basis, and therefore, would not include any environmental representation or warranty. However, where representation and warranty provisions are included, the vendor should limit the scope through the use of qualifiers and limitations as discussed in detail below.

On the other hand, counsel for a purchaser client should consider ways to limit the scope and extent of the client's exposure, among other things, by pushing back on liability for any existing contamination on the property and future contamination not caused by the purchaser. As such, purchasers typically seek *extensive*, *unqualified* environmental representations and warranties from the seller, which *survive* closing for a sufficient period of time. Purchasers should also request post-closing indemnities to address claims arising under or related to environmental regulations, even if there are no known environmental issues at the time of conveyance. Where possible, purchasers should conduct due diligence to confirm the vendor's representations and warranties[6] and/or seek the seller's disclosure of any existing environmental diligence to assist with their review. Depending on the course of the negotiations, the purchaser may also wish to either negotiate a longer due diligence period or strive to complete its due diligence during the negotiation period.[7] Where the purchaser's diligence during the due diligence period reveals environmental concerns, the purchaser can seek an amendment of the existing agreement of purchase and sale to address any concerns, and may wish to, before the waiver date, seek a

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[6] *Ibid*. For instance, in *Tony's Broadloom & Floor Covering Ltd v NMC Canada Inc*, 1996 CarswellOnt 4926, [1996] OJ No 4372, the ONCA held that the defect (existence of contaminants) "**would have been readily discoverable by the appellants had the exercised reasonable diligence in the circumstances**. In deciding whether the appellants exercised reasonable diligence, it must be remembered that the appellants were buying industrial land on which they proposed to build a residential condominium. A reasonable inspection of the property, reasonable enquiries of the respondents and reasonable enquiries of the local and provincial authorities would have put the appellants on notice of the existence of the contaminant." Here, the appellants had purchased property which they knew had an industrial use, but the vendors were not told that the purchasers intended to change the use from industrial to residential. The agreement warranted that the land's present use could be lawfully continued, and provided that the purchaser acknowledged inspecting the property prior to submitting the offer. The ONCA dismissed the appeal, holding that the vendor made no misrepresentations.

[7] An inspection/due diligence clause can be helpful for a purchaser who is: (a) willing to bear the costs of inspection, and (2) concerned about environmental contamination. In *1061590 Ontario Ltd v Ontario Jockey Club*, 1994 CarswellOnt 717, [1994] OJ No 1586 the Ontario Court of Justice granted summary judgment to the purchaser and declared the APS as terminated. The APS contained an inspection clause which provided the plaintiff with the right to terminate the agreement "if the Purchaser believes, acting reasonably," that the property was environmentally unsuitable for development. Subsequently, the plaintiff discovered, based on expert reports, that the property was subject to environmental contamination that would materially increase the cost of developing the lands. The court held that there was no genuine issue of fact requiring a trial and ruled in favour of the plaintiff.

reduction in purchase price, negotiate a longer survival period for representations and warranties, or seek a broader indemnity, etc.

2. Tips and Traps for Drafting and Negotiating Robust Environmental Representations and Warranties

A seller or purchaser should pay specific attention to the various considerations and qualifiers that can affect the scope of representations and warranties. These include, among other things:

Knowledge Qualifiers: A variety of knowledge qualifiers can be used to narrow the scope of a representation to limit exposure, which is obviously beneficial to a seller but less desirable to a purchaser. A seller should avoid accepting the broad risk of warranting that the property contains no environmental hazards and complies with all applicable environmental laws and should require the purchaser to satisfy itself with regard to these issues. However, where this is not possible, a seller may qualify the representation using a knowledge qualifier, which would in turn transfer some of the risk from the seller to the purchaser. For instance, the seller may represent that it has **no knowledge of**, or that it has **received no notice** of, any violation or contamination, which reduces the risk of liability.[8] Alternatively, the seller may qualify representations and warranties to

[8] Bruce Salvatore, Craig R Carter & Paul M Perell, *Agreements of Purchase & Sale*, (Markham: Butterworths Canada Ltd, 1996) at 181.

the **best of the seller's knowledge** with no additional duty or inquiry/investigation[9]. By adding this qualifier, the seller would not be warranting the absolute truth of the statement.[10]

The parties may also consider:

1. defining "knowledge" as: (i) actual knowledge, which is the most favourable for the seller because it does not carry an obligation to investigate; or[11] (ii) constructive knowledge, which is what a party ought have known[12]; and/or

2. limiting knowledge to the knowledge of a specific person(s) or category of persons; it is favourable for a purchaser to have, among others, both an executive officer of the seller

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[9] In *Vokey v Edwards*, 1999 CarswellOnt 1440 (ONSC), [1999] O.J. No. 1706, the ONSC has held that "to the best of knowledge and belief" was a stark qualifier, and the vendor's honest belief of the truth of the warranty that a swimming pool was in good working order meant that there was no breach of warranty. Similarly, in *Melko v Lloyd Estate*, 2002 CanLII 13191 (ONSC), the court was satisfied that "the defendants, in signing the warranty clause in the offer, honestly believed in the truth of the statements they made" [49]. The vendor had represented and warranted "to the best of his knowledge and belief" that the sewage systems "are wholly within the limits of the said property and have received all required certificates of installation and approval…" [54]. In *Beatty v Wei*, 2018 ONCA 479, the vendor had represented and warranted "**to the best of the Seller's knowledge and belief**", the use of the property and the buildings and structures had never been for the growth or manufacture of illegal substances. The parties signed the APS, and the Purchaser's lawyer subsequently discovered the property's previous use as a cannabis grow-op and opted out of the purchase. The vendor sued for breach of contract. The ONCA ruled in the vendor's favour and found that at the time the parties signed the APS, the vendor had no reason to doubt their statement with respect to the use of the home as a grow-op. The later discovery about the property came after the contract was signed, and did not serve to invalidate the Seller's warranty at the time it was made. For the new information to constitute a breach of the APS, the clause would either have had to specify that it continued to the date of closing, or the statement would have to been made a clear condition of closing.

[10] *John Levy Holdings Inc v Cameron & Johnstone Ltd,* 1992 CarswellOnt 602 (ONCJ) at para 64.

[11] In *Crombie Property Holdings Limited v McColl-Frontenac Inc (Texaco Canada Limited)*, 2017 ONCA 16, the ONCA found that the motion judge erred by equating knowledge of **potential** hydrocarbon contamination with actual **knowledge** of contamination. Here, Crombie Property had brought an action for damages resulting from hydrocarbon contamination on the property, which was purchased on April 10, 2012. The alleged source of contamination was the adjacent property which was a former gas station. The defendants moved for summary judgment, submitting that Crombie Property had discovered the contamination more than two years before the claim, which the motion judge granted. The motion judge relied on the Phase I ESA report, which the ONCA held was only evidence of "potential contamination".

[12] Practical Law Commercial Real Estate, "Representations and Warranties in Commercial Real Estate Purchase and Sale Agreements", (Thomson Reuters Practical Law).

and the seller's operating manager or property manager who has *day-to-day* knowledge as the "knowledge party".[13]

Materiality Qualifier: A materiality qualifier can limit the scope of environmental representations and warranties to degrees of **material** non-compliance, for instance, "the property is not in **material** violation of any federal, provincial, or local laws, rules or other regulations that apply to the property", etc. This benefits the vendor by providing a cushion to avoid liability for minor breaches of representations and warranties that do not affect the transaction's substance. Of course, purchaser should avoid accepting materiality qualifiers as they weaken assurances and limit recourse for breaches. Alternatively, where a seller insists on a materiality qualifier, the purchaser can seek to define materiality through a monetary threshold as per their risk tolerance.[14]

Timing: A prudent seller would limit the representation and warranty, if any, to matters arising during the term of its interest in the property, whereas, from a purchaser's perspective, a broader time frame is desirable.

Survival Period: Because environmental contamination can at times take months or years to surface and become evident, it is beneficial for a purchaser to negotiate a survival period post-closing. Otherwise, as the owner of the property post-closing, the purchaser could bear the liability for any environmental issues discovered during the purchaser's ownership. Given the potential for latent environmental conditions, purchasers should negotiate an extended survival period coupled

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[13] *Ibid.*

[14] *Ibid.* **Note:** Courts have stated the following regarding the interpretation of "material": "Something is material if it is substantial or essential in the context of the particular contract. Black's Law Dictionary defines material as: 'Of such a nature that knowledge of the item **would affect a person's decision-making**; significant; essential.'" [22] (*2198572 Ontario Inc v First Land (Overlea) Ltd*, 2016 ONSC 5587). See also, *Strategic Acquisition Corp v Multus Investment Corporation*, 2016 ABQB 681 at para 72.

with a robust indemnity to safeguard against potential environmental liabilities.[15] On the other hand, the seller should negotiate for representations and warranties to terminate as of the closing date. An indemnity given should not extend to future purchasers of the property and should add a limitation that it serves strictly for the purchaser's benefit only.

Strategic "except as" disclosure language: Purchasers should pay specific attention to the "except as disclosed" language in representations and warranties as this language may be employed to discreetly disclose something. Purchasers should ensure that disclosures of exceptions are specific or that they relate to a particular issue or occurrence. For example, instead of accepting "except as disclosed in Schedule A of the Agreement", where Schedule A is a multi-page report with many complex and technical schedules, a purchaser should instead seek to reference a specific disclosure in the representation itself, for example, "as disclosed in section X of the schedule" as opposed to Schedule A on the whole.

Indemnities: Indemnities are effectively insurance to a party in the event of a breach of a representation or warranty, though an indemnity may be a lot less meaningful if the party giving it becomes insolvent, which is not unlikely to occur. Regardless of whether a purchaser or a seller is giving an indemnity, an indemnity should: (a) be limited to indemnity for contamination caused by that party's acts or omissions or those for whom the party is legally responsible; (b) cover compliance with orders issued by regulatory authorities, claims by third parties and penalties imposed by courts, and (c) be explicitly set out to be in favour of the contractual party and that it does not extend to any other party (including future purchasers, where applicable). Puchasers should seek to be indemnified against any contamination existing at the property prior to its

[15] *Ibid.*

acquisition or arising from activities previously carried at the property. Sellers should seek to be indemnified for any contamination arising at the property due to future acts or omissions.

April 9, 2024

REAL ESTATE SUMMIT 2024 – ENVIRONMENTAL PITFALLS & LIABILITIES IN COMMERCIAL LEASES

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Environmental liability in commercial leases can be a complex and problematic issue if not properly considered and addressed. For example, landlords and tenants of commercial leases ought to be aware that regulatory authorities have broad remedial powers that can reach current and past owners, occupants/tenants, and anyone accountable for the contamination, the land, or the activities causing the contamination.[1]

As further discussed in this paper, representation, warranty and indemnity provisions in commercial leases have a crucial role in delineating environmental liability.[2] Accordingly, this paper offers guidance to lawyers negotiating environmental provisions within commercial leases. Firstly, the paper provides a brief overview of the law on environmental contamination that occurs during a commercial tenancy. Secondly, the paper discusses landlord and tenant considerations on representations, warranties, and indemnities in commercial leases. The paper concludes with

[1] For instance, under section 17 of the *Environmental Protection Act*, RSO 1990, c E 19, the Director appointed by the Minister of the Environment and Climate Change has the authority to make a remedial order "[w]here **any person causes or permits the discharge** of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered". [*Emphasis added*].

[2] These provisions depend on various factors, including the tenant's negotiating power and the use of the property. Property use can be broadly classified into the following categories: (1) industrial, (2) retail, particularly ground-level or underground, and (3) office use. For instance, in an office space, the landlord will rarely give a representation or warranty with respect to asbestos. Conversely, in a ground-level retail space, water or soil contamination will be more relevant. For instance, in an office space, the landlord will rarely give a representation or warranty with respect to asbestos. Conversely, in a ground-level retail space, water or soil contamination will be more relevant. Please note that for simplicity, we have generally referred to all non-residential leases as "commercial" throughout this paper, to distinguish these leases from leases governed by the *Residential Tenancies Act, 2006*, SO 2006, c 17.

examples of environmental provisions in leases that may be favourable to landlords and tenants, respectively.

1. Current State of the Law on Contamination Arising From Commercial Tenancy

At common law, absent an express covenant, a commercial tenant is not bound by an implied covenant to repair the leased premises, but must treat the premises in a tenant-like manner.[3]

Commercial leases often include a covenant to requiring a tenant to leave the premises "clean and in good repair", which courts have generally determined is insufficient to oblige the tenant to undertake soil and groundwater remediation.[4] Similarly, case law indicates that where a lease expressly requires a commercial tenant to restore or remediate a property to its previous condition, the standard of remediation and/or restoration imposed is only to the extent permissible under the relevant Ministry of the Environment, Conservation and Parks guidelines, as further exemplified by the following case.

In *Eastgate Developments v First Pioneer Investments Ltd*[5], a landlord leased commercial property to a tenant operating a gas station. Upon termination of the lease, the tenant vacated the property without removing underground equipment and remediating soil contamination. The landlord commenced a remediation program to mitigate its damages, and sued the tenant for damages. The lease contained the following express covenant in respect of remediation: "Lessee shall be required at its expense to remove all buildings and structures placed on the lands herein together with all

[3] Frederick Coburn & Gabrielle K Kramer, at § 2:19. Tenant's Express and Implied Leasehold Covenants in *Toxic Real Estate Manual* (Thomson Reuters Canada Limited, Toronto: 2023).

[4] *Ibid.*

[5] 2005 CanLII 25892 (ONSC).

underground storage tanks whereupon the Lessee shall restore the demised lands to the condition that they were in at the time of execution of this Lease."[6]

In this case, the court found that the tenant was liable for the removal of the contamination, but only to the maximum concentrations allowed under the Ontario Ministry of Environment's *Guideline For Use At Contaminated Sites In Ontario* Table B/Table 3, having regard to the proposed land use.[7] The court rejected the landlord's claim that the tenant was required to remediate the land to its original condition and stated that "restoration to pristine condition was not required".[8] As such, even given the express covenant addressing remediation, the court was reluctant to impose a standard of perfection upon the tenant. For landlords, this likely entails that if a higher standard of remediation is sought, that obligation must be expressly set out in the lease.

2. Representations, Warranties and Indemnities

A representation is a statement of fact, past or present, that, at the time the parties entered into the contract, was communicated to induce the other party to enter into the contract. Remedies for misrepresentation are damages and, prior to closing, rescission. A warranty is "a term in a contract which does not go to the root of the agreement between the parties but simply expresses some lesser obligation, the failure to perform which can give rise to an action for damages, but never to the right to rescind or repudiate the contract".[9]

An indemnity is an obligation to compensate for loss or liability. In the context of commercial leases, an environmental indemnity can be thought of as a type of private insurance arrangement,

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[6] *Ibid* at para 97.
[7] *Ibid.*
[8] *Ibid.*
[9] *Fraser-Reid v Droumtsekas*, 1 SCR 720 at 731.

under which the indemnifying party agrees to compensate the indemnified party for a future cost. Typically, an indemnity only covers costs incurred from conditions not in existence before closing.

For landlords leasing commercial (or other non-residential) properties to tenants engaged in activities with potential environmental impacts, it is crucial to allocate this risk appropriately within the lease agreement. This can be achieved by including: (1) an indemnity in favour of the landlord regarding contamination resulting from the tenant's activities, (2) representations and warranties from the tenant affirming compliance with environmental laws, and/or (3) a provision absolving the landlord of responsibility for contamination caused by a third party.

Conversely, tenants should ensure that the lease protects them from any pre-existing contamination at the property and, where the property is shared with other tenants, in respect of contamination not caused by the tenant's activities. The tenant should ask for the landlord's representation and warranty that: (1) to the best of the landlord's knowledge, the landlord is in compliance with environmental laws (or alternatively, have the landlord provide an environmental assessment report), and (2) the tenant is not responsible for any pre-existing contamination and any other contamination that the tenant does not cause. With respect to indemnities, the tenant should seek a provision providing that the landlord will indemnify the tenant for any pre-existing contamination or third party harm. If the landlord refuses to provide an indemnity, tenants may opt for insurance, which often requires an environmental assessment.

While an environmental assessment is often required for insurance, it is also necessary to perform a baseline environmental assessment at the commencement of the lease to establish the nature and extent of existing contamination, to ensure that the tenant is not liable for any pre-existing

contamination. Similarly, an environmental assessment at termination of the lease will uncover whether any contamination has been caused by the tenant's activities throughout the lease term.

3. Examples of Tenant and Landlord-Friendly Provisions

The following is an example of a landlord-friendly representation, warranty and indemnity provision:[10]

> The Landlord represents and warrants to the Tenant **to the best of its knowledge and belief,** as at the date hereof that: (i) the Building, the Development and Lands comply with all applicable Environmental Laws relating to any contaminant, pollutant, Hazardous Substances, discharges and/or substances **in amounts in excess of those permissible in Law** and (ii) the Landlord agrees to indemnify and save harmless the Tenant from any and all liabilities, damages, costs, suits or actions suffered or incurred by the Tenant as a result of any environmental contamination or pollutants **in amounts in excess of those permissible in Law** in, on or under the Building, the Development and the Lands or any part thereof which originated prior to the Delivery Date, unless such contaminant or pollutant was brought in, introduced or allowed onto the Building, Development or Lands by the Tenant, the Tenant's Employees, or those whom the Tenant is at Law responsible. [*Emphasis added*].

Tenant-friendly representation, warranty, and indemnity provisions are generally broader. For example, a representation and warranty that is not limited "to the best of [the landlord's] knowledge and belief" and "in amounts excess of those permissible in Law", is more favourable to the tenant. Similarly, counsel acting for tenants ought to extend the indemnity beyond pre-existing contaminants to **any** hazardous substances brought in, introduced or released during the term, unless it was caused by the tenant. The following is an example of a tenant-friendly indemnification provision:

> Tenant shall protect, defend, indemnify, and hold harmless Landlord and Landlord's agents, officers, directors, contractors, employees, parents, subsidiaries, successors and assigns (each, a "Landlord Indemnified Party") from and against any and all loss, damages, costs, claims, liability or expense ("Claims") actually incurred by such Landlord Indemnified Party, to the extent such Claims arise out of or are attributable to the storage, use, disposal, and removal from the Premises

[10] Please note that these examples are provided for educational purposes only, and are not a substitute for legal advice.

of Hazardous Substance by Tenant or Tenant's authorized agents, contractors, or employees. **The foregoing indemnity shall include, without limitation, all third-party legal or other professional fees actually incurred by such Landlord Indemnified Party and the cost of repairs and improvements necessary to return the Premises to the physical condition existing prior to undertaking any activity giving rise to such Claims**. This indemnity shall survive the termination of this Lease. [*Emphasis added*].

Law Society of Ontario | Barreau de l'Ontario

TAB 8

21st Real Estate Law Summit

The Business of Law
What Real Estate Lawyers Need to Know (PPT)

Matthew Wilson, C.S.
Siskinds LLP

April 16, 2024

cpd

THE BUSINESS OF LAW

WHAT REAL ESTATE LAWYERS NEED TO KNOW

Matthew Wilson, C.S.

21st Real Estate Law Summit

Overview of Topics

- Business Structures
- Marketing Strategies / Tips and Tricks
- Advertising Rules

Business Structures

What's right for you?

The answer is "IT DEPENDS".

The *Law Society Act* and Law Society by-laws permit a variety of practice structures:

- Sole Proprietorships
- General Partnerships
- Limited Liability Partnerships
- Professional Corporations

Sole Proprietorships

The sole practitioner owns and operates his or her professional business alone. This is the simplest structure and there are few formal business registrations required (for example, registering a business name).

This structure may be appropriate if you plan to practice alone or to employ lawyers to practice under your name or your trade name.

If you have employees, you may wish to consider a professional corporation instead.

Professional Corporations

The *Business Corporations Act* and the *Law Society Act* permit lawyers and licensed paralegals to practice law or provide legal services through a professional corporation, in accordance with the requirements of those Acts and Part II of By-law 7.

All shareholders must be lawyers entitled to practice law in Ontario or licensed paralegals entitled to provide legal services in Ontario.

You cannot practice through a professional corporation until that corporation has received a Certificate of Authorization from the Law Society.

While structuring your practice as a professional corporation instead of as operating as a sole practitioner (or as a partnership) could have a variety of tax and liability benefits, no matter the structure you remain responsible for your actions as a professional. However, tax benefits may only be realized after the business has generated income for which the tax may be deferred.

In other words, per s. 3.4 of the *Business Corporations Act*, there is no limit on professional liability (versus limited liability that is otherwise afforded to corporations)

Partnerships

General Partnerships

A general partnership consists of two or more individuals carrying on business.

Limited Liability Partnerships

A limited liability partnership (LLP) is a specific type of partnership that protects the personal assets of the individual partners for purposes of professional liability.

If you practice through a partnership, make sure you have a good partnership agreement!

Other Arrangements

Associations

Lawyers who practice in association with other lawyers usually operate separate practices from the same location, with an agreement to share overhead costs. The term “association” can mean various arrangements, but whatever the arrangement is it needs to be clearly defined and identified to clients and the public.

Arrangements with Non-Licensees

A multi-discipline partnership is a partnership between a lawyer and an individual who is not a licensee who practices a profession, trade or occupation that supports or supplements the provision of legal services (for example, an accountant or a trademark agent).

An affiliation is a business structure that allows a lawyer to join with an affiliated entity (for example, an accounting firm) in the delivery or promotion of the legal services of the lawyer and the non-legal services of the affiliated entity, however the businesses are not integrated (unlike a MDP).

Business Structures

There are a lot of things to consider!

- Get good tax advice
- Speak to mentors

- How many employees will there be?
- How will lawyers be compensated?
- How will the firm be managed?
- What will the firm's name be?
    - The Law Society has guidelines on law firm names

The Law Society has great information on business structures, including online at https://lso.ca/lawyers/practice-supports-and-resources/topics/opening,-operating-or-closing-a-practice/business-structures

Marketing

What's right for you?

The answer is "IT DEPENDS".

What's right for you is not necessarily right for someone else. What's right for someone else is not necessarily right for you.

Questions to Ask Yourself

- What is the scope of your practice?
- Who are you trying to target?
- Is your approach general or niche?

- What are your target clients' frustrations / challenges?
- What makes your target clients happy?
- How is it best to reach your target clients?

- What's the spend?
  - Money?
  - Time?

Questions to Ask Yourself

- What marketing tactics appeal most to you?
- What marketing tactics appeal least to you?
- How do other lawyers grow their practice?
  - Are they doing it ethically?
- Who in your network can help you?
- Do you have a mentor?

Advertising Rules

What's right for you?

The answer is NOT "IT DEPENDS".

Background

Lawyers were not always allowed to advertise.

Before 1987 lawyers were permitted to engage in informational advertising but not promotional advertising. The *Rules of Professional Conduct* at the time provided that a "lawyer should not, directly or indirectly, do or permit any act or thing to be done which can reasonable be regarded as professional touting or as designed primarily to attract legal business". The *Rules* also stated that "[t]he overriding considerations are that the content of such advertising should be true and should not be capable of misleading those to whom it is addressed".

Rules of Professional Conduct (1983), Rule 13

By 1987 the *Rules* were amended to provide advertising of services, provided the advertising was not false or misleading, was in good taste, did not bring the profession or the administration of justice into disrepute, and did not compare services or charges with other lawyers or firms.

Rules of Professional Conduct (1987), Rule 12

Advertising Rules

Advertising is primarily governed by the *Rules of Professional Conduct*:

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the professional honourably and with integrity.

2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Advertising Rules

4.1-2 In offering legal services, a lawyer shall not use means that

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;

(d) are intended to influence a person who has retained another lawyer or paralegal for a particular matter to change that representative for that matter, unless the change is initiated by the person or that representative; or

(e) otherwise bring the profession or the administration of justice into disrepute.

Advertising Rules

4.1-2 A lawyer may market legal services only if the marketing

(a) is demonstrably true, accurate and verifiable;

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Similar to 1987

4.3-1 A lawyer shall not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Law Society.

Contraventions of the Rules

Possible Contraventions

- Suggesting qualitative superiority to other lawyers
- Raising expectations
- Suggesting or implying the lawyer is aggressive
- Disparaging or demeaning other persons or groups

Definite Contraventions

- Marketing services the lawyer is not able to perform to the standard of a competent lawyer
- Bait and switch marketing
- Failing to state that the services will be provided by licensed lawyers
- Referring to awards or endorsements that are not *bona fide* or are likely misleading, confusing or deceptive
  - Awards that are genuine reflections of professional performance may be permissible
  - Awards or endorsements that are “pay to play” are not

Advertising of Fees - Generally

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if:

(a) The advertising is reasonably precise as to the services offered for each fee quoted;
(b) The advertising states whether other amounts, such as disbursements, third-party charges and taxes will be charged in addition to the fee; and
(c) The lawyer strictly adheres to the advertised fee in every applicable case.

Advertising of Fees – Residential Real Estate

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

(a) the price is inclusive of all fees for legal services, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, the cost of a condominium status certificate, payment for letters from creditors' lawyers regarding similar name executions and any title insurance premium;

(b) the advertisement states that harmonized sales tax and the permitted disbursements mentioned in paragraph (a) of this Rule are not included in the price;

Advertising of Fees – Residential Real Estate

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

(c) the lawyer strictly adheres to the price for every transaction;

(d) in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage; and

(e) in the case of a sale transaction, the price includes the price of acting on the discharge of the first mortgage.

Rule introduced in 2018

Advertising of Fees – Residential Real Estate

The intent of Rule 4.2-2.1 is to ensure that prices advertised by lawyers in residential real estate transactions are clear and comparable. The Rule applies to all types of residential real estate transactions.

The Rule applies to all forms of price advertising, including on the internet. The Rule does not apply where a specific fee quotation is provided that is specific to a transaction, provided that full disclosure is made of the anticipated types of disbursements and other charges which the client would be required to pay in addition to the quoted fee.

Disbursements should not be in “small print” or in a separate document / website.

The price in Rule 4.2-2.1 is an “all-inclusive” price. The all-inclusive price is required to include overhead costs, courier costs, bank fees, postage costs, photocopy costs, third party conveyancer's title and other search or closing fees and all other costs and disbursements that are not permitted disbursements specifically mentioned under the subrule.

Questions?

SISKINDS | The law firm

How to contact myself or one of the SISKINDS lawyers:

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N6B 3L1
Phone:519 660 2061
Toll Free:877 672 2121
Fax:519 672 6065

SISKINDS Law Firm in Toronto, Ontario
65 Queen Street West, Suite 1155
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Matthew's Email: matthew.wilson@siskinds.com

THANK YOU

SISKINDS | The law firm

Law Society of Ontario | Barreau de l'Ontario

TAB 9

21st Real Estate Law Summit

Acting for a Borrower on an Alternative Mortgage: Giving ILA

Mark Gelfand
Keslassy Freedman Gelfand LLP

Jonas Rubinoff
Rubinoff Law

April 17, 2024

cpd

21st Real Estate Law Summit

Acting for a Borrower on an Alternative Mortgage: Giving ILA

April 17th, 2024

Mark Gelfand, *Keslassy Freedman Gelfand LLP*

Jonas Rubinoff, *Rubinoff Law*

INDEPENDENT LEGAL ADVICE ("ILA") VS INDEPENDENT LEGAL REPRESENTATION ("ILR") – HOW DO THEY DIFFER?

ILA and ILR play a crucial role in how real estate transactions are facilitated and completed. In order for lawyers to effectively and diligently carry out their duties when providing ILA and ILR it is important to understand and differentiate between the two.

Rule 1.02 of the Rules of Professional Conduct (the "Rules") from the Law Society of Ontario defines these terms as follows[1]:

"**independent legal advice**" means a retainer where
(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
(b) the client's transaction involves doing business with
    (i) another lawyer,
    (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
    (iii) a client of the other lawyer,
(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

[1] Law Society of Ontario, Complete Rules of Professional Conduct, Rule 1.02, Definitions https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
(f) the retained lawyer informed 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;
"**independent legal representation**" means a retainer where
(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and
(b) the retained lawyer will act as the client's lawyer in relation to the matter;

When you review the definitions above, you will note some difference between ILA and ILR, as follows[2]:

1. **Independent Legal Advice (ILA)**
   - ILA involves seeking advice from an external lawyer who has no affiliation to the client's matter, any other parties involved in the client's matter or the primary lawyer.
   - The ILA lawyer must maintain impartiality and must not have any conflicting interests.
   - The ILA lawyer is responsible for offering impartial, objective and unbiased legal advice concerning decisions the client must make.
   - ILA is a limited scope retainer for a specific purpose and within a defined scope. For example, advising only on the consequences and liability to a person providing a guarantee on a mortgage or a spouse singing the mortgage documentation as a consenting spouse.
   - Despite receiving ILA from the ILA lawyer, that client remains the client of the primary lawyer. For example, the primary lawyer must still verify the identity of that client and obtain the proper joint retainer consents, as applicable.

[2] Law Society of Ontario, Independent Legal Advice Versus Independent Legal Representation https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/independent-legal-advice-and-independent-legal-rep/independent-legal-advice-versus-independent-legal#:~:text=The%20outside%20lawyer%20or%20paralegal,the%20decision%20to%20be%20made.

2. **Independent Legal Representation (ILR)**
   - ILR involves retaining a lawyer who has no conflicts of interest in the matter.
   - The ILR lawyer acts as the legal representative in the matter.
   - The ILR lawyer represents all interests specifically set out in the client retainer agreement .

LSO RULES OF PROFESSIONAL CONDUCT

The lawyer's Rules of Professional Conduct (the "Rules") outlines situations in which a lawyer either should or must recommend that a client obtain ILA or ILR.

Duty to Avoid Conflicts of Interest

Rule 3.4-2

A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all 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[3].

This rule does not require a lawyer to recommend ILA, however, "in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable and not sophisticated"[4].

Consenting to Joint Retainers

Rule 3.4-5

Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

[3] Law Society of Ontario, Complete Rules of Professional Conduct https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

[4] Law Society of Ontario, Complete Rules of Professional Conduct, Commentary [2A], Rule 3.4-5 https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
(c) 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[5].

Rule 3.4-5 does not require a lawyer to advise their client's to obtain ILA but it may be recommended "to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other."[6]

Rule 3.4-6
If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and **recommend** that the client obtain **independent legal advice** about the joint retainer.[7]

Transactions with Clients - Rule 3.4-27 to 3.4-36
Rule 3.4 -29
In any transaction with a client that is permitted under Rules 3.4-28 to 3.4-36, the lawyer shall in sequence
(a) disclose the nature of any conflicting interest or how and why it might develop later;
(b) with respect to **independent legal advice** and **independent legal representation**;

(i) in the case of a loan to a client who is not a related person, the lawyer shall **require** that the client receive **independent legal representation**;
(ii) in the case of a loan to a client who is a related person, the lawyer shall **require** that the client receive **independent legal advice**;
(iii) in the case of borrowing money from a client who is a regulated lender, the lawyer need not **recommend independent legal advice** or **independent legal representation**;

[5] Law Society of Ontario, Complete Rules of Professional Conduct https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct
[6] Law Society of Ontario, Complete Rules of Professional Conduct, Commentary [1], Rule 3.4-5 https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct
[7] Law Society of Ontario, Complete Rules of Professional Conduct https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

(iv) in the case of a corporation, syndicate, or partnership borrowing money from a client of the lawyer where either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest in the corporation, syndicate or partnership, the lawyer shall **require** that the client receive **independent legal representation**;

(v) in all other cases, the lawyer shall **recommend** that the client receive **independent legal advice** and, where the circumstances reasonably require, recommend or require that the client receive legal representation; and

(c) obtain the client's consent to the transaction

(i) after the client receives the disclosure, **legal advice or representation required** under paragraph (b) and before proceeding with the transaction, or

(ii) where a recommendation required under paragraph (b) is made and not accepted, before proceeding with the transaction.[8]

Rules 3.4-27 to 3.4-36 deal with situations where a lawyer takes part in a transaction with a client. Although the Rules do not prohibit lawyers from taking part in certain transactions with clients, the Rules do set out certain requirements where ILA and ILR may be recommended or required.

Discovery of Error or Omission

Rule 7.8-1

When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall

(a) promptly inform the client of the error or omission being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise;

(b) **recommend** that the client obtain **legal advice from an independent lawyer** concerning any rights the client may have arising from the error or omission; and

(c) advise the client that in the circumstances, the lawyer may no longer be able to act for the client[9].

[8] Law Society of Ontario, Complete Rules of Professional Conduct https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

[9] Law Society of Ontario, Complete Rules of Professional Conduct https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

The Two Lawyer Mortgage Rule (Acting for a Borrower and Lender)

Rules 3.4-12 to 3.4-14 do not allow a lawyer or two or more lawyers practicing in partnership or association to act or otherwise represent both the lender and borrower in a mortgage or loan transaction except in certain limited situations where a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction as follows:

(a) the lender is a bank, trust company, insurance company, credit union, a finance company that is a corporation or partnership, a corporation or partnership designated as an approved lender under the *National Housing Act* (Canada) or a Community Futures Development Corporation, a federal or provincial crown corporation or a corporation or agency affiliated with or funded by such a corporation, a municipality or an agency affiliated with or funded by a municipality;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) 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;

(c.1) the consideration for the mortgage or loan does not exceed $75,000; or

(d) the lender and borrower are not at "arm's length" as defined in section 251 of the *Income Tax Act* (Canada).[10]

If the transaction does not fall within one of the above exceptions, the borrower and lender must each have independent legal representation.

The Two Lawyer Transfer Rule (Acting for a Transferor and Transferee in Transfers of Title) 3.4-16.7 to 3.4-16.8

Rule 3.4-16.7 does not allow an individual lawyer to act for or otherwise represent both the transferor and the transferee in a transfer of title to real property except in certain limited situations where a lawyer may act for or otherwise represent both a transferor and a transferee in a transfer of title to real property transaction as follows:

(a) the *Land Registration Reform Act* permits the lawyer to sign the transfer on behalf of the transferor and the transferee;

(b) the transferor and transferee are "related persons" as defined in section 251 of the *Income Tax Act* (Canada); or

[10] Law Society of Ontario, Complete Rules of Professional Conduct https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

(c) the lawyer practises law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer.[11]

If the transaction does not fall within one of the above exceptions, the transferor and transferee must each have independent legal representation.

There is one significant difference between the Two Lawyer Mortgage Rule and the Two Lawyer Transfer Rule. In the Two Lawyer Transfer Rule, the Rules do not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 3.4.[12]

GIVING ILA – ADMINISTRATION OF FILE

- It is important to treat ILA matters seriously like you would any other purchase, sale or mortgage fileYou must open a file, prepare an account and repot to your client
- It is always suggested to conduct your ILA in person, alone, vs virtually in order to ensure that the person receiving the ILA is not under duress or coercion and there is no other parties in the room
- It is important to take detailed notes and document all conversations with your client throughout your retainer
- LAWPRO has made available an Independent Legal Advice Checklist that is detailed (See Schedule "A" for a copy of the Law Pro Checklist). It is recommenced that this Checklist is used and fully completed. The case of *Webb v. Tomlinson, [2006] CanLII 18192 (ON S.C.) is a* textbook example on how to conduct yourself when providing ILA. In this case the lawyer proving the ILA used the LAW Pro checklist and supplemented it with 4 pages of handwritten notes made during the course of the ILA meeting. Based on the checklist and handwritten notes, the court accepted the lawyer's version of advice provided and the lawyer was not found negligent.

[11] Law Society of Ontario, Complete Rules of Professional Conduct https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

[12] Law Society of Ontario, Complete Rules of Professional Conduct, Rule 3.4-16.8 https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

PROTECTING YOURSELF – MITIGATING YOUR RISK /PRACTICE TIPS

- Obtain full and complete instructions from opposing counsel on what is being asked of you:
    - Avoids confusion as to the advice you will be required to give to the client
    - Allows you to understand your scope of work so that you can allocate time and set fees appropriately
    - Limit delays and costs caused by confusion and/or incomplete instructions
    - The goal is to avoid surprises in scope of work and to allow yourself the opportunity to fully assess the file before being retained
    - Assess the circumstances – is your client a spouse? Elderly? Susceptible to being taken advantage of? Able to understand their circumstances?
        - Consider, where applicable, third-party interpreters, other professionals who may be able to assist you in executing your role as an ILA lawyer (with the express written permission of the client).
    - Complete appropriate conflict search(es) prior to the retainer

- Now that you fully understand you role as the ILA lawyer on the file, define the retainer with the client clearly, and put it in writing:
    - Explain your role to the client - what is an ILA lawyer?
    - Explain the limitations of your role as an ILA lawyer – what is outside the scope of your retainer?
    - Confirm the advice you will be providing and set it out precisely – what will you, specifically, be advising on?
    - Consider confirming the advice that you are not able to provide or are not willing to provide – Leave no questions about the scope of retainer unanswered
    - Confirm that you will only act in the presence of the client themselves and that no other participants in the transaction can be associated with the retainer, correspondence and/or any meetings - avoid a conflict of interest.

- Key Takeaways
    - Obtain clear instructions, clarify retainer, eliminate confusion as to scope of ILA

PREPARING ACKNOWLEDGEMENTS AND WAIVERS

- Obtain written confirmation from client (in the form of signed Acknowledgments, Directions and/or Waivers) where the client confirms their understanding and acceptance of:
    (i) any nuances associated with the transaction;
    (ii) limitations in the scope of advice you are giving; and
    (iii) specific and/or unique risk(s) the client is taking on by entering into and/or participating in the transaction
- Be precise, list all key items/factors
- Consider repeating your advice clearly, if necessary, in any such documents confirming your explanation of the liabilities/responsibilities your client is taking on and your client's full and completed understanding of same

BIO:

Mark's practice is focused on commercial and residential real estate. Mark handles all aspects of transactions including the negotiation of agreements of purchase and sale and the acquisition, disposition and financing of all types of real property. His real estate clients include the owners of commercial, industrial, residential and retail properties and he also helps landlords and tenants in the negotiation and drafting of commercial leases.

Jonas practices primarily in the areas of residential and commercial real estate with a focus on purchases, sales, mortgage financings and mortgage enforcement. With a diverse client base, Jonas represents individuals, credit unions, trust companies, private corporations, mortgage investment corporations, institutional lenders and developers.

Independent Legal Advice Checklist Generic

Record the following information:

- Date, start time and finish time:
- Client's name:
- Client's address:
- Telephone:
- Client ID checked:
- Referred by:
- Other parties to the agreement, transaction or course of action:
- Background facts and circumstances and why independent legal advice is necessary:

- List the documents reviewed:

- List everyone present at the meeting:

If language or understanding the client is an issue:

• Client's spoken languages:
• Written languages:
• The client has limited facility with English, so I obtained an interpreter whose name was:

Part A - The Client

- ❑ I reviewed the current state of the client's relevant personal/health/family/business circumstances.
- ❑ I reviewed the background facts and circumstances for the subject agreement, transaction or course of action.
- ❑ The client said that the reason for his or her consent to this agreement, transaction or course of action was [•].
- ❑ I satisfied myself that the client was not subject to duress or undue influence and that the client was signing relevant documents or proceeding with the planned course of action freely and voluntarily.
- ❑ I accepted payment from the client only, and not from anyone adverse in interest to the client.

Part B - If the independent legal advice relates to a contract or agreement

- ❑ I obtained relevant disclosure (personal, financial, other) from both my client and the other side. o I determined that documents were sufficiently well-drafted to accomplish my client's objectives. o I ensured that the terms of the agreement were both certain and enforceable.
- ❑ I explained the final nature of the agreement.
- ❑ I reviewed the risks and consequences of the agreement.
- ❑ I carefully explained all the clauses of the agreement and the client indicated that he or she understood same.

Part C - When client signs or proceeds contrary to advice

- ❑ I advised the client against signing the documents or pursuing the intended course of action, but the client wished to proceed contrary to my advice, so I explained my advice in the presence of a witness, whose name was [•].
- ❑ The client signed an acknowledgement, in the presence of this witness, that he or she was signing the documents or proceeding against my advice.

Part D - File management

- ❑ I opened a file.
- ❑ I placed this form, a copy of the document and my notes in the general independent legal advice file.
- ❑ I took notes of my meeting(s) with the client and retained these.
- ❑ I docketed the time spent advising the client.
- ❑ I sent a reporting letter outlining the terms of the agreement or obligation assumed, together with my account.
- ❑ My advice was verbal only and I sent no reporting letter.

Source of document: Adapted from an ILA Checklist prepared by Philip Epstein, a specialist in family law practicing in Ontario, for the Lawyers' Professional Indemnity Company

Law Society of Ontario | Barreau de l'Ontario

TAB 10

21st Real Estate Law Summit

Market Intelligence
A Review of Ontario's Housing Market in 2023

A Review of Ontario's Housing Market in 2023 (PPT)

Emily Cheung, Director, CPA, Data Analytics & Insights
Teranet® Inc.

April 17, 2024

Market Intelligence

A Review of Ontario's Housing Market in 2023

Emily Cheung, Director, Data Analytics & Insights

TERANET

2023 was a slow year for Ontario's real estate market, with record low home sales due in part by a number of interest rate increases since early 2022. In this report, we'll dive deeper into data from 2023 and wrap up the year by reviewing trends and behaviours amongst Ontario's home buyer segments.

In exploring trends by buyer segment, Teranet classifies buyers into the following categories:

- **Movers:** This category of buyers moved from one property in Ontario to another. They have sold their sole, existing property and purchased another property within a period of time.
- **Multi-property owners:** Property purchases by buyers who, at the time of the purchase, also own other properties in Ontario. The properties purchased by this group of buyers could represent a principal residence, an investment property, or a recreation property.
- **First-time homebuyers:** Property purchases by buyers who claimed the Ontario land transfer tax exemption for first-time homebuyers. To qualify for this exemption, the buyer(s) must not have purchased property anywhere in the world.
- **Life event:** Transfer of ownership between related parties for nominal value. These transactions could be due to marriage, or transfer between generations.
- **Other:** All other buyers. This could include buyers from outside of Ontario or Canada, or re-entry into the property market after an extended absence.

Overview of Ontario's buyer segments

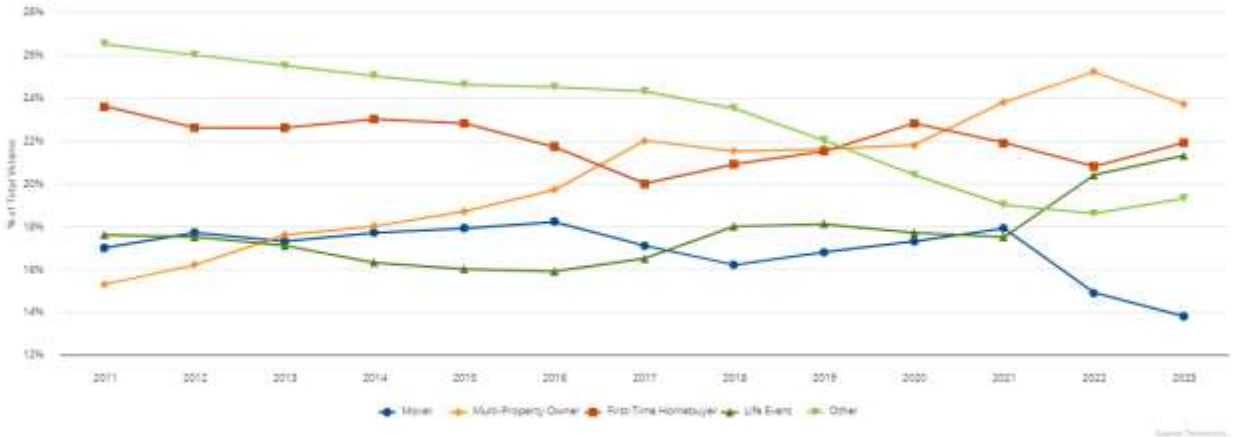


Figure 1 Property transfers by buyer segment as a percentage of total transactions, 2011 to 2023

This report will begin with an overview of activity amongst all buyer segments in Ontario from 2011 to 2023. **Multi-property owners** have significantly increased their representation to almost a quarter of the market in recent years, accounting for 25.2% of all property transactions at its peak in 2022 before settling down to 23.7% in 2023. Since 2011, **first-time homebuyers** have consistently represented 20%-25% of the purchasing market. Similarly, **life event** transactions have remained fairly stable across time, but vary as a percentage of total transactions from 17.6% in 2011 to 21.3% in 2023. While there were many reports about the activity of **movers** during the pandemic, they have consistently remained one of the smallest (and in some years the smallest) buyer segments, with a significant drop in transaction activity in both 2022 and 2023 as interest rates rose.

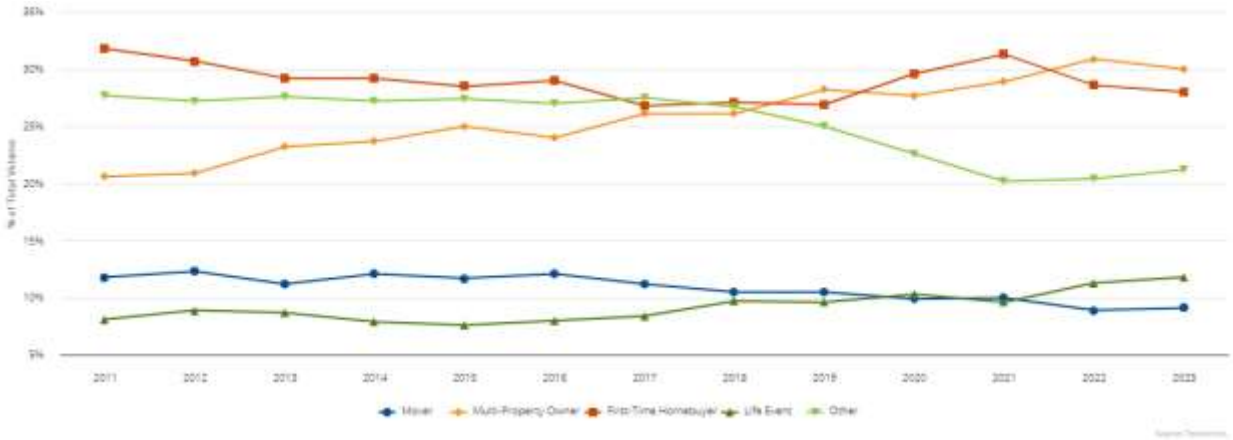


Figure 2A Condo property transfers by buyer segment as a percentage of total transactions, 2011 to 2023

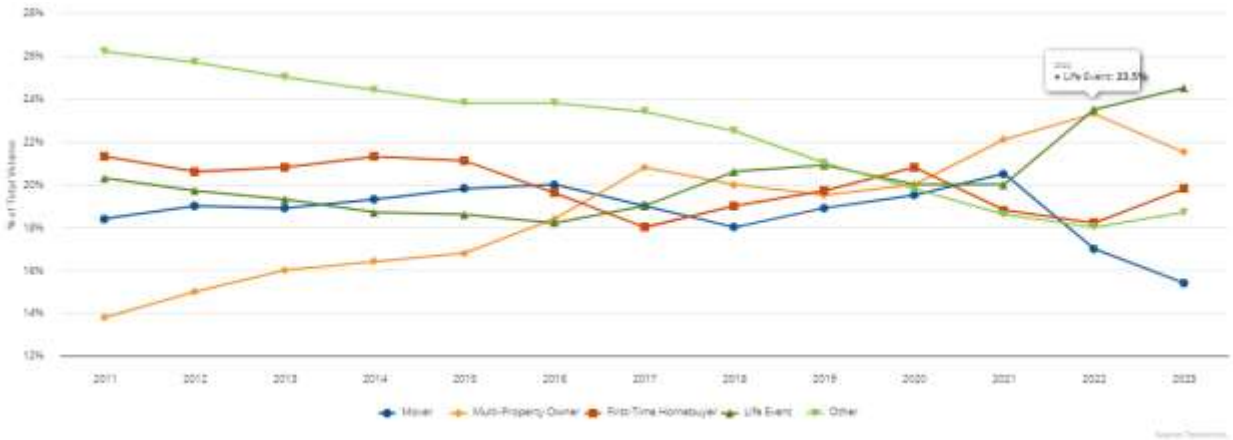


Figure 2B Non-condo property transfers by buyer segment as a percentage of total transactions, 2011 to 2023

Since 2011, condo property purchases (Figure 2A) have been dominated by the first-time homebuyer and multi-property owner buyer segments, accounting for 28% and 30% respectively in 2023. This trend may be due to the relatively lower prices of condos being more attractive to these buyer segments. On the other hand, non-condo purchases have been more balanced between all buyer segments within a fairly small range of 15.4% (purchased by the mover segment) to 24.5% (purchased by the life event segment) in 2023.

Regional Spotlights

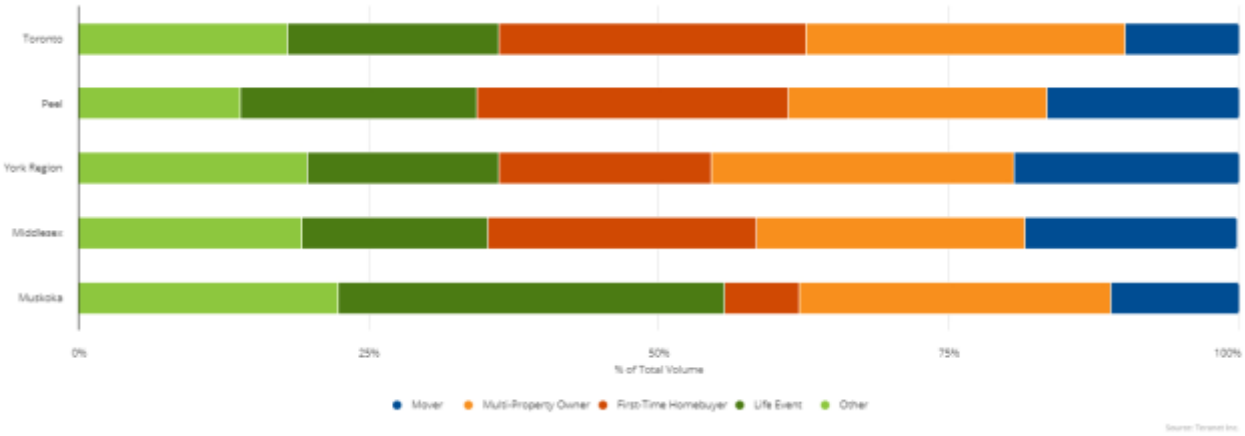


Figure 3 Property transfers by buyer segment as a percentage of total transactions by region, 2018 to 2023

Toronto: Urban Centre

Since 2018, purchase transactions in Toronto have been dominated by first-time homebuyers and multi-property owners at about 25% and above. Despite media reports of movement in and out of the urban city centre during the pandemic, the mover buyer segment accounts for less than 10% of all purchase transactions in Toronto.

Peel and York Regions: Suburbs

While both Peel and York regions are classified as suburban, they show different trends amongst buyer segments. Peel has more first-time homebuyer activity, and higher-than-average life event transaction activity. Meanwhile, in York, there is a high ratio of multi-property owner purchase activity with a more balanced mix of the other segments.

London (Middlesex): University Town

London, as a university town, has high demand for student and faculty housing, in addition to a fair-sized city that attracts first-time homebuyers and families, that makes it a fairly balanced market amongst all five buyer segments between 2018 and 2023.

Muskoka: Cottage Country

Muskoka has a higher than average percentage of life event and multi-property owner transactions. This is aligned with the expectation that many cottage properties are passed down through generations and/or are recreational or investment properties.

Average purchase values

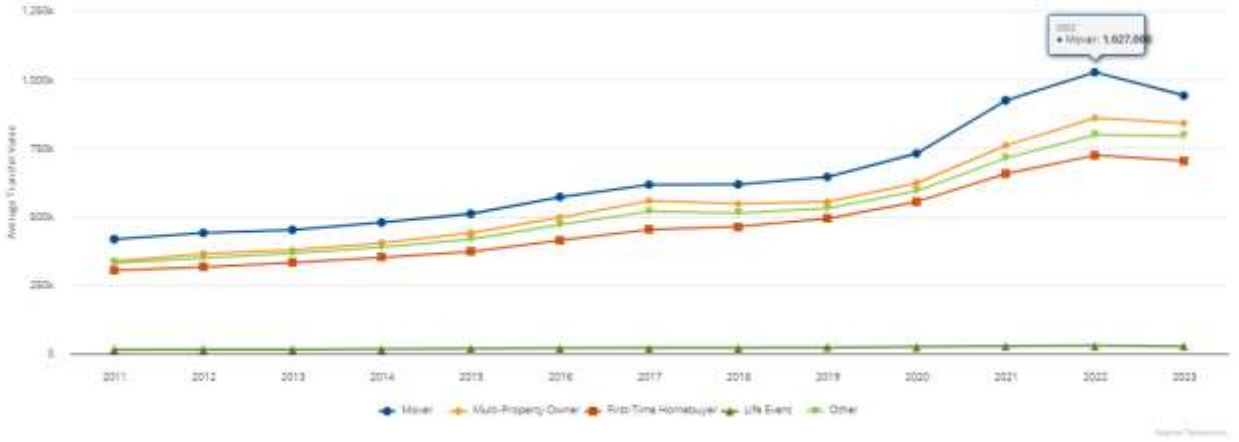


Figure 4A Average transfer value by buyer segment – Ontario

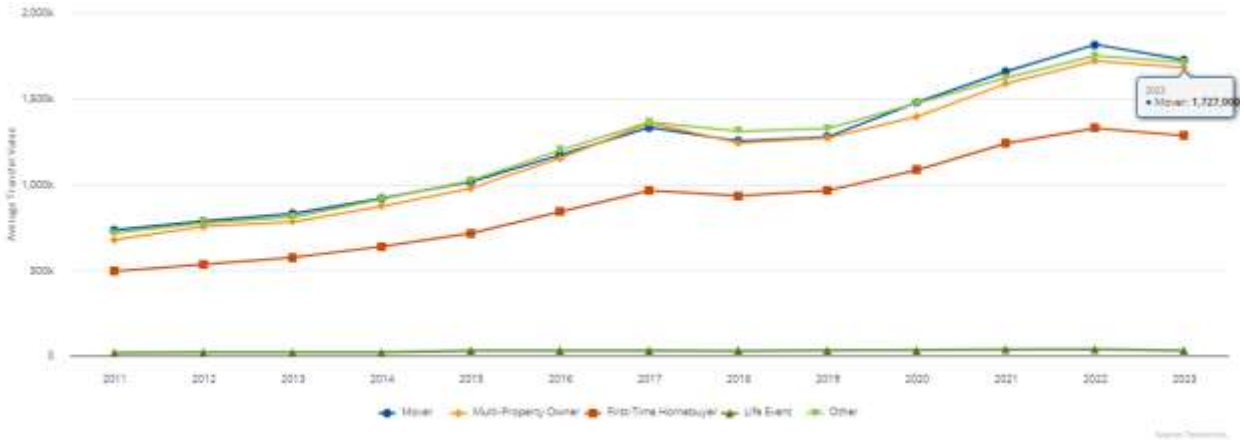


Figure 4B Average transfer value by buyer segment - Toronto Non-Condo

We have observed that Ontario's buyer segments make different pricing decisions amidst the market's overall escalation. In 2011, most buyer segments purchased in a fairly tight price range (Figure 4A). While movers continue to spend the most and first-time homebuyers the least, the price range has widened over time from $114,000 to $239,000 by 2023. The price appreciation in movers' purchases equates to a Compound Annual Growth Rate (CAGR) of 7% over the course of 2011 to 2023, and 7.3% for first-time homebuyers. When we look at the average purchase value of Toronto non-condo properties amongst the buyer segments (Figure 4B), we

can see that the price gap between groups has also widened significantly over time. Movers and the other buyer segment are willing to pay the most, followed closely by multi-property owners. First-time homebuyers spend the least, but they experienced the most significant price appreciation during the period at a CAGR of 8.3%, and in 2023, paid 2.6 times more than 2011.

Parties purchasing together

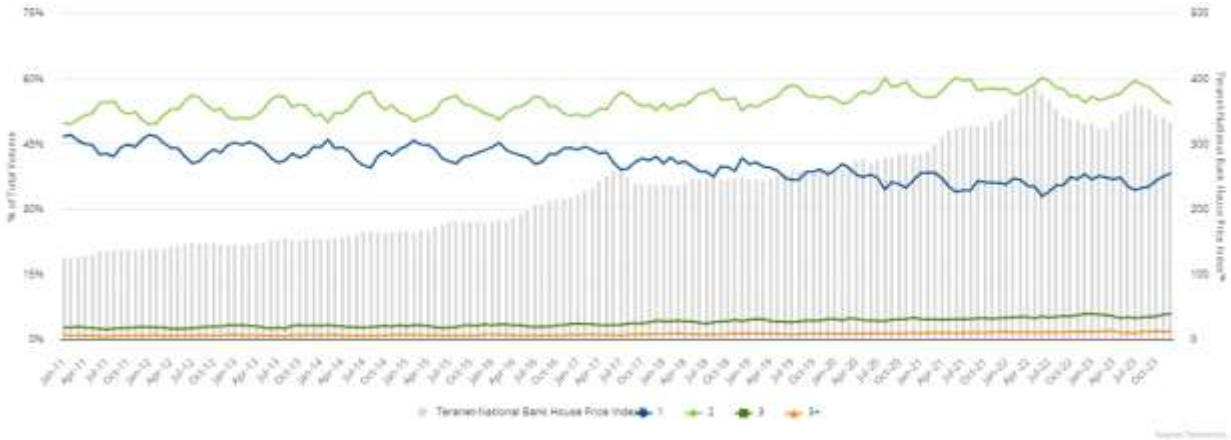


Figure 5A Percentage of transfer volume by number of parties on title

In recent years, trends relating to the number of parties registered on title have reflected the state of affordability in the real estate market. In 2016, following the introduction of the mortgage stress test, a period of decline in solo transactions and a corresponding increase of two-party transactions ensued. Historically, less than 5% of transactions have been made by parties of 3 and more, although we can observe a slight increase in these groups over time to just under 8% in 2023. These may be indications that individuals are increasingly having to pool funds and credit together for home ownership.

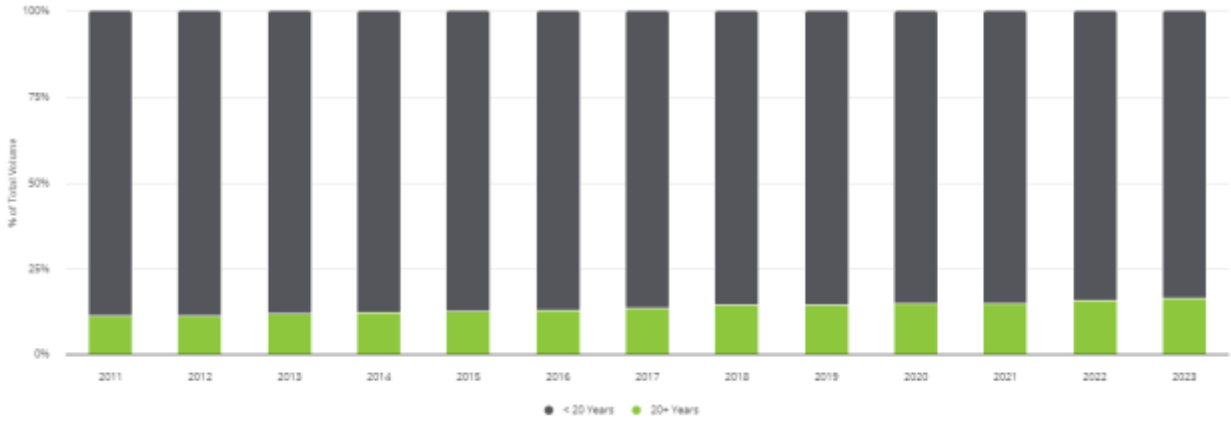


Figure 5B Age gap between parties in multi-party transactions

To assess the magnitude of multi-generation purchases in Ontario, we measured the maximum age gap between parties in multi-party purchases. The vast majority of multi-party transactions are between parties within 20 years of age. There is a small, but growing, portion of transactions between parties greater than 20 years, which may be indicative of multi-generation purchases, a phenomenon that is more pronounced and growing in Toronto versus the rest of the province.

Buyer segment spotlight: Multi-property owners

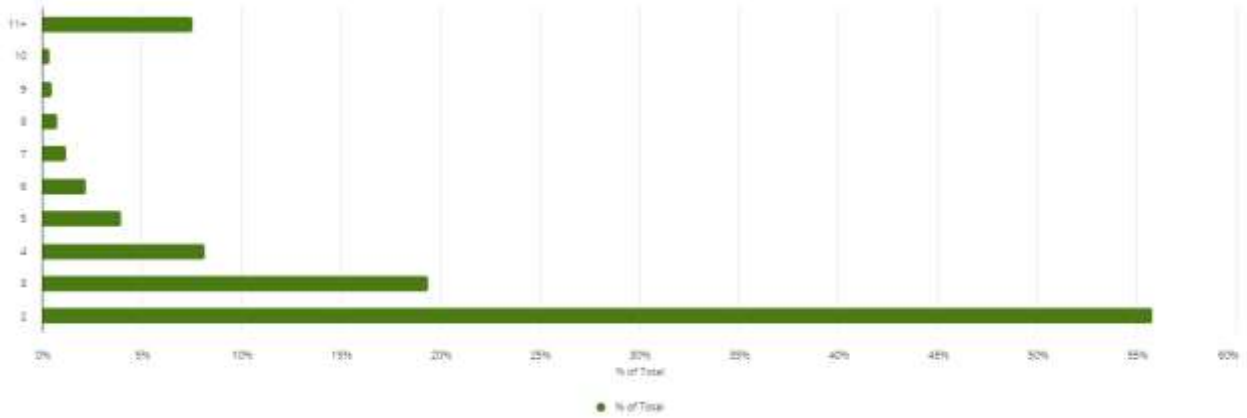
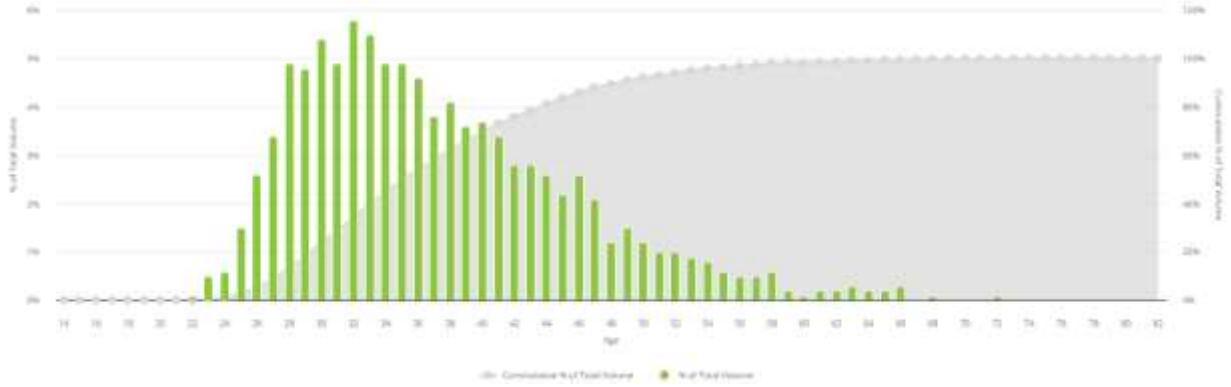


Figure 6 Number of properties held by multi-property owners as at December 31, 2023

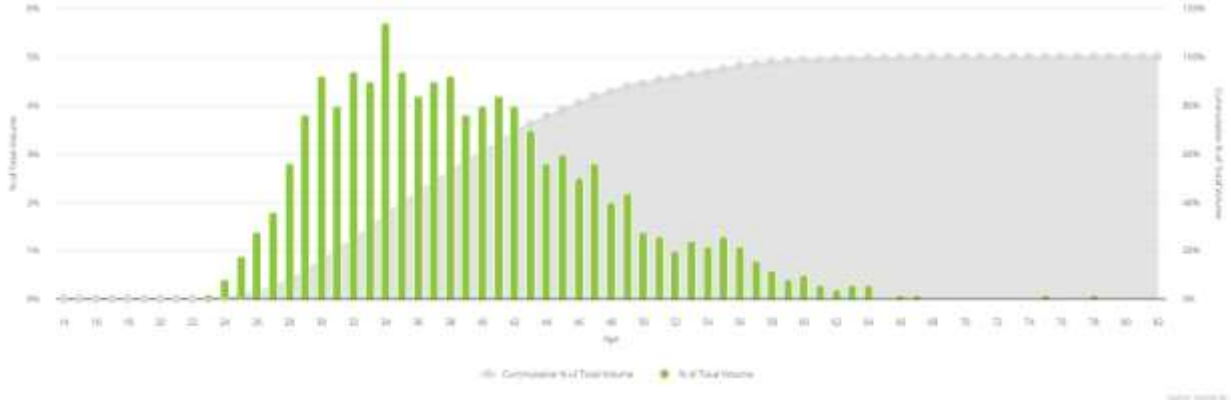
The majority of multi-property owners in Ontario have only two properties in their portfolios, suggestive of “passive” holdings instead of an active business venture for the purpose of income generation. While multi-property owners are continuing to make purchases, many portfolios have shrunk in size since April 2022. Multi-property owners with more than 11 properties accounted for 13% of all multi-property owner holdings in April 2022, but that has since decreased to 7.6% by the end of 2023. This observation may be indicative of profitability on investment holdings against a backdrop of rising rates since early 2022.

Buyer segment spotlight: First-time homebuyers

2013 – First-time homebuyer volumes by age as percentage of total and cumulative percentage of total



2018 – First-time homebuyer volumes by age as percentage of total and cumulative percentage of total



2023 – First-time homebuyer volumes by age as percentage of total and cumulative percentage of total

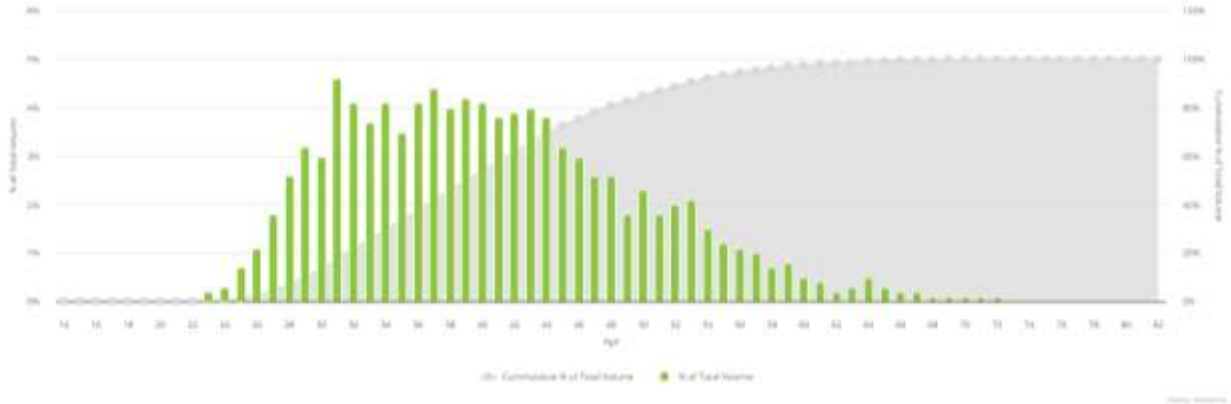


Figure 7 First-time homebuyer volumes by age as percentage of total and cumulative percentage of total, 2013, 2018 and 2023

In analyzing 2013 to 2023 data on the ages of first-time homebuyers at the time of purchase, we can observe that they are entering the housing market later in life, potentially another indicator of affordability challenges in Ontario. In 2013, 50% of first-time homebuyer transactions came from those aged 35 and younger. By 2018, 50% of first-time homebuyer transactions came from those 38 and younger, and by 2023, it has increased to 39 years of age.

Buyer segment spotlight: Movers

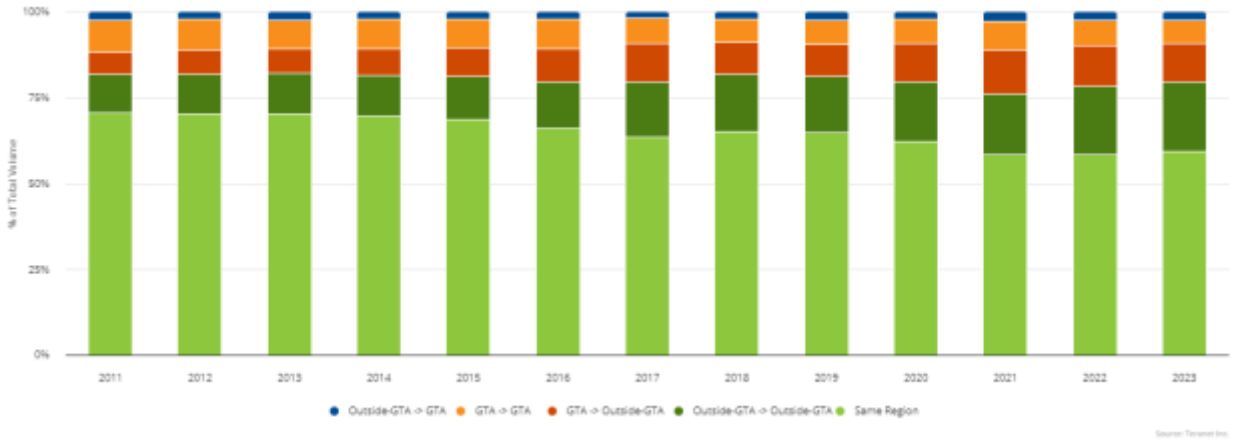


Figure 8 Proportion of Ontario mover transfer activities by geographic migration pattern, 2011 to 2023

Since 2011, the vast majority of the mover segment were those moving within the same region in Ontario, however this segment has been shrinking over time, from 70% to just under 60% by 2023. Those who moved from outside of the GTA to another area outside of the GTA has doubled in the last 10 years. Another small but growing segment were the movers that migrated from the GTA to outside of the GTA, from 6.5% to 11.1% of total Ontario mover activity by 2023. Its growth was particularly pronounced during the Covid-19 pandemic, where it peaked at 12.7% of total Ontario mover activities. And despite some headlines of urbanites who left the city during the pandemic and moving back as we return to normal, the portion of those moving from outside of the GTA to the GTA remain a very small segment at 2% and did not significantly increase post-pandemic.

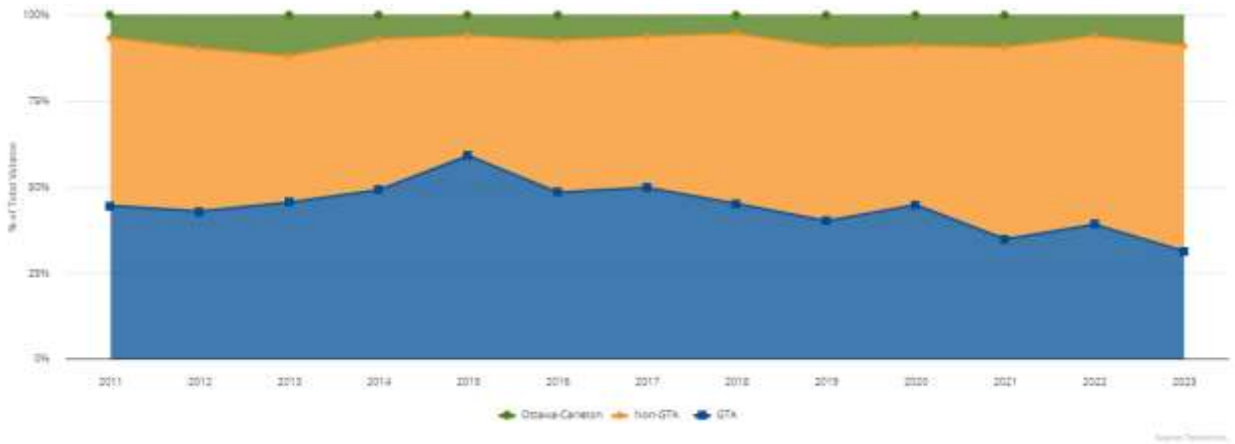


Figure 9 Proportion of new Ontario properties by region, 2011 to 2023

The migration patterns that we have observed since 2011 correlates highly with the location of new housing stock across the province. Over time there has been a declining proportion of new homes within the GTA, with a significant decline in York and Peel regions. On the other hand, the Simcoe and Waterloo regions have seen an increase in new housing stock.

Overview of sellers in Ontario: Holding periods at time of sale

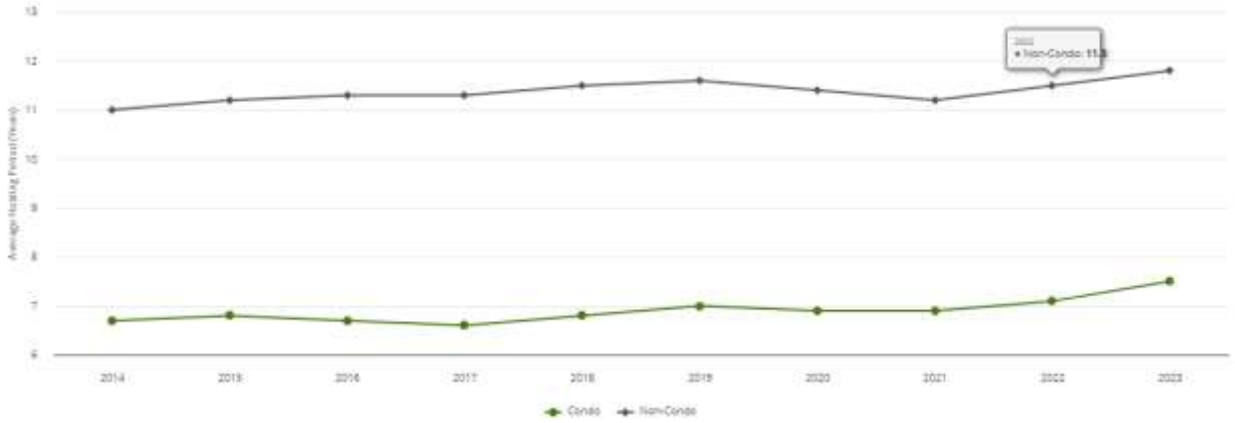


Figure 10A Average holding period in years, Condo and Non-condo properties, 2014 to 2023

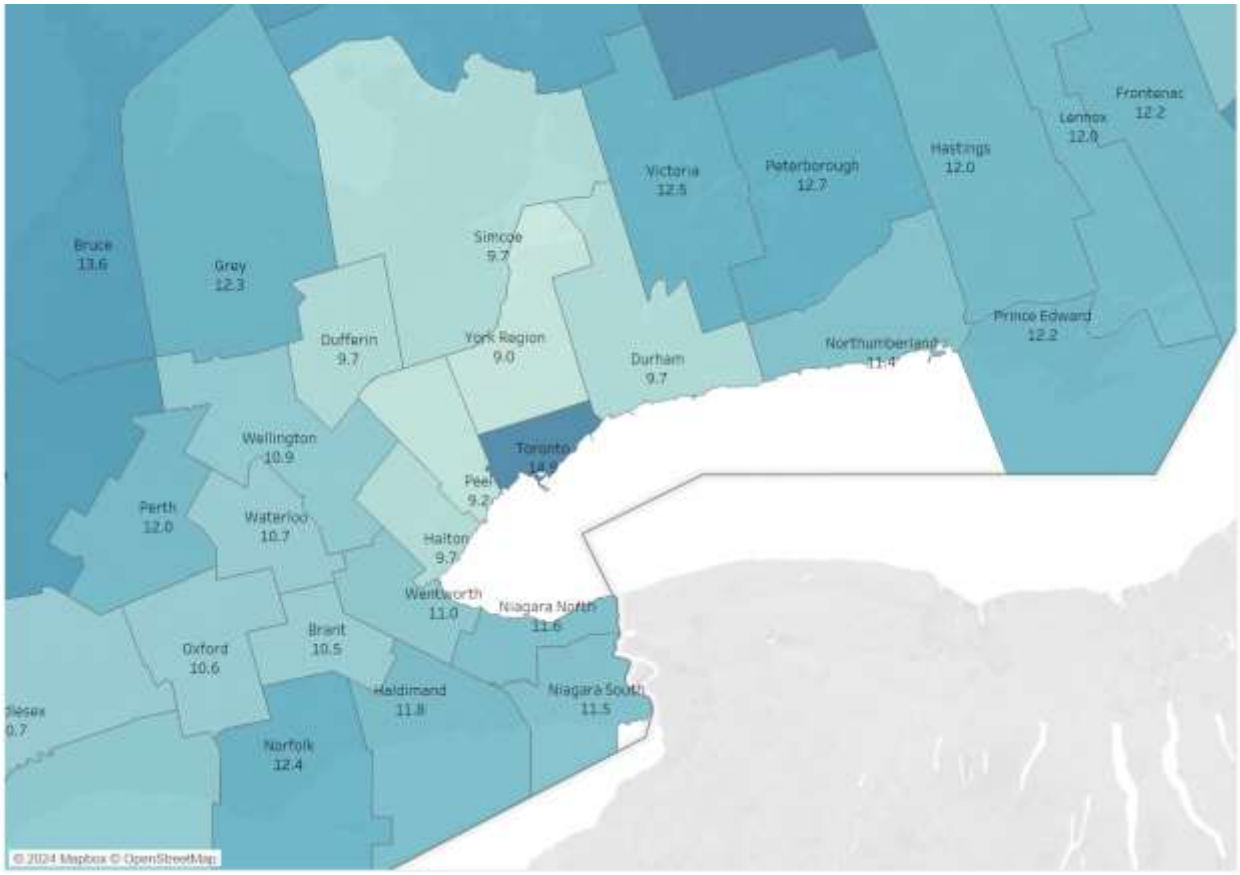


Figure 10B Average holding period for non-condo properties by region, 2014 to 2023

In this section of the report we will shift our focus from purchasing trends to selling behaviour in Ontario. Within the past year the sentiment of uncertainty amongst Canadians with regards to the real estate market has been widely discussed, which appears to be evident in the length of holding periods. Holding period in this case is measured by the number of years the property was held at the point of sale. Ontario non-condo properties are held between 10 and 12 years on average, and as expected, condo properties are held for much shorter periods, between 6 and 8 years; both are increasing in length, albeit slightly, over the past 10 years (Figure 10A).

Regionally, Toronto has one of the highest holding periods for non-condo properties in Ontario at 14.9 years for sales in the ten years to 2023, compared to surrounding regions of Peel at 9.2 years and York at 9 years (Figure 10B). This observation may be indicative of Toronto homeowners' preferences for urban and/or choices to upgrade existing home to meet changing needs.

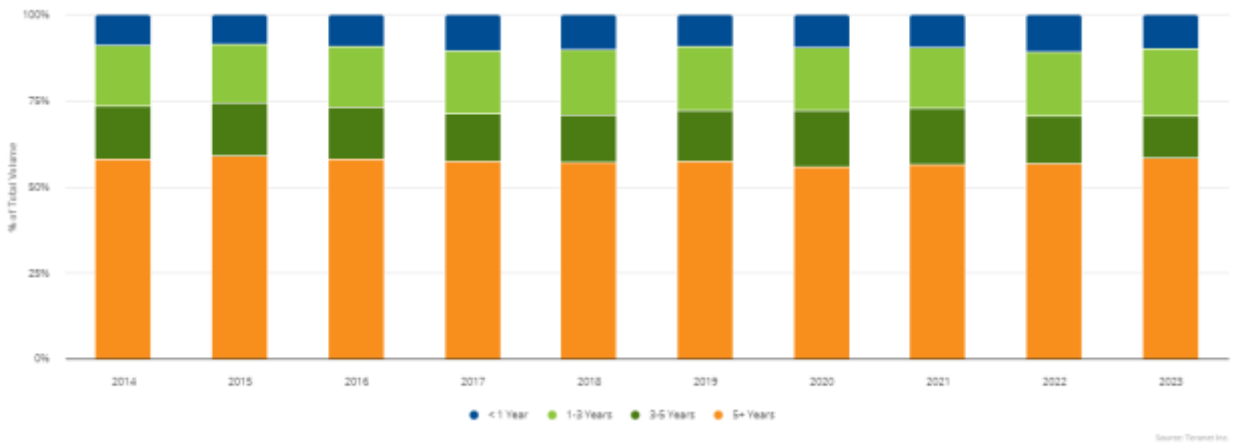


Figure 11 Proportion of sales by holding period, 2013 to 2023

Since the series of rate increases beginning in Spring 2022 and carrying costs increasing correspondingly, accounts of distressed property sales were rampant. Through our data, we have observed a recent increase in the proportion of properties that were sold within one to three years of ownership. While this was only a slight uptick from 17.8% in 2021 to 19.6% of all sales in 2023, it may be an early indication of homeowner stress who purchased their properties at the price peak of 2021 and 2022.

Overview of sellers in Ontario: Selling at a loss

	Purchase Year					
Sold Year	2023	2022	2021	2020	2019	2018
2023	4.5%	18.0%	7.8%	1.5%	1.1%	1.1%
2022		9.5%	2.7%	1.3%	0.9%	1.3%
2021			2.9%	1.4%	1.2%	1.1%
2020				2.8%	2.3%	2.4%
2019					4.1%	3.9%
2018						3.6%

Figure 12A Percentage of properties sold at a loss by purchase and sold year

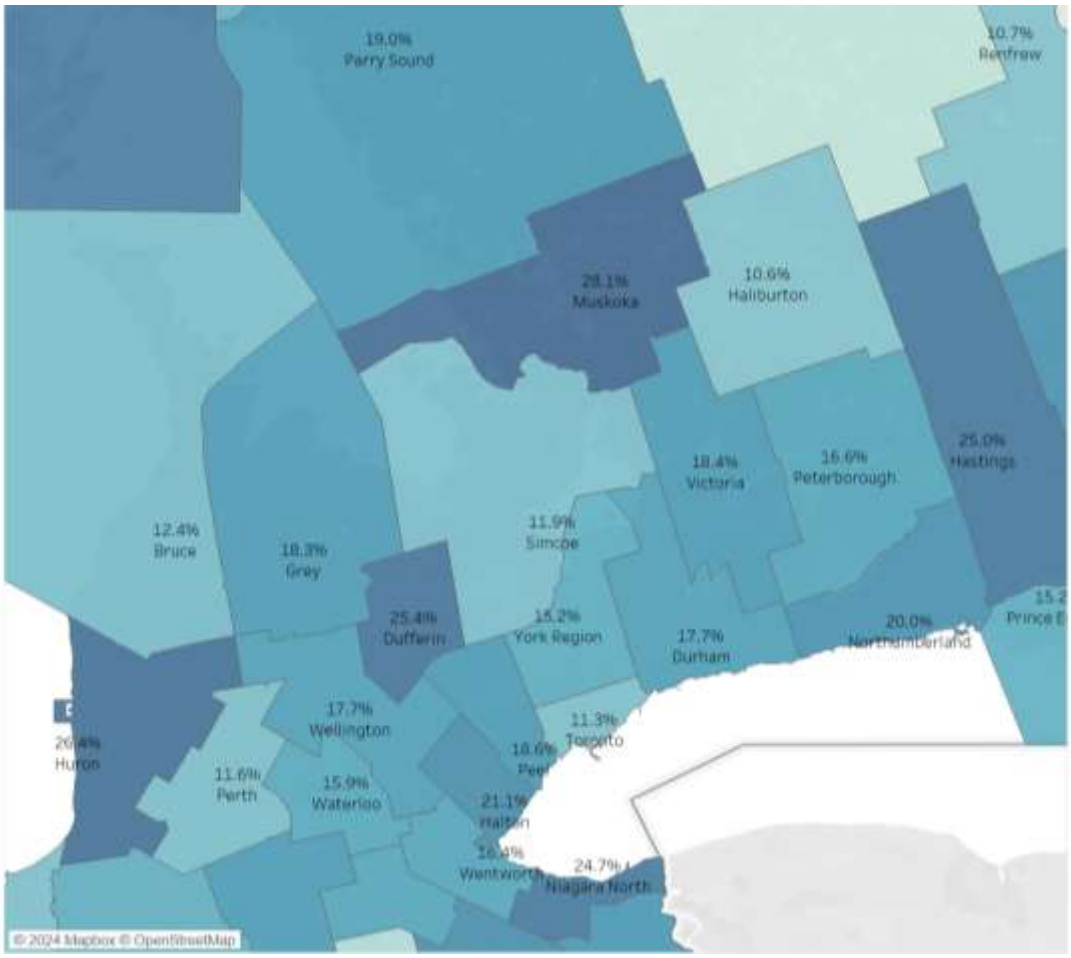


Figure 12B Percentage of properties purchased in 2022 and subsequently sold for a loss by region

Another indication of market stress may be visible in the recent trend in which properties recently purchased and sold are incurring losses at much higher rates than historical averages. As an example, of Ontario properties purchased in 2022 and sold within the same year, 9.5% were sold at a loss; of properties purchased in 2022 and sold in 2023, 18% were sold at a loss, where the historical averages were closer to 2% to 4% (Figure 12A). When we look at this from a regional perspective (Figure 12B), of properties purchased in 2022 and sold by 2023, 11.3% of Toronto properties sold at a loss, faring better than most other regions, while Muskoka saw the highest rates of loss at 28.1%.

		Purchase Year					
Value Range	Sold Year	2023	2022	2021	2020	2019	2018
$500K – 1M	2023						
	2022		9.8%	2.2%			
	2021			2.0%			
	2020				1.6%	1.0%	1.3%
	2019					2.4%	3.3%
	2018						2.5%
$1M – 3M	2023						
	2022		8.9%	1.5%			
	2021				0.9%		0.9%
	2020				5.3%	3.1%	4.3%
	2019					9.4%	5.6%
	2018						4.7%
$3M – 5M	2023		33.3%			1.4%	0.0%
	2022		33.3%	3.0%		1.0%	
	2021			4.5%		2.0%	2.2%
	2020				37.5%	8.1%	4.3%
	2019					0.0%	5.3%
	2018						0.0%

Figure 13 Percentage of properties sold at a loss by Purchase and Sold Year, by Sold Value Range

These elevated rates of loss were observed in properties purchased in 2022 and sold by 2023 across all price ranges. However, sales of properties priced $3 million to $5 million were twice as likely to have been sold at a loss than other price ranges.

Conclusion

In summary, we discern the following trends in the Ontario housing market using data from 2013 to 2023:

- Multi-property owners have been the dominant buyer segment in Ontario, accounting for a quarter of all transactions.
- First-time homebuyers faced tremendous headwinds in purchasing their first homes in Ontario, especially those looking for a non-condo property in Toronto. This is likely correlated with the delays in first-time homebuyers getting into the housing market.
- Ontario movers appear more inclined to move out of local areas, which may correspond to where new housing stock is being developed.
- Those who purchased in late 2021 and 2022 and subsequently sold these properties are doing so at a loss at elevated rates against historical trends.

These trends, coupled with the upcoming mortgage renewal cycles, may have a bilateral effect on one another. Teranet's Data Analytics team will continue to monitor these trends and the behaviours of Ontario's buyers and sellers to bring you new insights in future editions of the Market Insight Report.

If you need more information about the data presented in this report, the Teranet Data Science Lab can help you dig deeper. Our team will work closely with you to answer your questions with insights from our proprietary databases.

TERANET® RELIABLE DATA + INSIGHTFUL SOLUTIONS

A Review of Ontario's Housing Market in 2023

21st Real Estate Law Summit

April 17, 2024

TERANET® RELIABLE DATA + INSIGHTFUL SOLUTIONS

Emily Cheung

Director, Data Analytics & Insights Teranet

TERANET
RELIABLE DATA +
INSIGHTFUL SOLUTIONS

Ontario
Buyer Profiles

Ontario Buyer Classification

Movers

This category of buyers moved from one property in Ontario to another. They have sold their sole, existing property and purchased another property within a period of time.

Multi-Property Owners (MPOs)

Property purchases by buyers who, at the time of the purchase, also own other properties in Ontario. The properties purchased by this group of buyers could represent a principal residence, an investment property, or a recreation property.

First-Time Homebuyers (FTHBs)

Property purchases by buyers who claimed the Ontario land transfer tax exemption for first-time homebuyers. To qualify for this exemption, the buyer must not have purchased property anywhere in the world.

Life Events

Transfer of ownership between related parties for nominal value. These transactions could be due to marriage, or transfer between generations.

Other

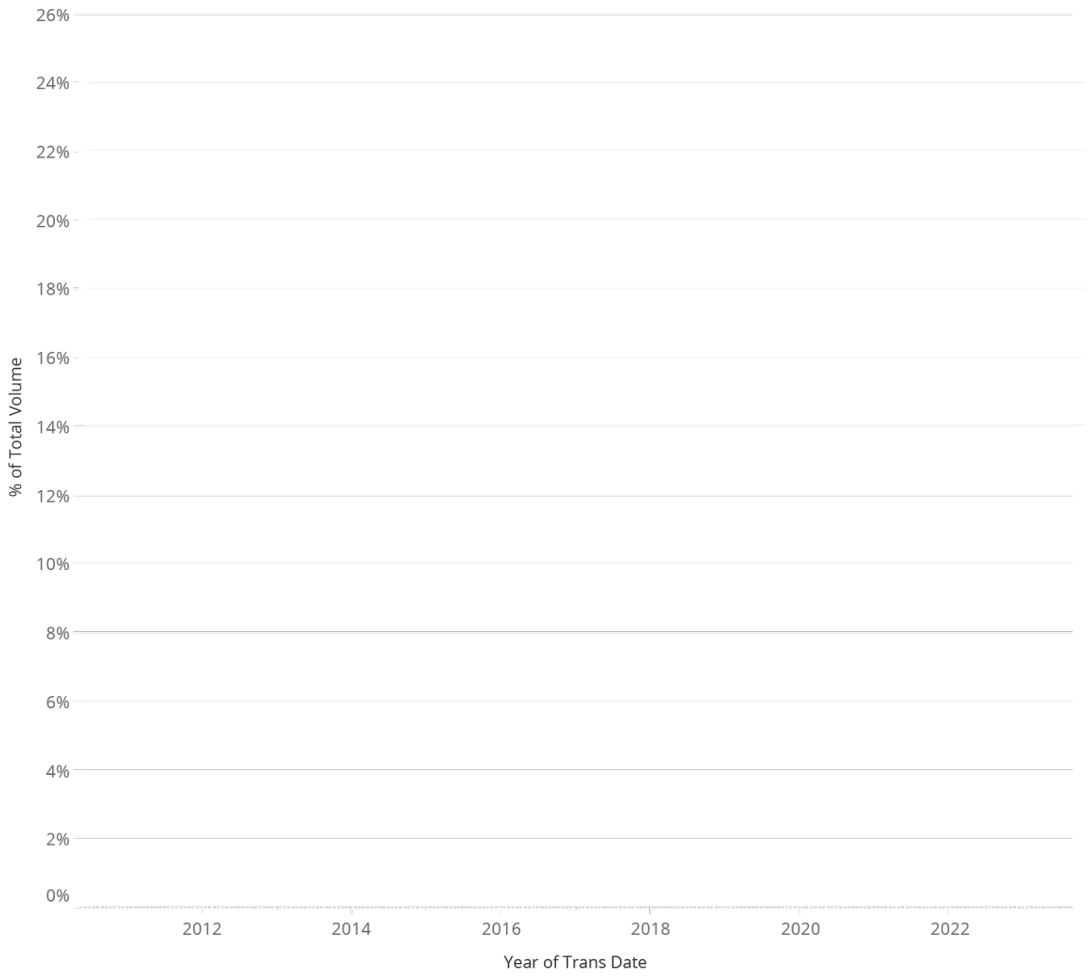
All other buyers. This could include buyers from outside of Ontario or Canada, or re-entry into the property market after an extended absence.

Other data notes:

- Data series represents 2011 to 2023 unless otherwise noted
- Regional boundaries represent those of Ontario Land Registry Offices, which largely corresponds to municipalities and regions

Ontario Buyer Classification – Overview

Property transfers by Buyer Classification as a percentage of total transactions, 2011 to 2023



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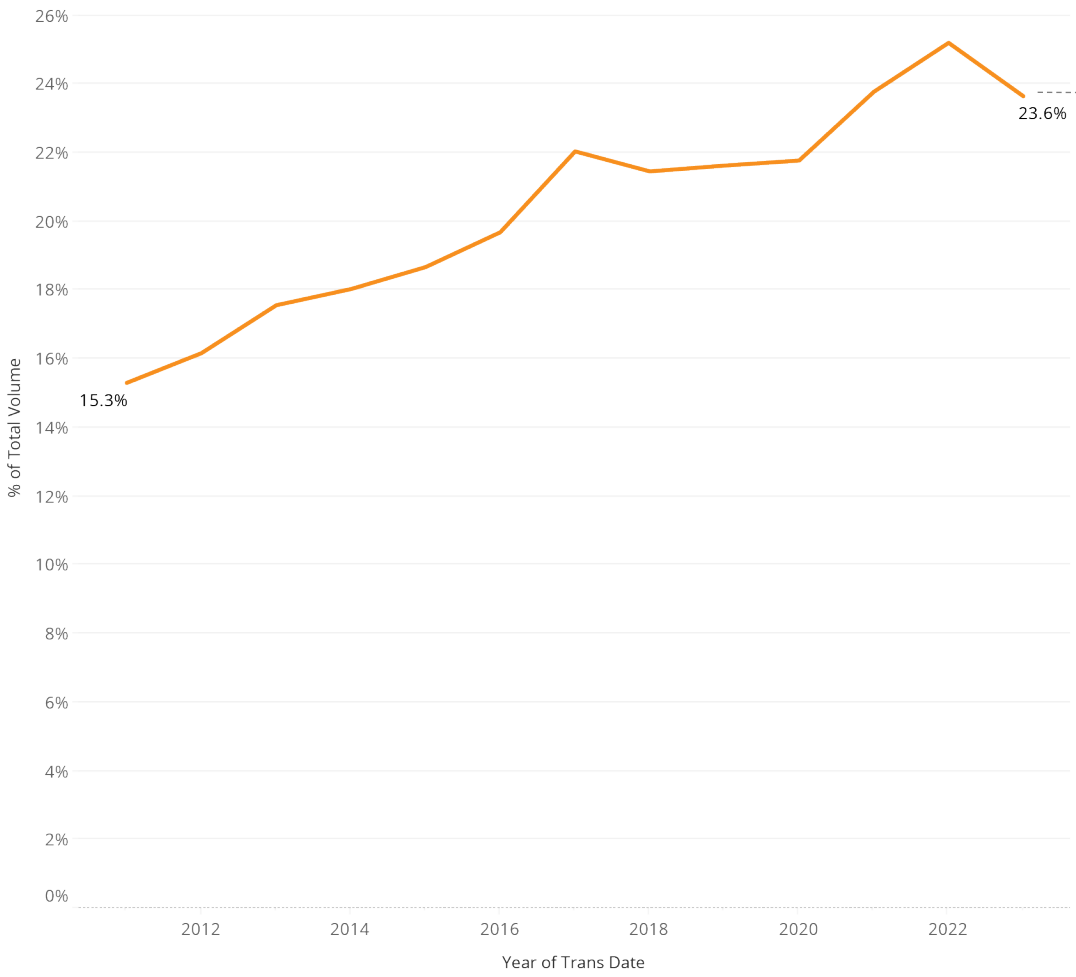
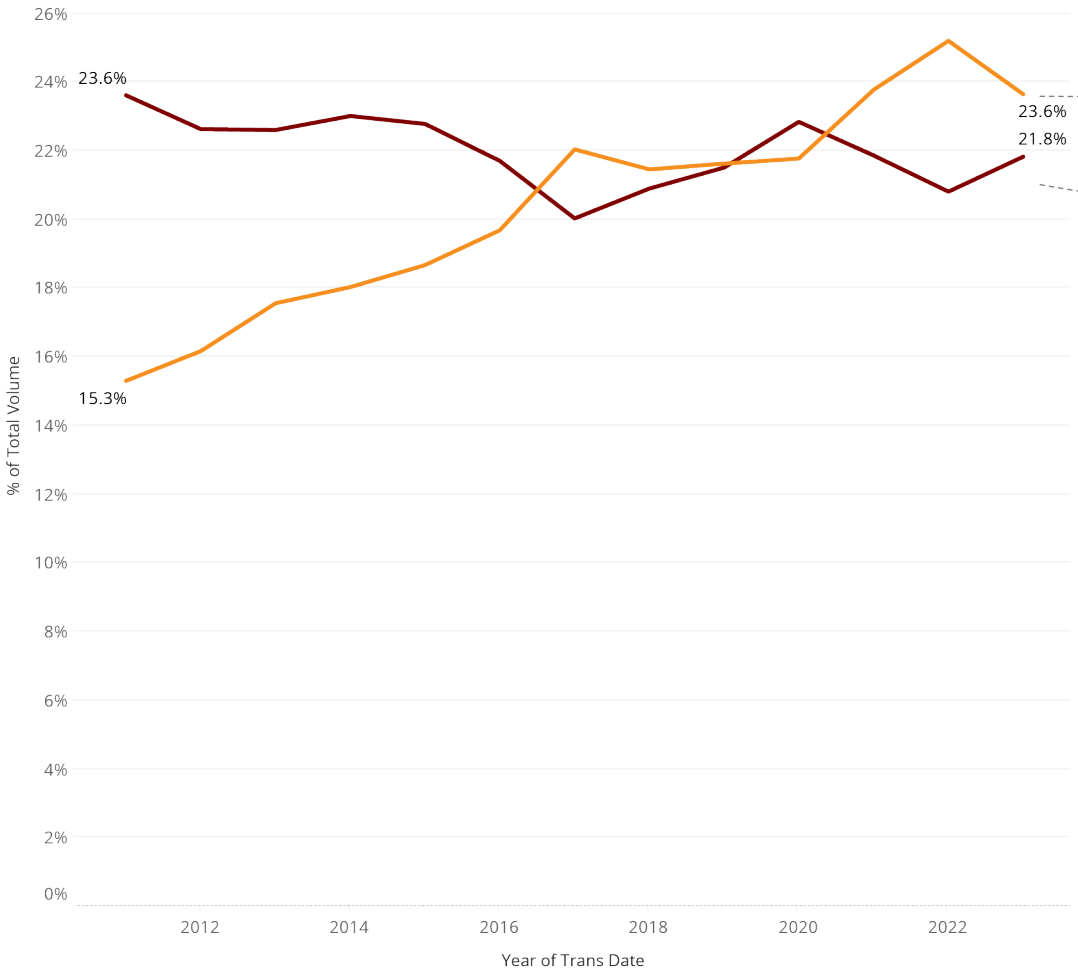


MPOs have significantly increased their representation to almost a quarter of the market in recent years

Ontario Buyer Classification – Overview

Property transfers by Buyer Classification as a percentage of total transactions, 2011 to 2023



MPOs have significantly increased their representation to almost a quarter of the market in recent years

FTHBs represent a stable 20-25% of purchasing market

Ontario Buyer Classification – Overview

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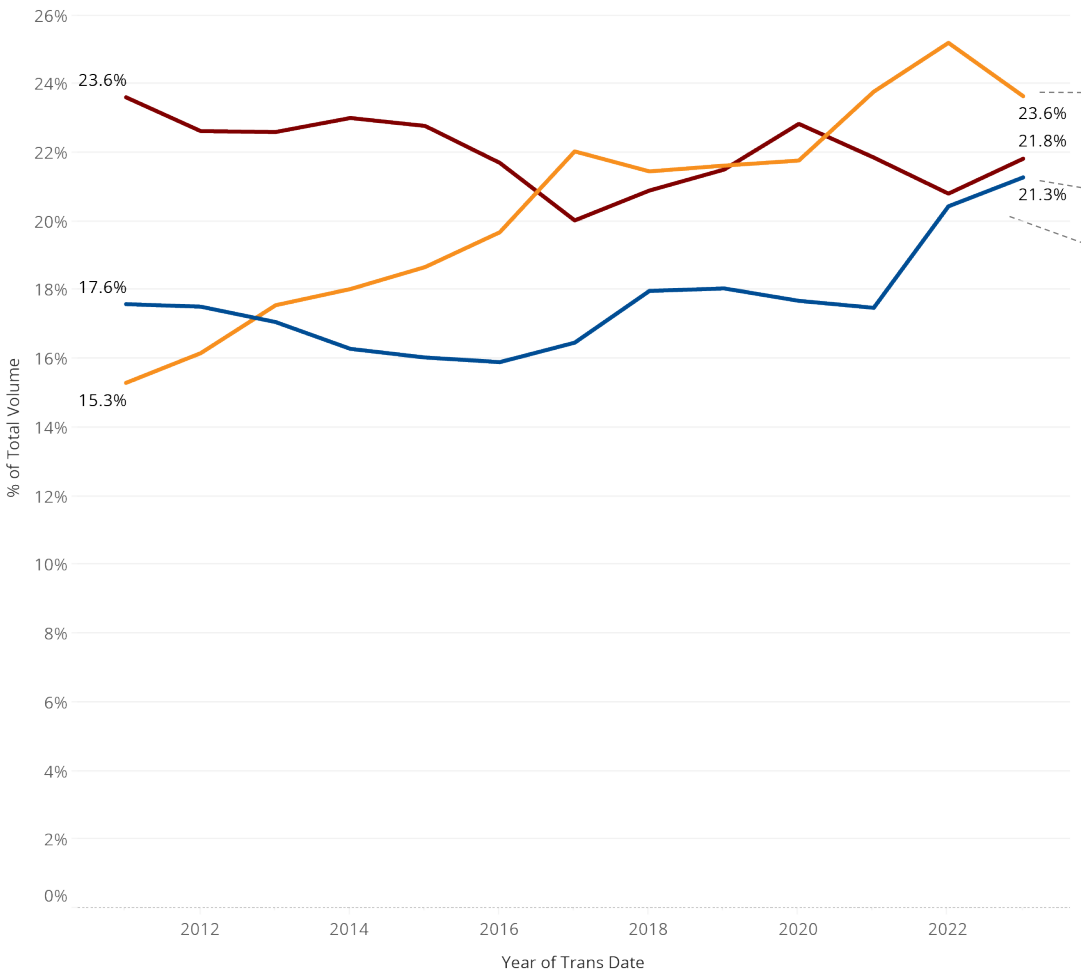

MPOs have significantly increased their representation to almost a quarter of the market in recent years

FTHBs represent a stable 20-25% of purchasing market

Life event transactions are fairly stable across time

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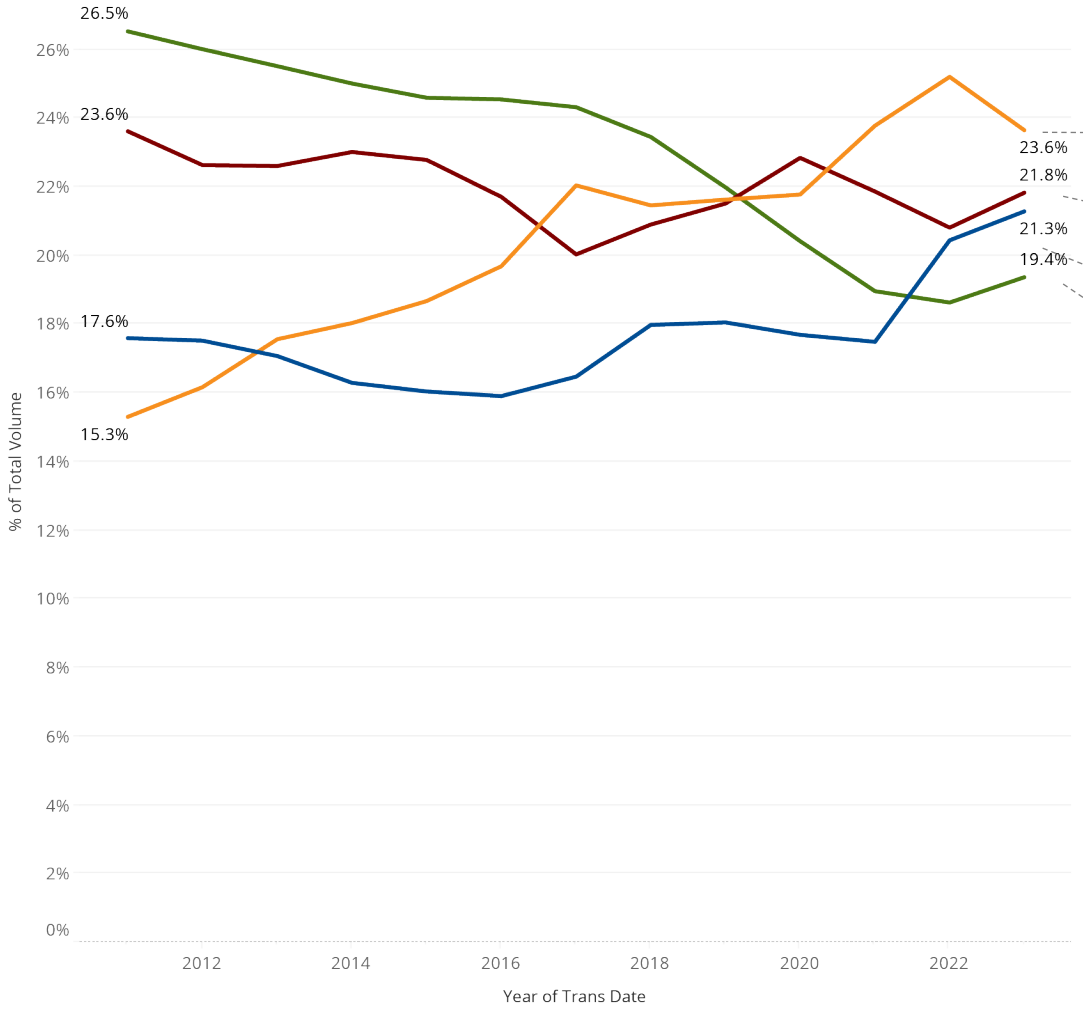

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FTHBs represent a stable 20-25% of purchasing market

Life event transactions are fairly stable across time

Other buyer segment decreased during the pandemic but is bouncing back

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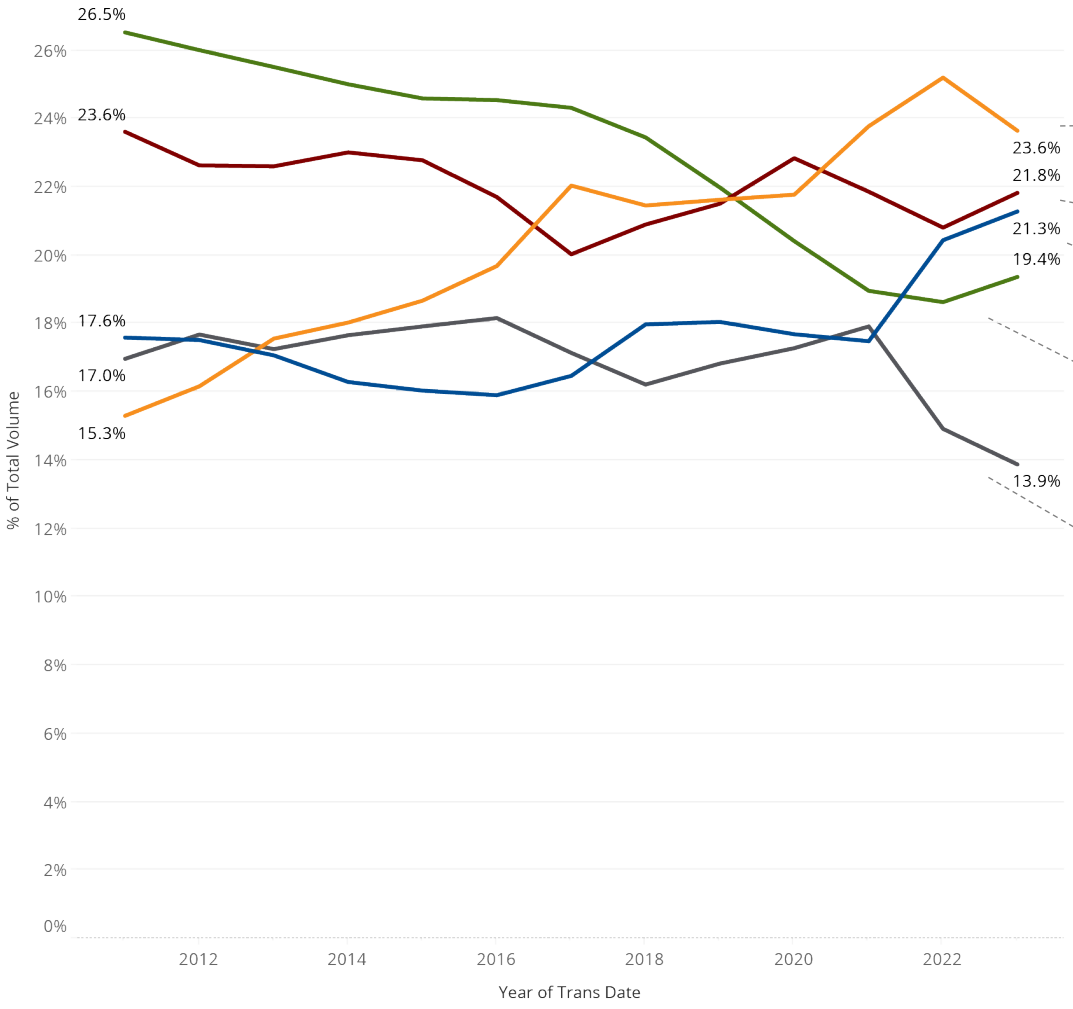
Property transfers by Buyer Classification as a percentage of total transactions, 2011 to 2023



MPOs have significantly increased their representation to almost a quarter of the market in recent years

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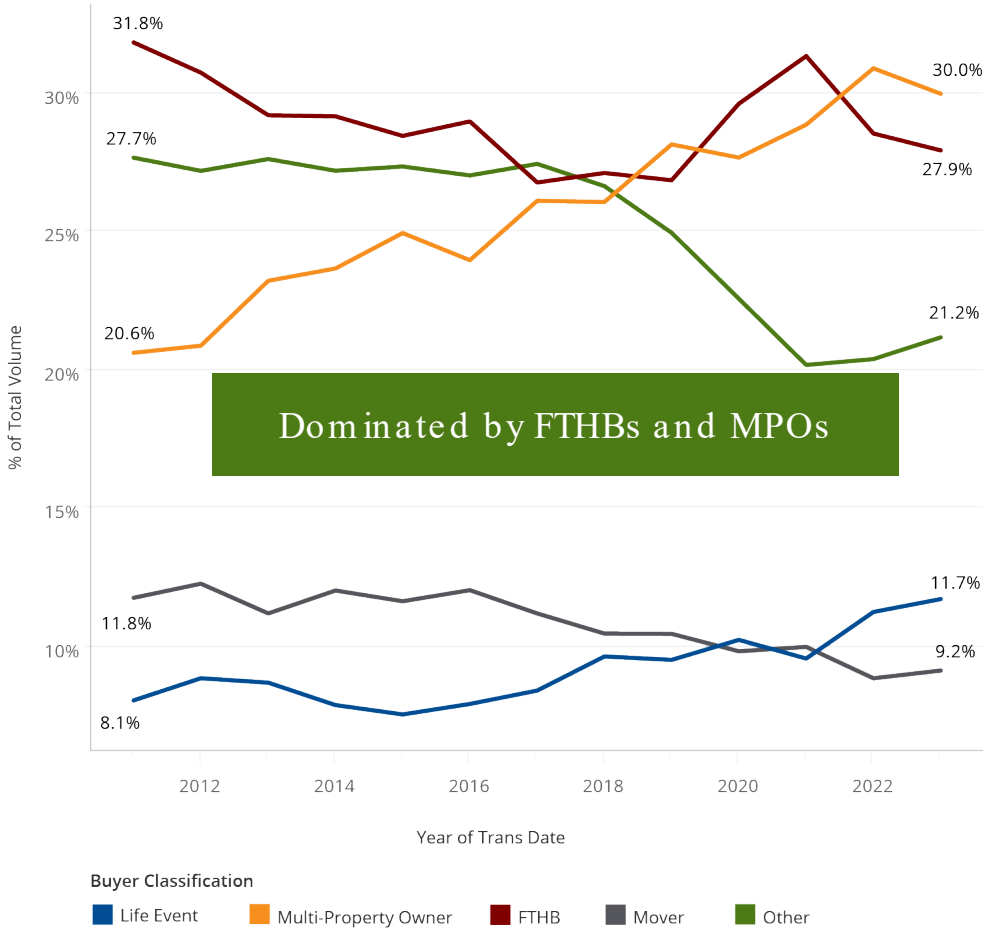
Life event transactions are fairly stable across time

Other buyer segment decreased during the pandemic but is bouncing back

Movers activities have taken a significant dive since rate increases began in 2022

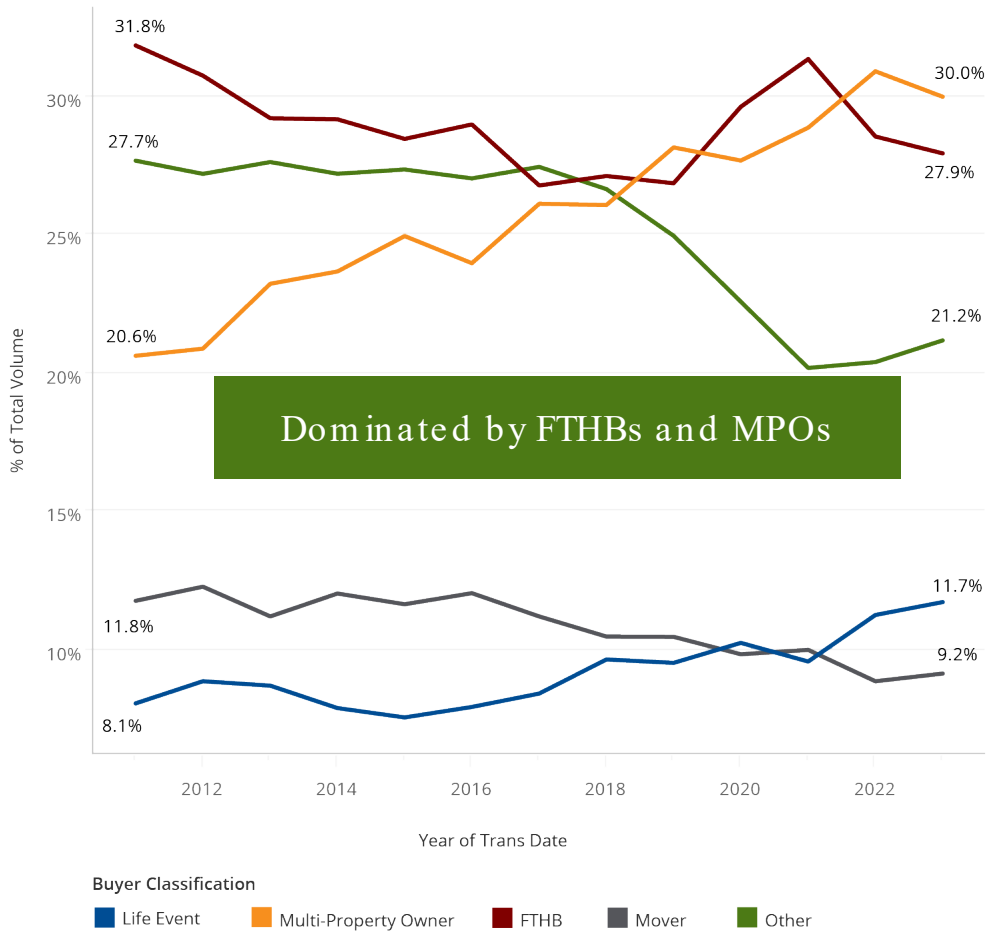
Ontario Buyer Classification – Condo vs. Non-Condo

Condo Properties

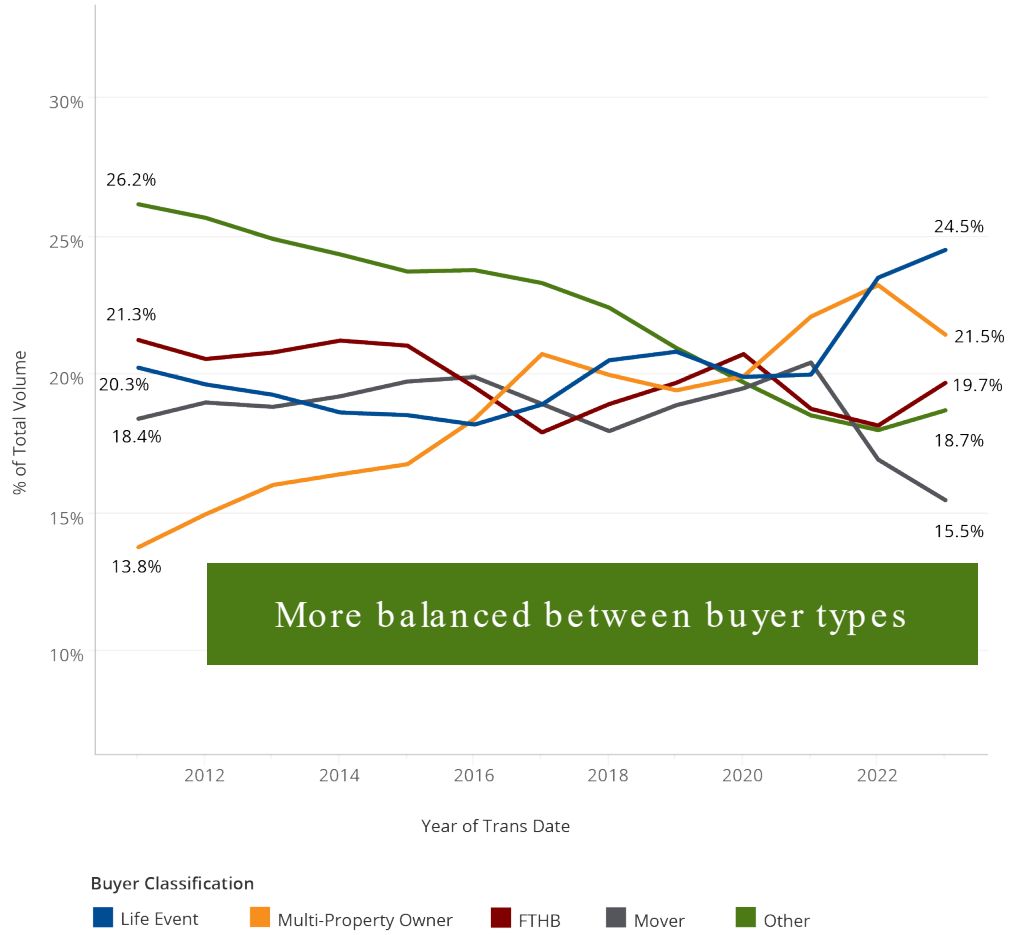


Ontario Buyer Classification – Condo vs. Non-Condo

Condo Properties



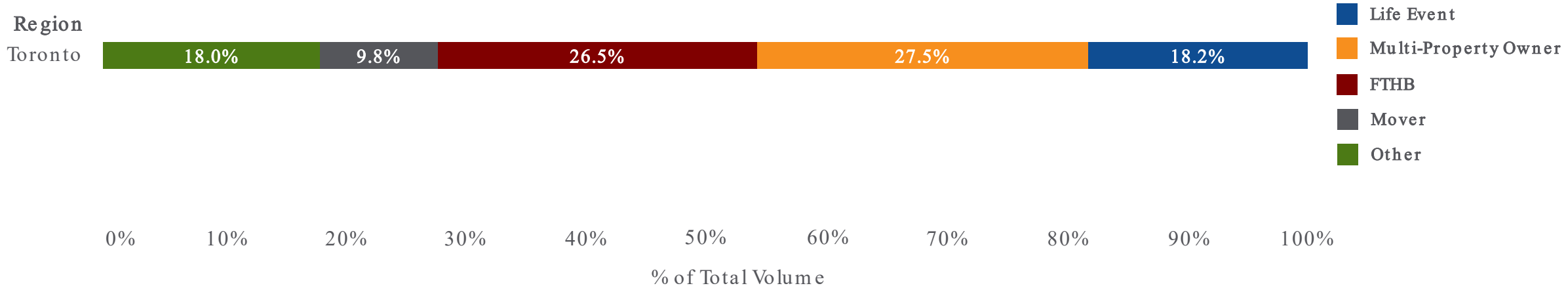
Non-Condo Properties



Ontario Buyer Classification – Regional Spotlight

Local market dynamics reflected in differing buyer segmentation

Property transfers proportion by Buyer Classification, 2018 to 2023



Toronto – Urban Centre

- Dominated by FTHBs and MPOs @ 25% each
- Little Mover activity

Ontario Buyer Classification – Regional Spotlight

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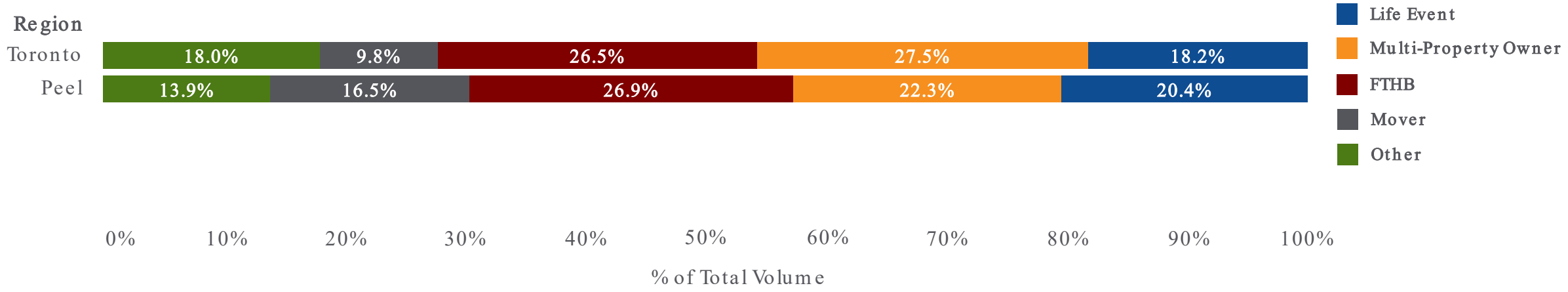


Toronto – Urban Centre

- Dominated by FTHBs and MPOs @ 25% each
- Little Mover activity

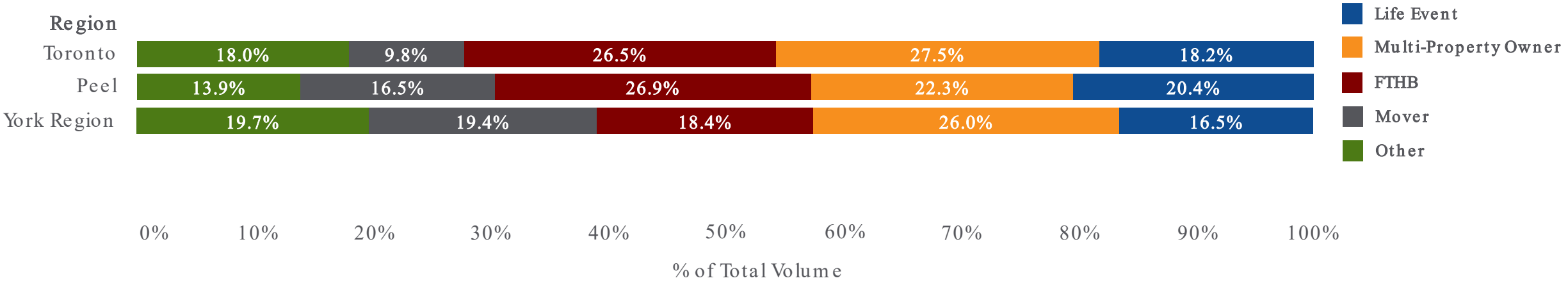
Peel – Suburb

- FTHB centric with higher than average life events

Ontario Buyer Classification – Regional Spotlight

Local market dynamics reflected in differing buyer segmentation

Property transfers proportion by Buyer Classification, 2018 to 2023



Toronto – Urban Centre

- Dominated by FTHBs and MPOs @ 25% each
- Little Mover activity

Peel – Suburb

- FTHB centric with higher than average life events

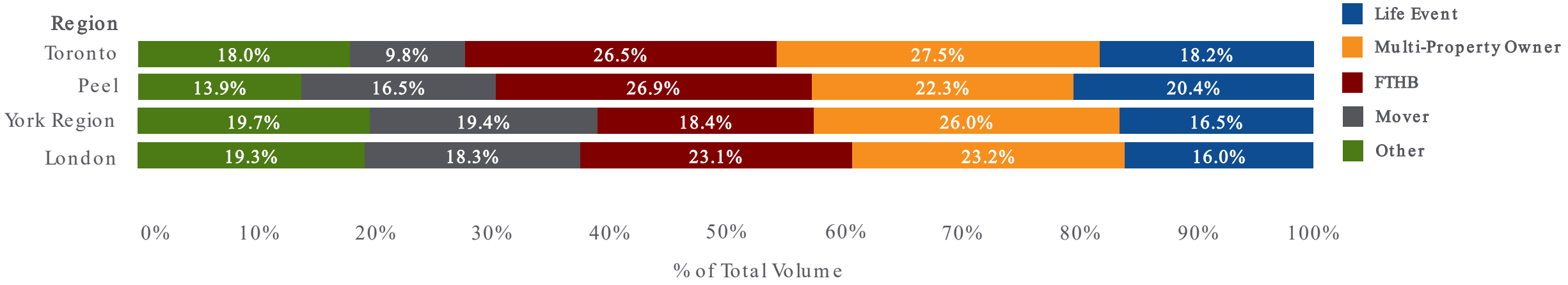
York Region – Suburb

- High ratio of MPOs, and balanced mix of all segments

Ontario Buyer Classification – Regional Spotlight

Local market dynamics reflected in differing buyer segmentation

Property transfers proportion by Buyer Classification, 2018 to 2023



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Peel – Suburb

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York Region – Suburb

- High ratio of MPOs, and balanced mix of all segments

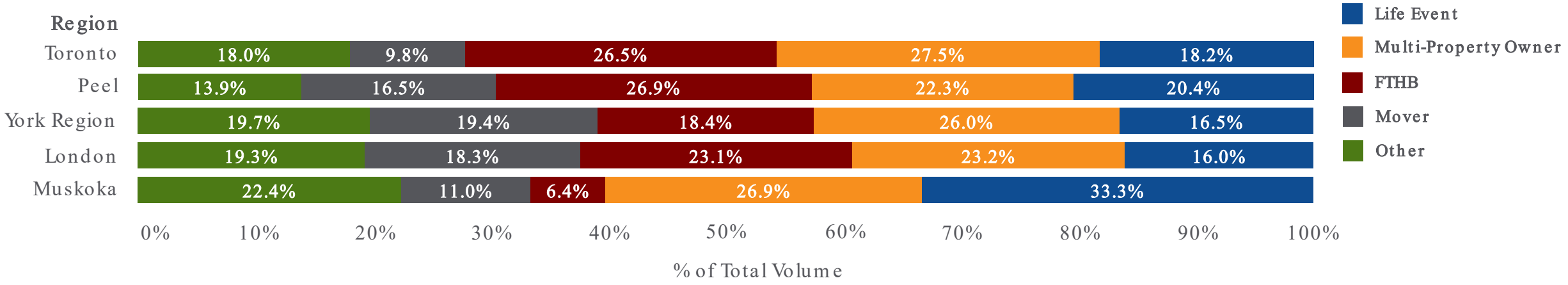
London – University Town

- Fairly balanced market

Ontario Buyer Classification – Regional Spotlight

Local market dynamics reflected in differing buyer segmentation

Property transfers proportion by Buyer Classification, 2018 to 2023



Toronto – Urban Centre
- Dominated by FTHBs and MPOs @ 25% each
- Little Mover activity

Peel – Suburb
- FTHB centric with higher than average life events

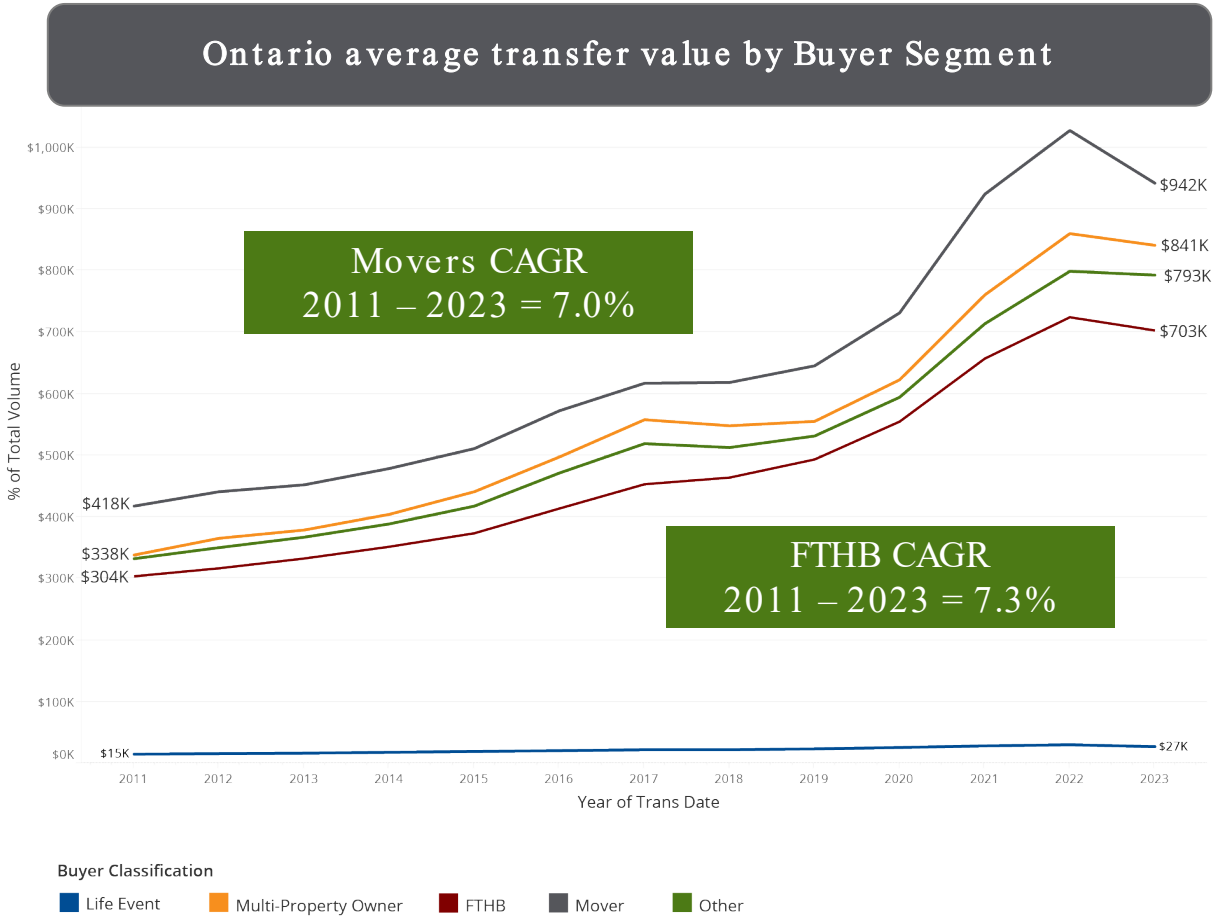
York Region – Suburb
- High ratio of MPOs, and balanced mix of all segments

London – University Town
- Fairly balanced market

Muskoka – Cottage Country
- As expected, higher than average of Life Events, MPOs, and Other buyers

Ontario Buyer Classification – Average Purchase Value

Different buyer groups making different pricing decisions amidst overall market escalation

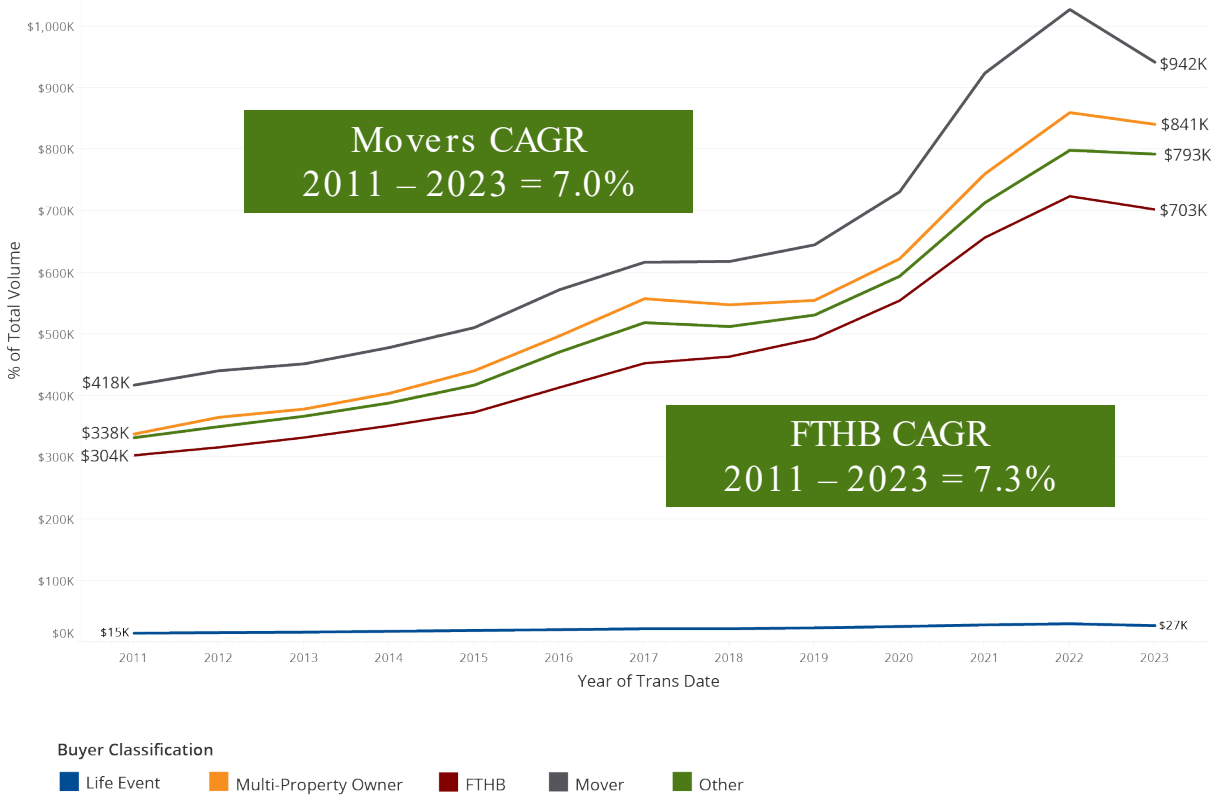


- All buyer groups purchased in a fairly tight price range in 2011
- Movers are spending the most and FTHB the least
- Gap in price range has widened over time

Ontario Buyer Classification – Average Purchase Value

Different buyer groups making different pricing decisions amidst overall market escalation

Ontario average transfer value by Buyer Segment



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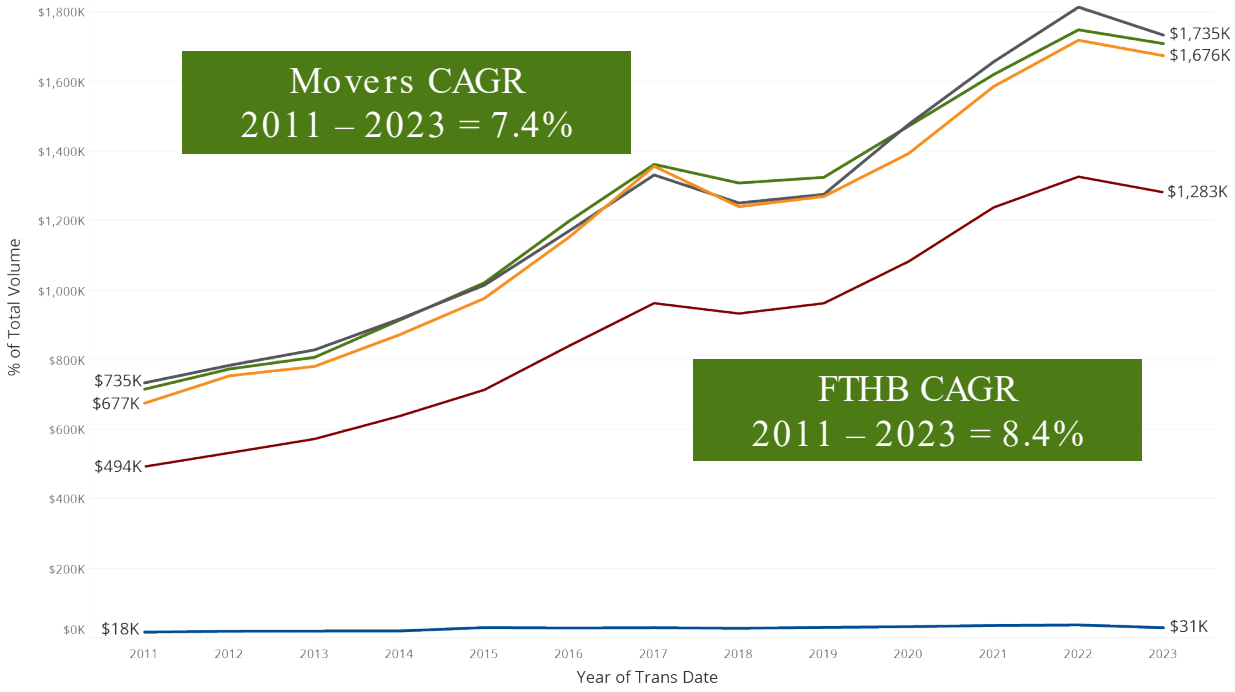
Toronto non-condo average transfer value by Buyer Segment

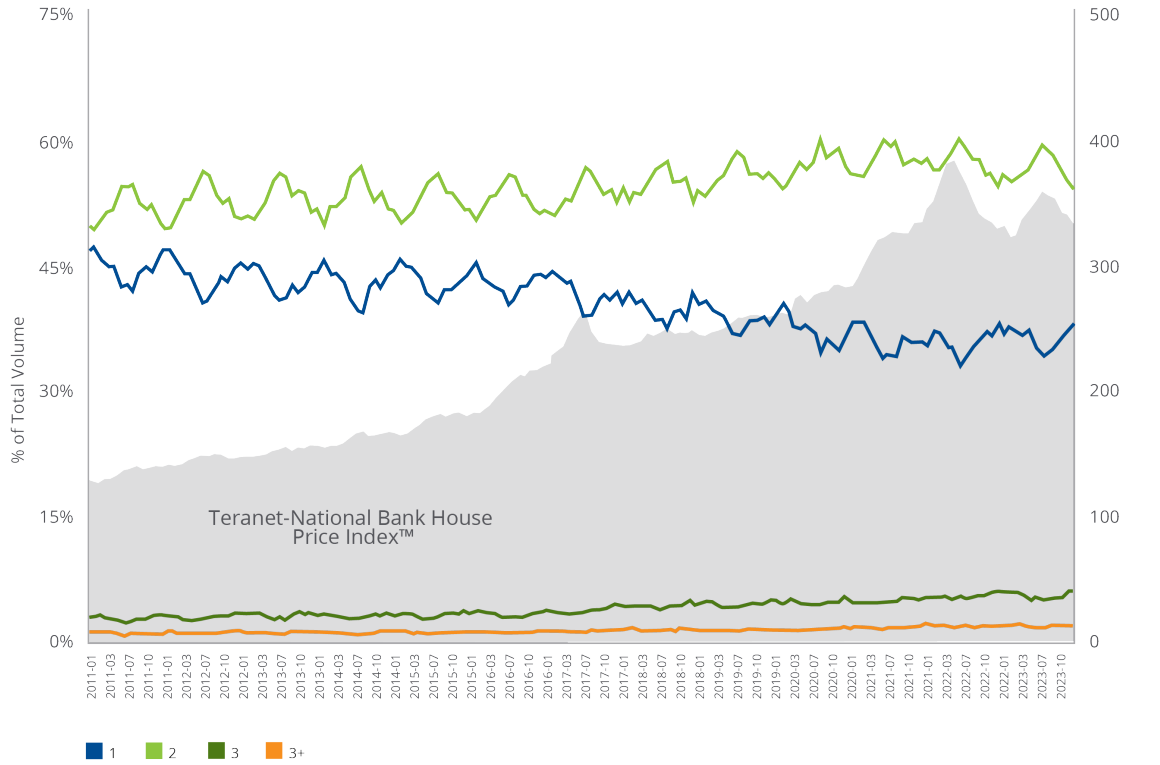


- Besides well-established price escalation, the gap between buyer groups has also widened significantly
- Movers and the other buyer group are willing to pay the most, followed by MPO
- FTHB is willing to pay the least, but still spending ~2.5x over 2011

Parties Purchasing Together – Growing Trend?

Decrease in solo purchases may be indicative of affordability challenges

Percentage of Transfer Volume by Number of Parties



- Since 2016, a decline of solo transactions and corresponding increase of 2-party transactions
- Historically very low (<5%) of all 3+ party transactions, although there's been a slight increase over time

Parties Purchasing Together – Growing Trend?

Decrease in solo purchases may be indicative of affordability challenges

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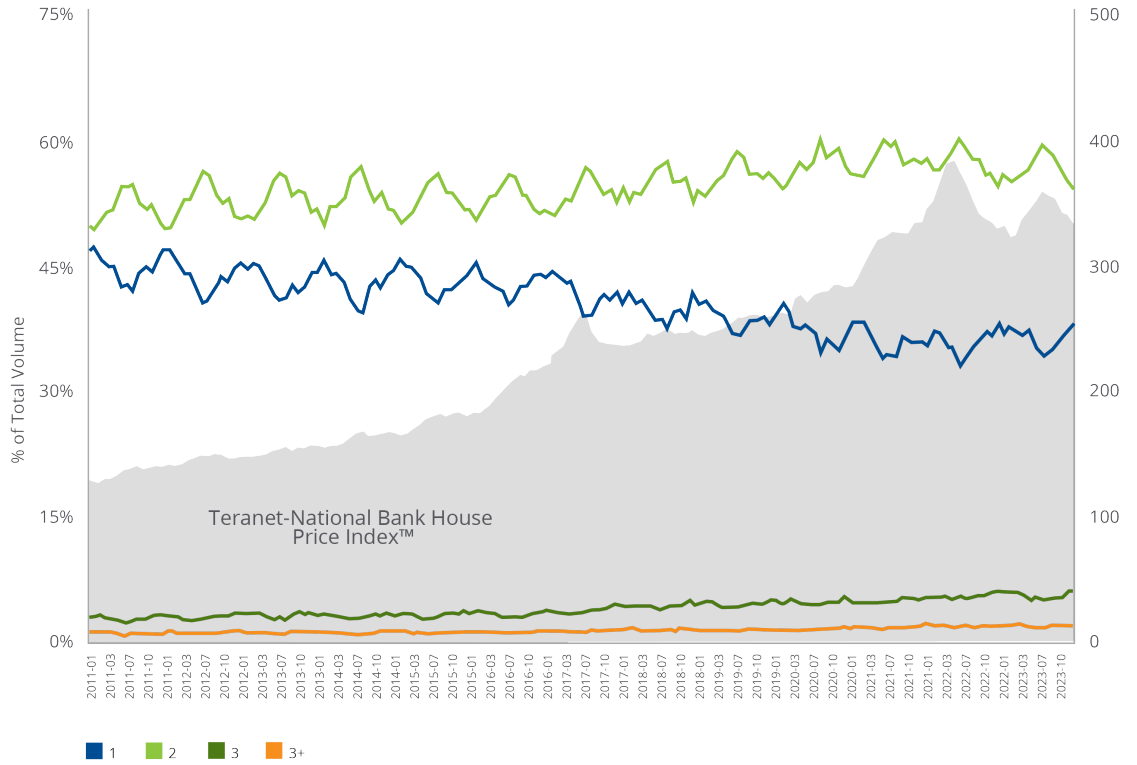
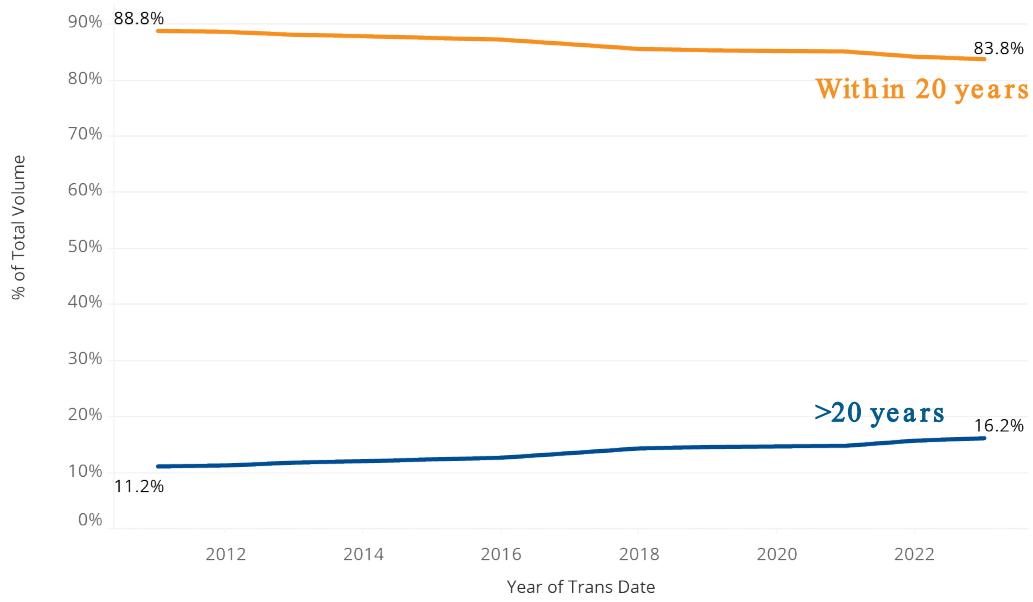


- Since 2016, a decline of solo transactions and corresponding increase of 2-party transactions
- Historically very low (<5%) of all 3+ party transactions, although there's been a slight increase over time

Age gap between parties in multi-party transactions

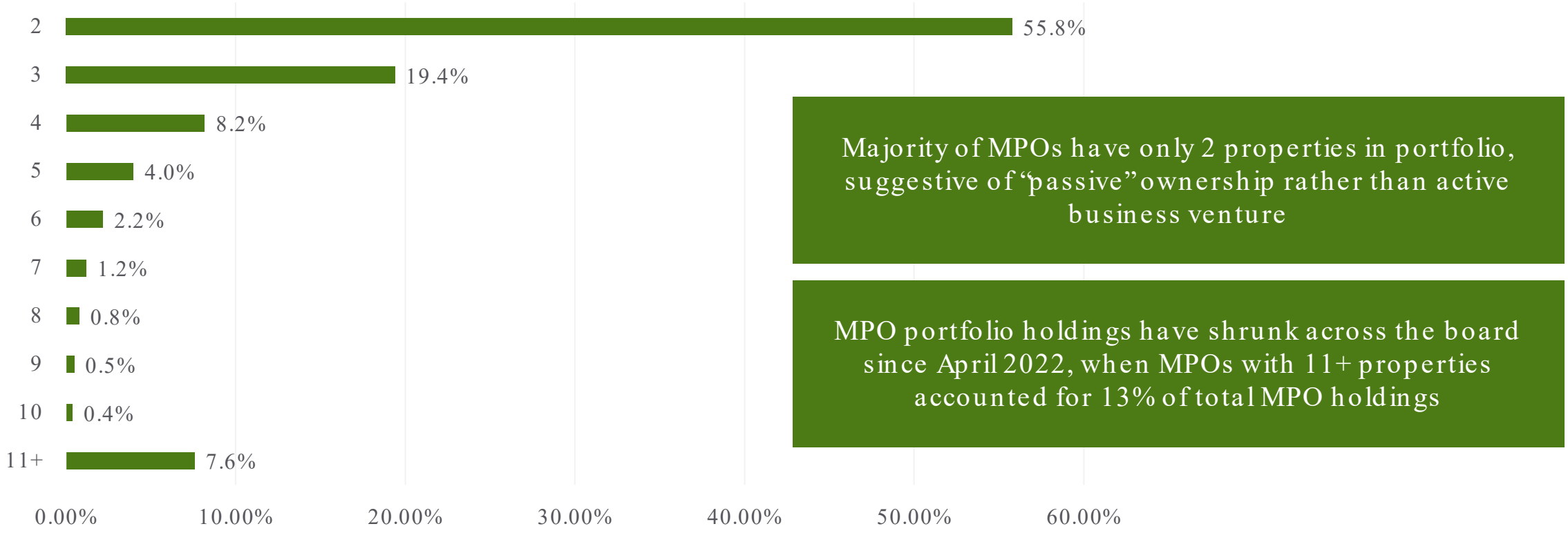


- Vast majority of multi-party transactions are between parties within 20 years of age
- Small but growing portion are between parties greater than 20 years of age
  - Growth in Toronto more pronounced

Deep dive on MPOs

Despite continued purchasing by MPOs, overall portfolio sizes have shrunk since 2022

Number of properties held by multi-property owners, as of December 31, 2023



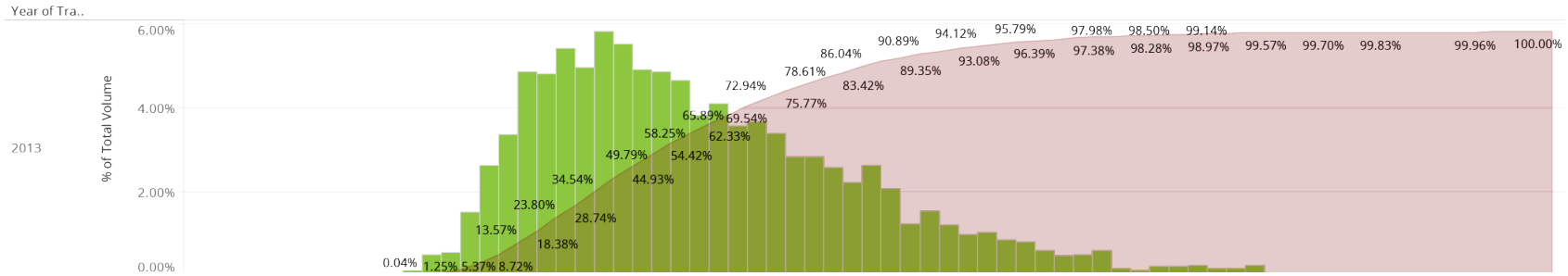
Majority of MPOs have only 2 properties in portfolio, suggestive of "passive" ownership rather than active business venture

MPO portfolio holdings have shrunk across the board since April 2022, when MPOs with 11+ properties accounted for 13% of total MPO holdings

Deep dive on FTHBs

Purchasers are getting into the market later, potentially another indicator of affordability challenges

FTHB purchase volumes and cumulative % of total by age, 2013, 2018, 2023



50% of 2013 FTHB transactions are from those **35** and younger

Deep dive on FTHBs

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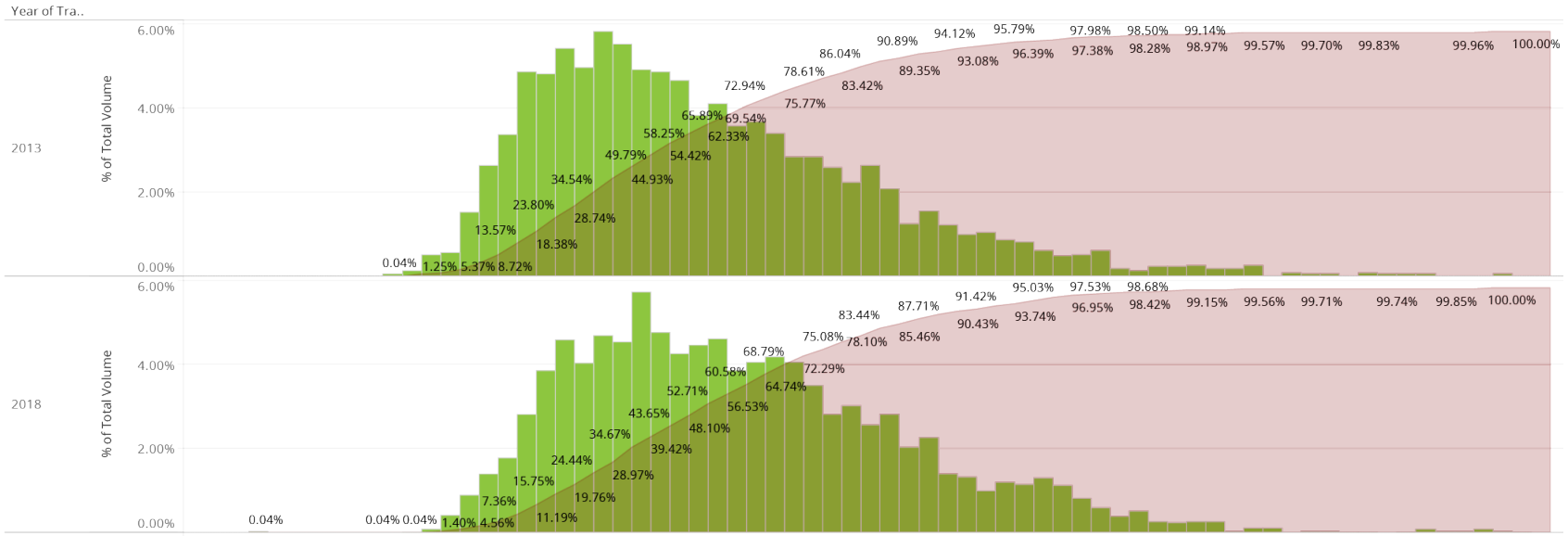

50% of 2013 FTHB transactions are from those **35** and younger

50% of 2018 FTHB transactions are from those **38** and younger

Deep dive on FTHBs

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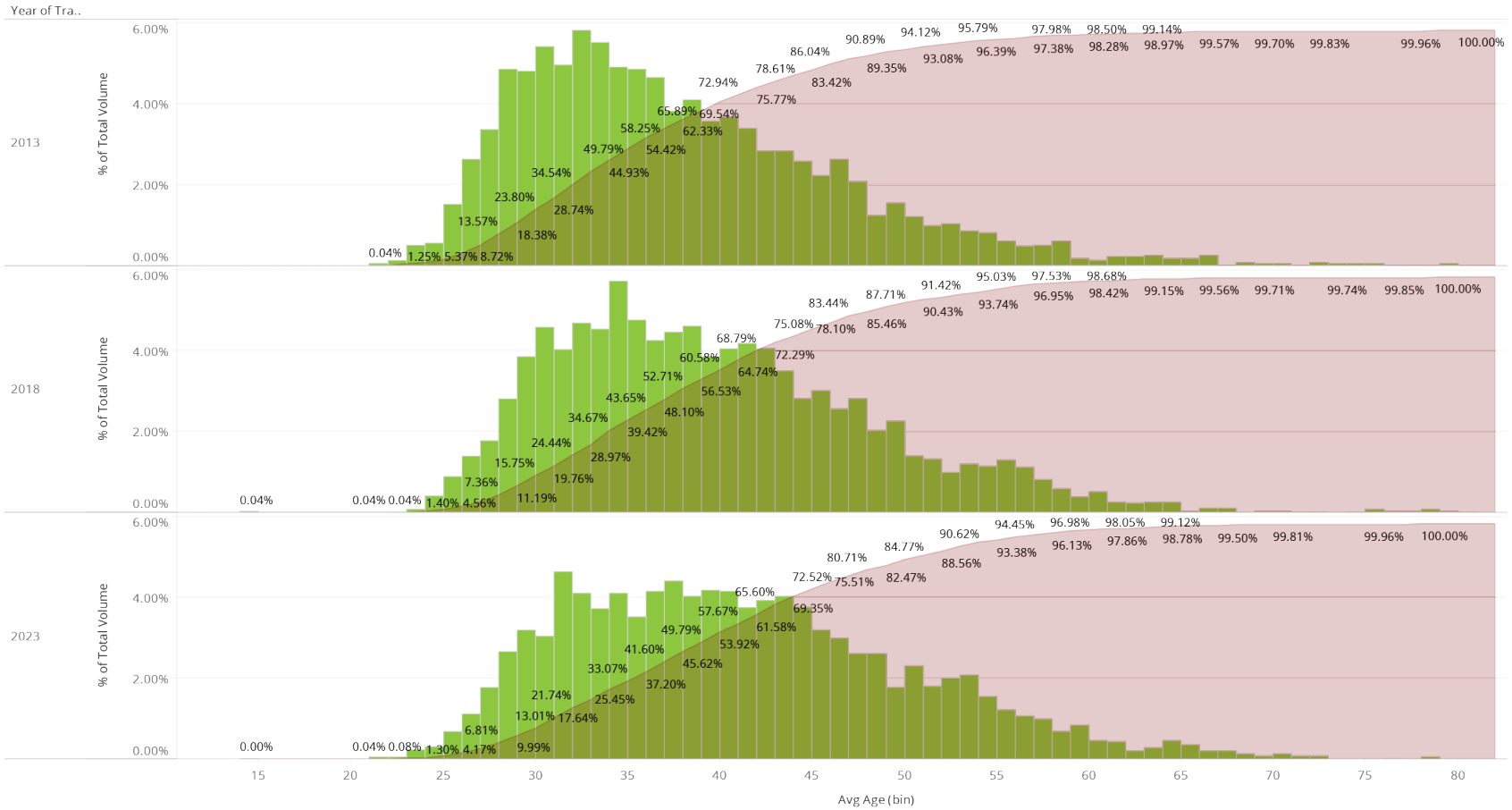


50% of 2013 FTHB transactions are from those **35** and younger

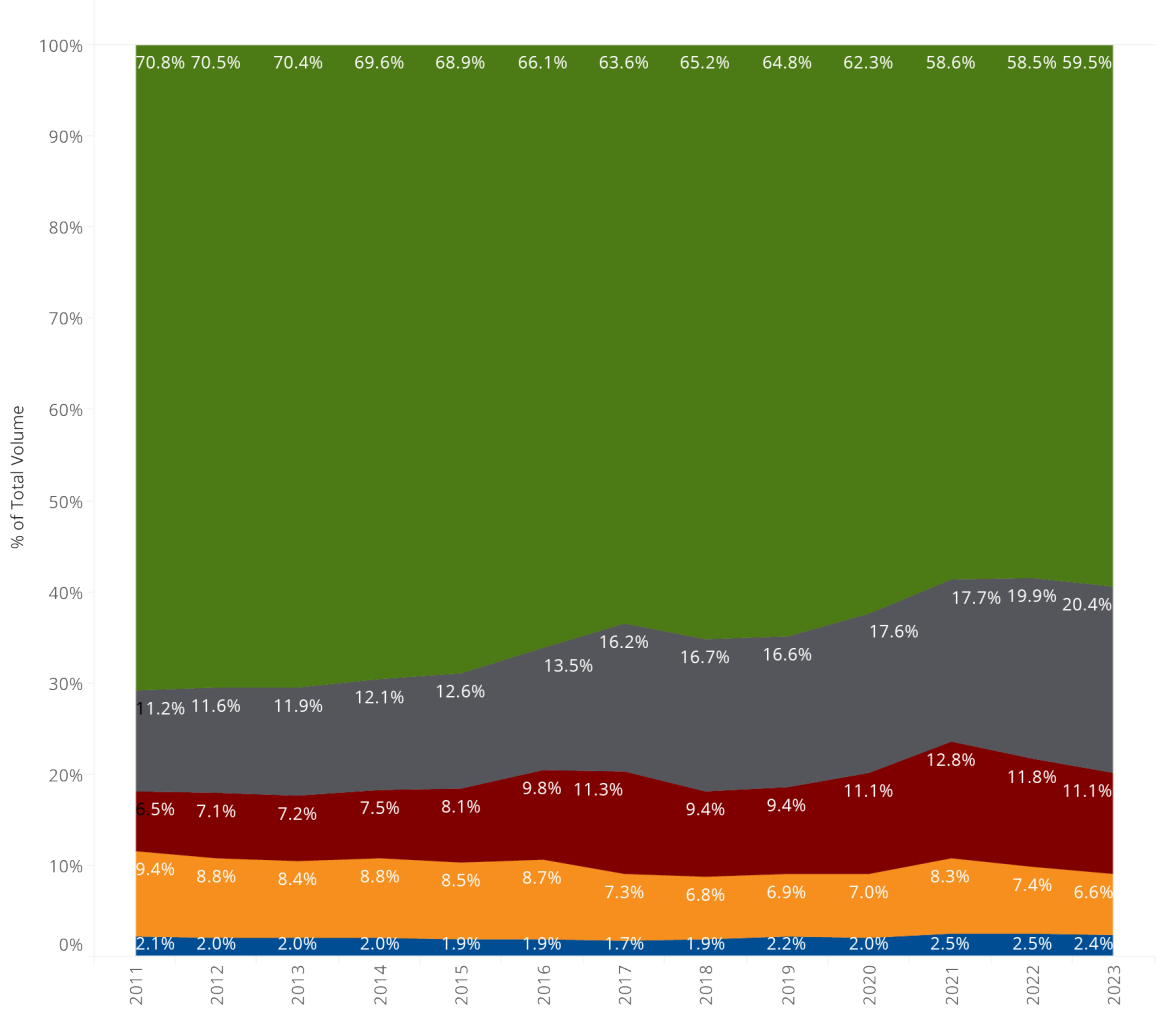
50% of 2018 FTHB transactions are from those **38** and younger

50% of 2023 FTHB transactions are from those **39** and younger

Deep dive on Movers

Migration out of local areas are increasing over time

Proportion of Ontario Mover transfer activities by geographic migration pattern, 2011 to 2023

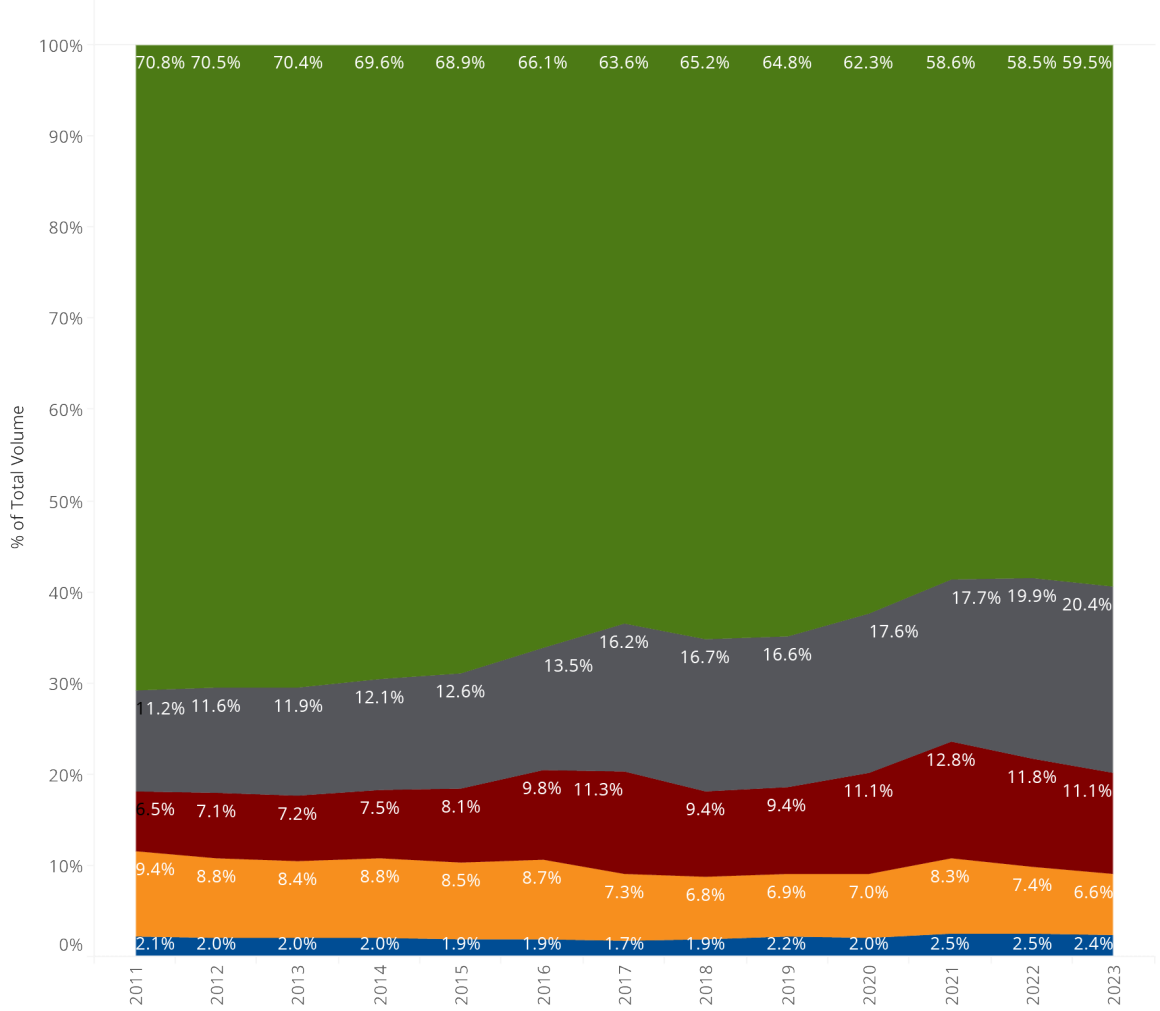


Moving within same region / city:
Majority but shrinking segment

Deep dive on Movers

Migration out of local areas are increasing over time

Proportion of Ontario Mover transfer activities by geographic migration pattern, 2011 to 2023



Moving within same region / city:
Majority but shrinking segment

Moving from outside of GTA to another area outside of GTA: Doubled in last 10 years

Deep dive on Movers

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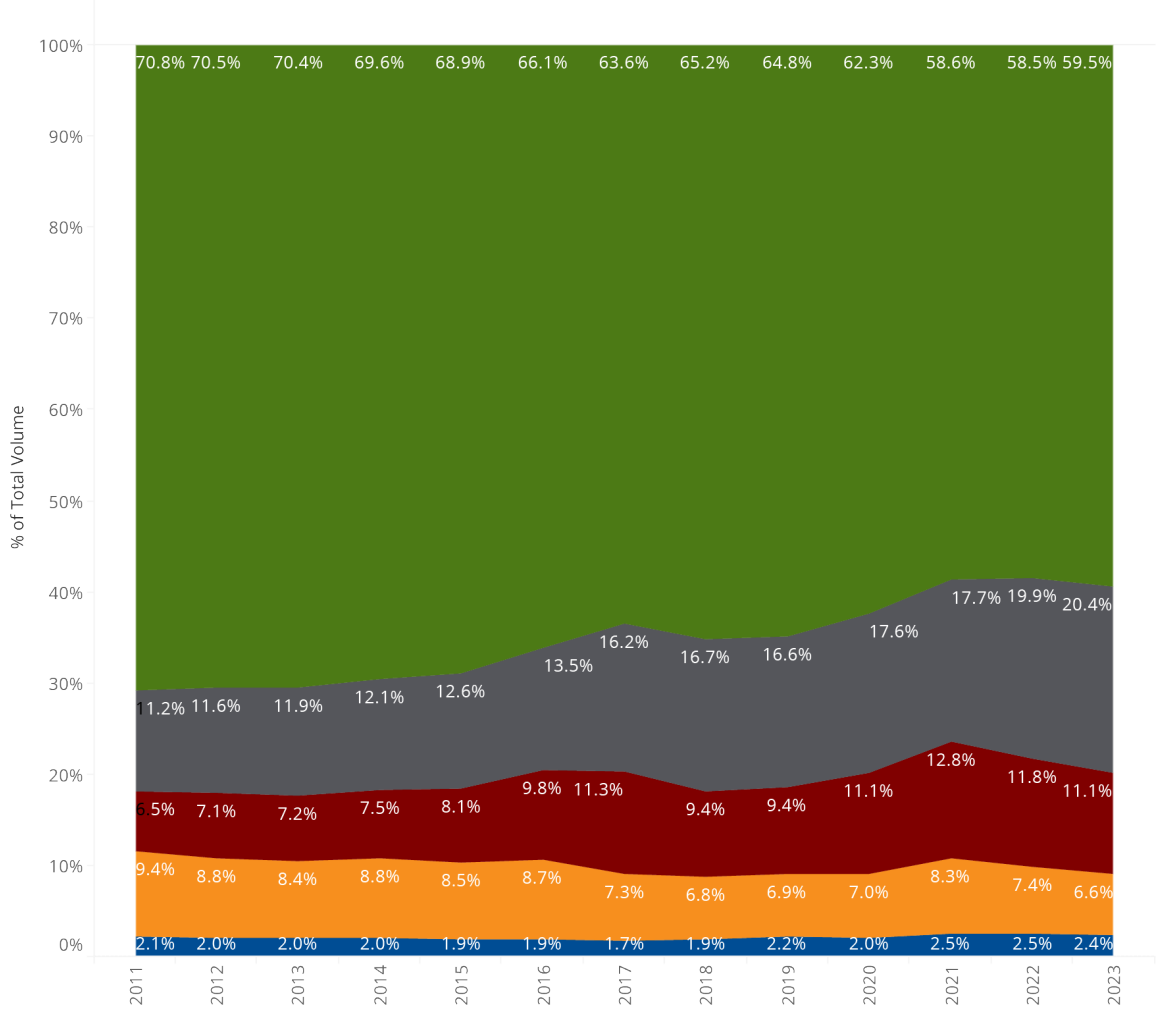

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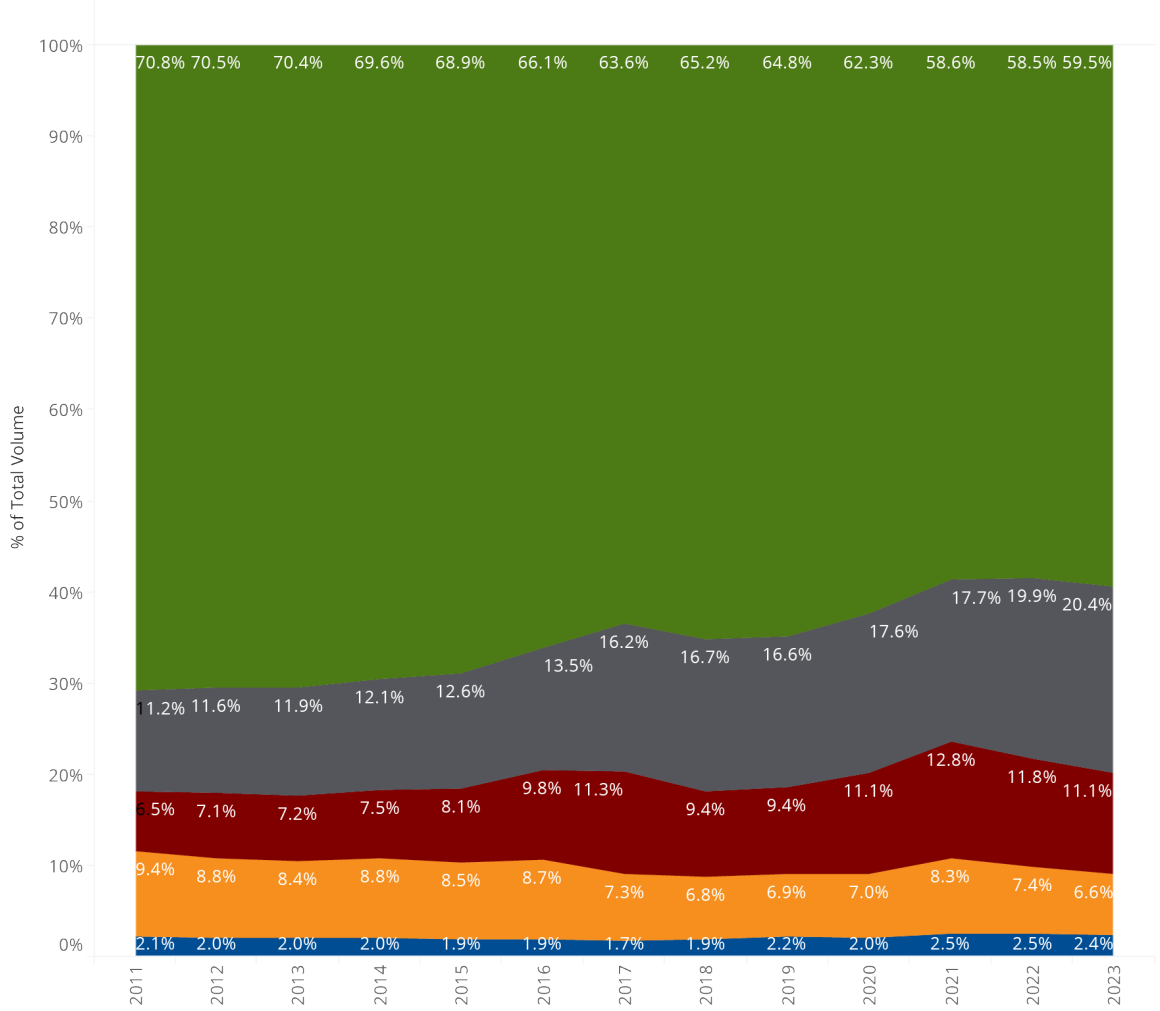

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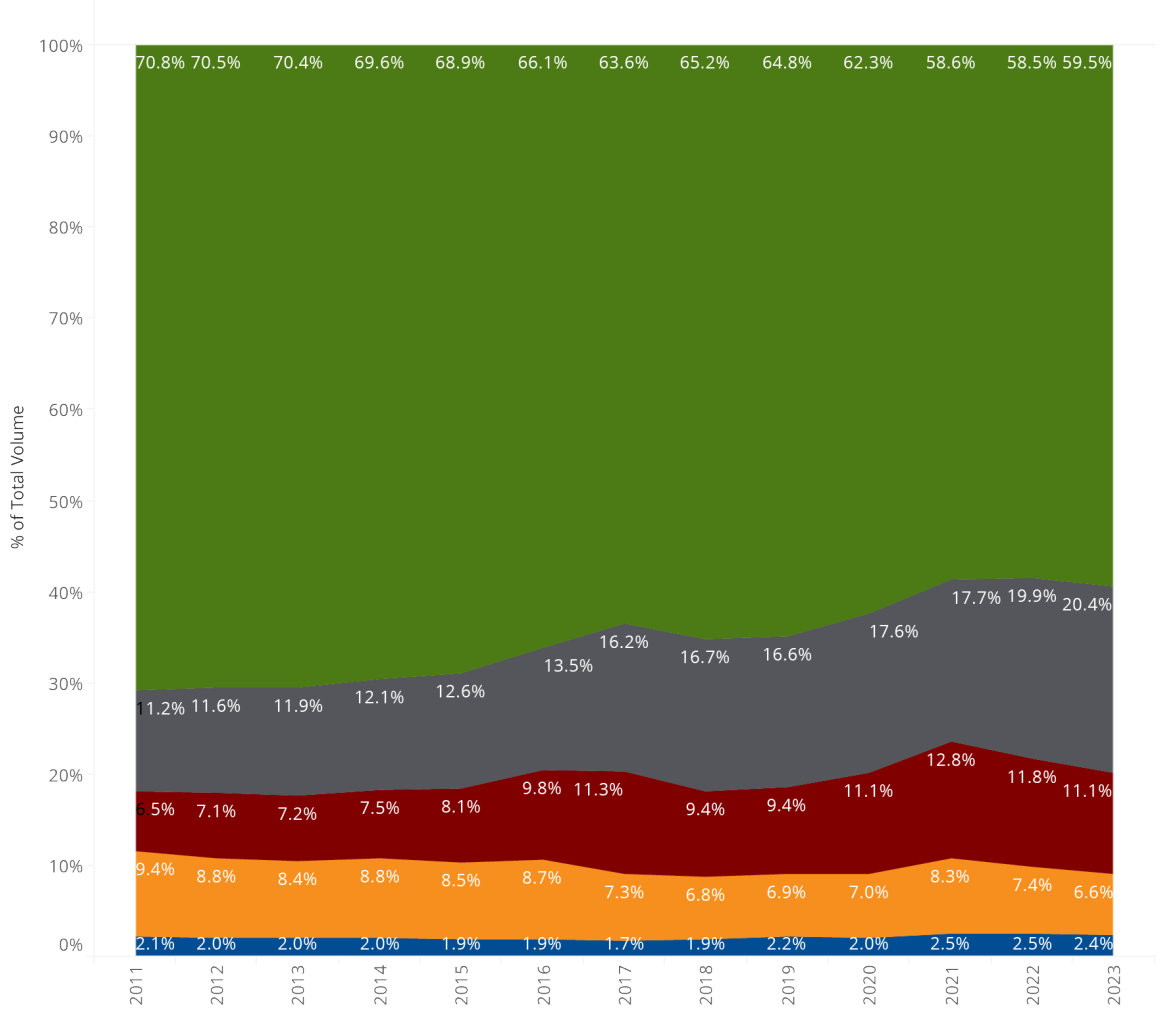

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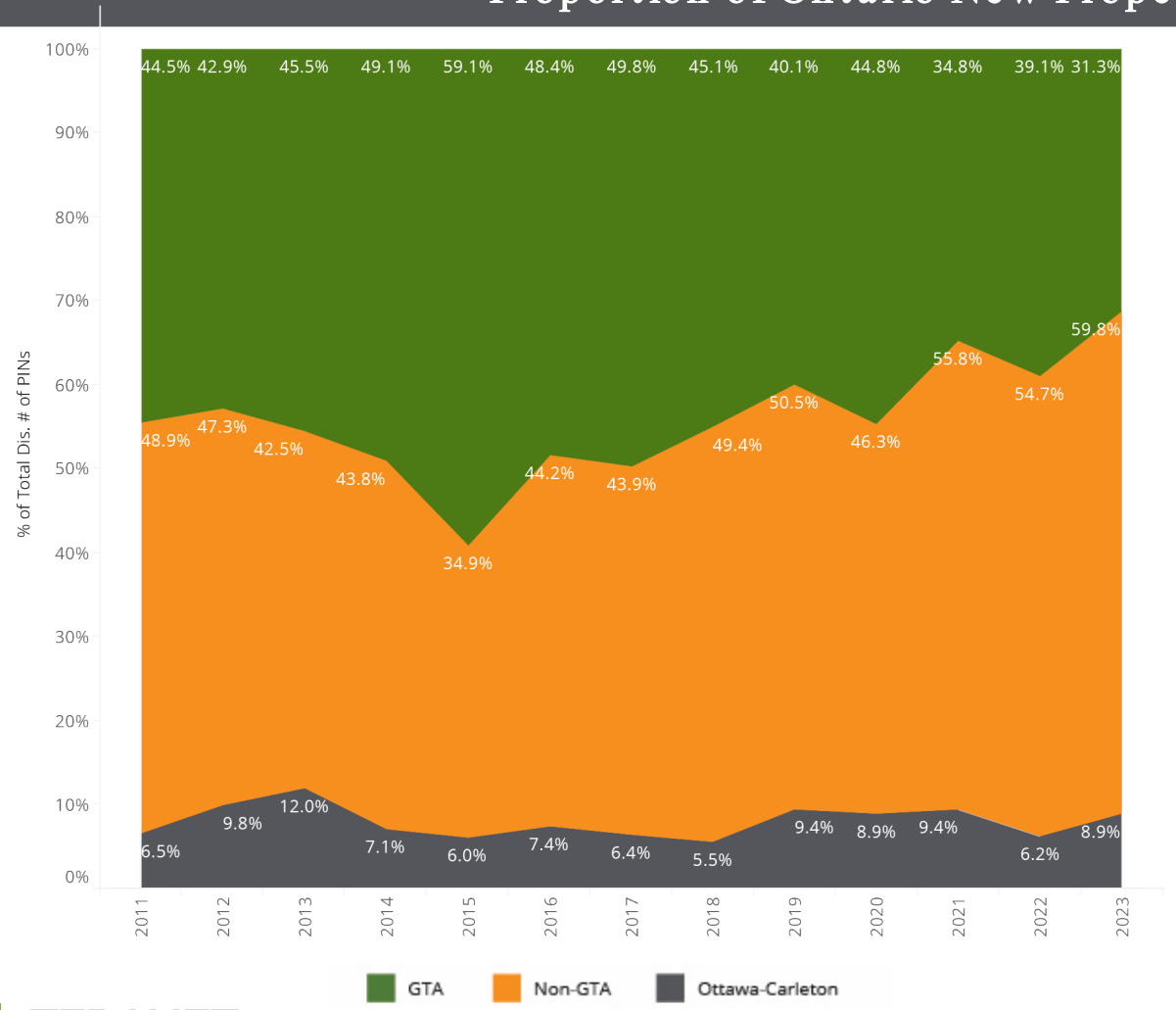
Moving from outside of GTA to GTA:
Historically low at 2%

Deep dive on Movers

Migration patterns may be attributed to location of new housing stock

Proportion of Ontario New Properties by region, 2011 to 2023



Decreasing proportion of new Ontario housing stock within GTA

Significant decline in proportion in Peel and York regions; Increase in Simcoe and Waterloo areas

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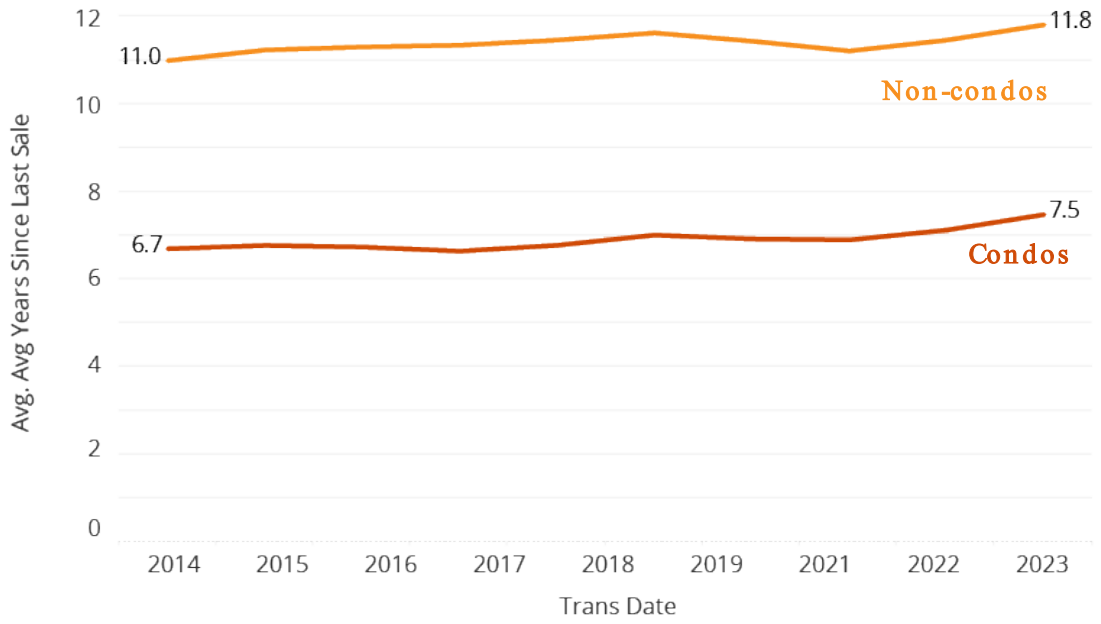
Holding periods at time of sale

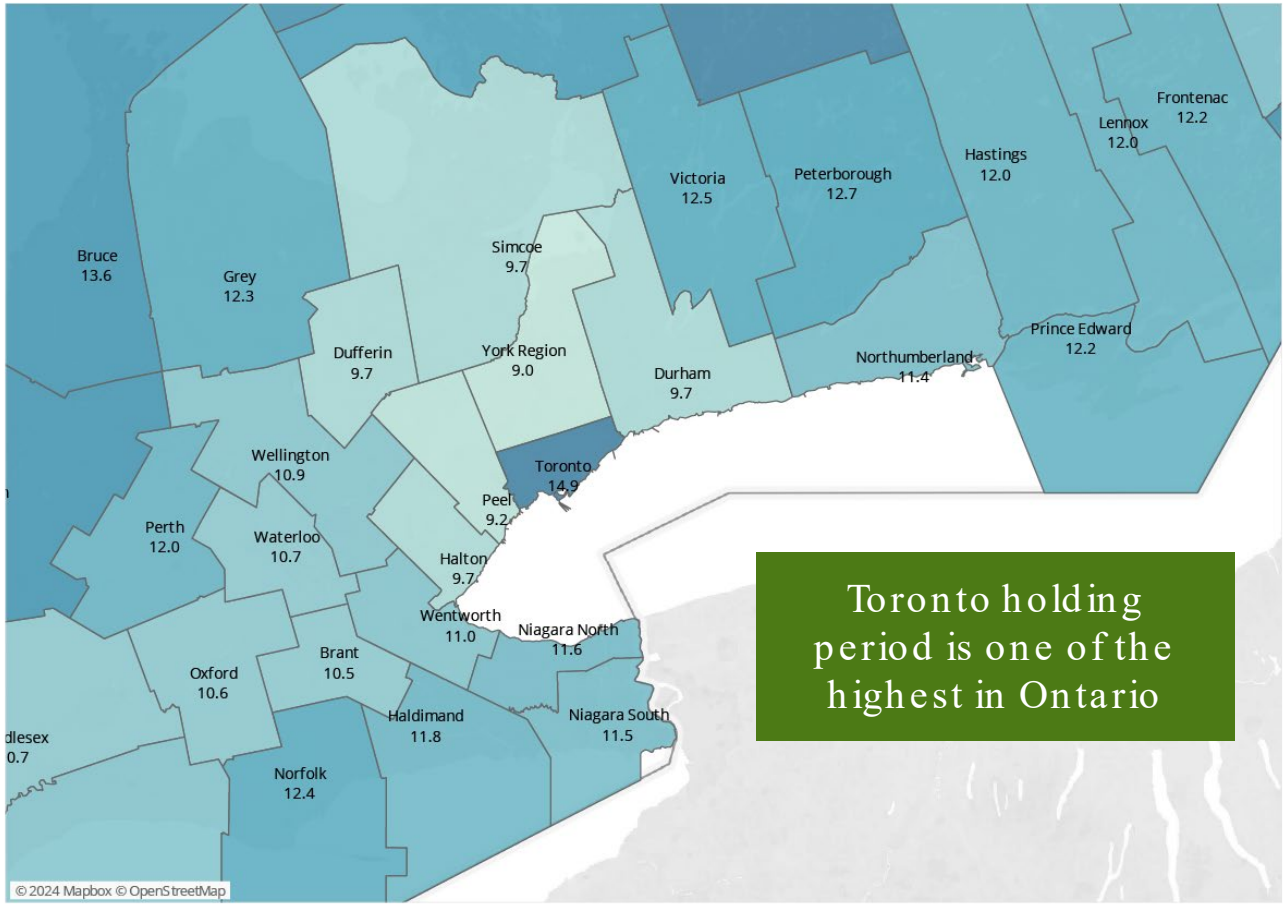
Growing holding periods may have long-term implications for the housing market

Average Holding Period in Years, Condo and Non-Condo Properties, 2014 to 2023



- Slight increase over the last 10 years
- Toronto non-condo properties average holding period has grown from 13.4 years in 2013 to 16.7 years in 2023

Average Holding Period for Non-Condo Properties, 2014 to 2023

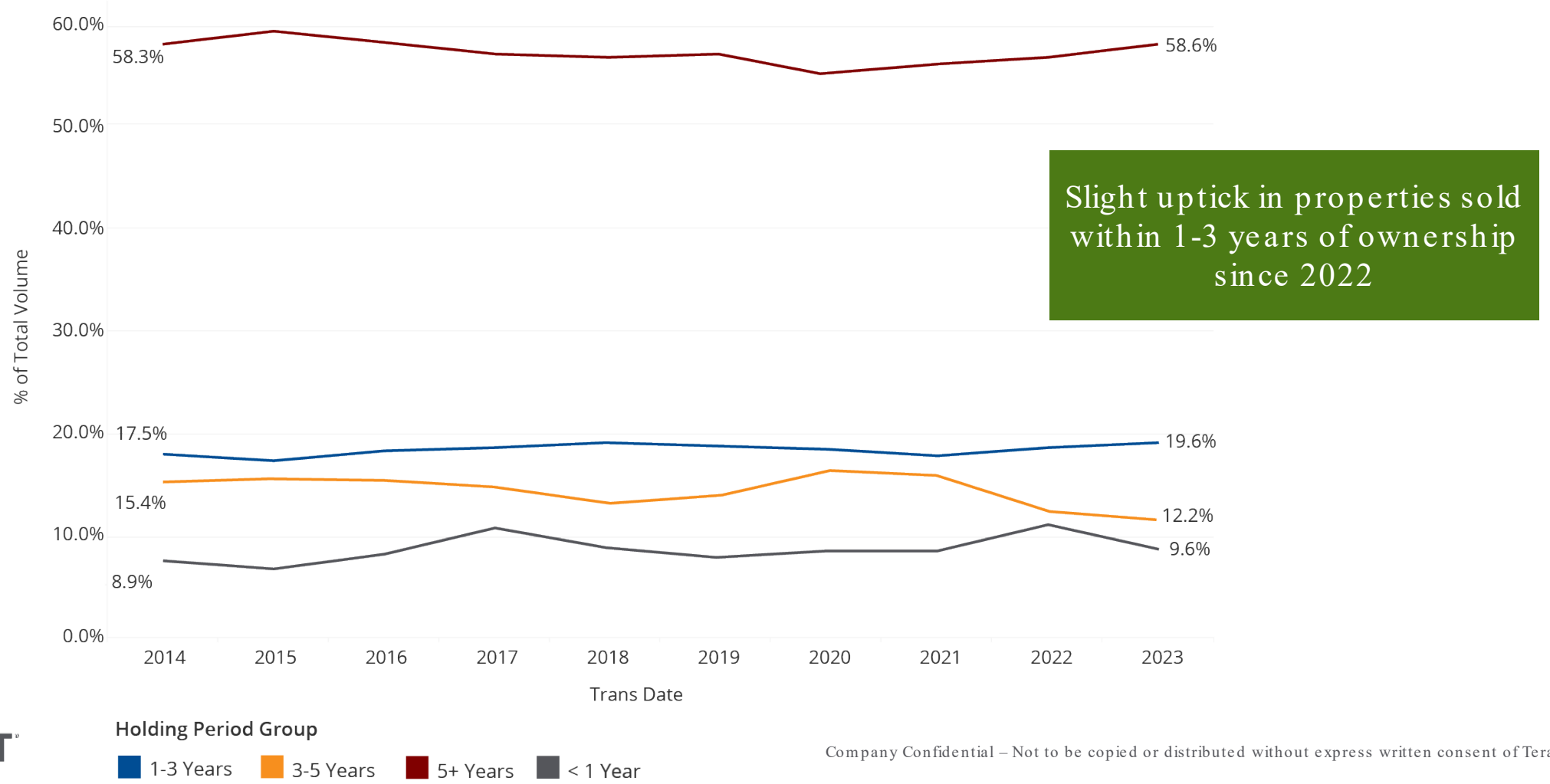


Toronto holding period is one of the highest in Ontario

Holding periods at time of sale

Recent uptick in sales of properties within 1-3 years of ownership may be early indication of market stress

Proportion of sales by holding period, 2013 to 2023



Slight uptick in properties sold within 1-3 years of ownership since 2022

Selling at a loss?

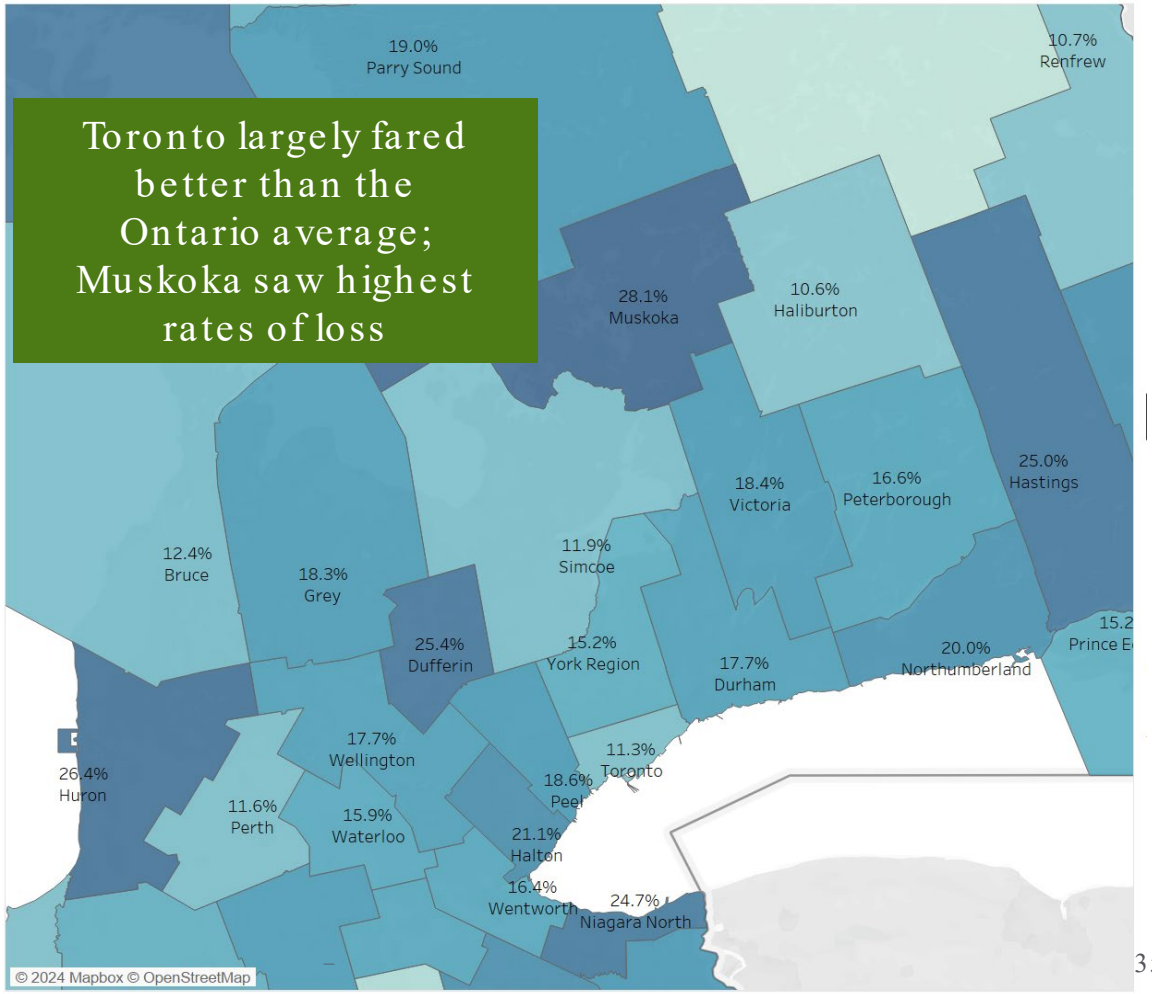
Properties recently purchased and sold are incurring losses at much higher rates than historical trends

Percentage of properties sold at a loss by Purchase and Sold Year

Sold Year	Purchase Year				
	18.0%	7.8%		1.1%	1.1%
2022	9.5%		1.3%	0.9%	1.3%
2021			1.4%	1.2%	1.1%
2020			2.8%	2.3%	2.4%
2019				4.1%	3.9%
2018					3.6%

Properties purchased in 2022 and subsequently sold is taking a loss at rates significantly above historical trends

Percentage of properties purchased in 2022 and subsequently sold for a loss, by region



Selling at a loss?

Elevated rates of loss were observed for properties purchased in 2022 across all value ranges

Percentage of properties sold at a loss by Purchase and Sold Year, by Sold Value Range

Value Range	Sold Year	Purchase Year: 2023	2022	2021	2020	2019	2018
$500K – 1M	2023	3.2%	17.3%	7.1%	0.9%	0.2%	0.2%
	2022		9.8%	2.2%	0.6%	0.2%	0.2%
	2021			2.0%	0.7%	0.3%	0.4%
	2020				1.6%	1.0%	1.3%
	2019					2.4%	3.3%
	2018						2.5%
$1M – 3M	2023	3.3%	16.7%	5.5%	0.9%	0.5%	0.3%
	2022		8.9%	1.5%	0.2%	0.3%	0.2%
	2021			2.3%	0.9%	0.7%	0.9%
	2020				5.3%	3.1%	4.3%
	2019					9.4%	5.6%
	2018						4.7%
$3M – 5M	2023	50%	33.3%	10.2%	1.2%	1.4%	0.0%
	2022		33.3%	3.0%	0.7%	1.0%	1.4%
	2021			4.5%	0.7%	2.0%	2.2%
	2020				37.5%	8.1%	4.3%
	2019					0.0%	5.3%
	2018						0.0%

Properties purchased in 2022 and subsequently sold had elevated rates of loss across all value ranges

Sales of properties $3m to $5m suffered double the rates of loss than other value ranges

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Summary

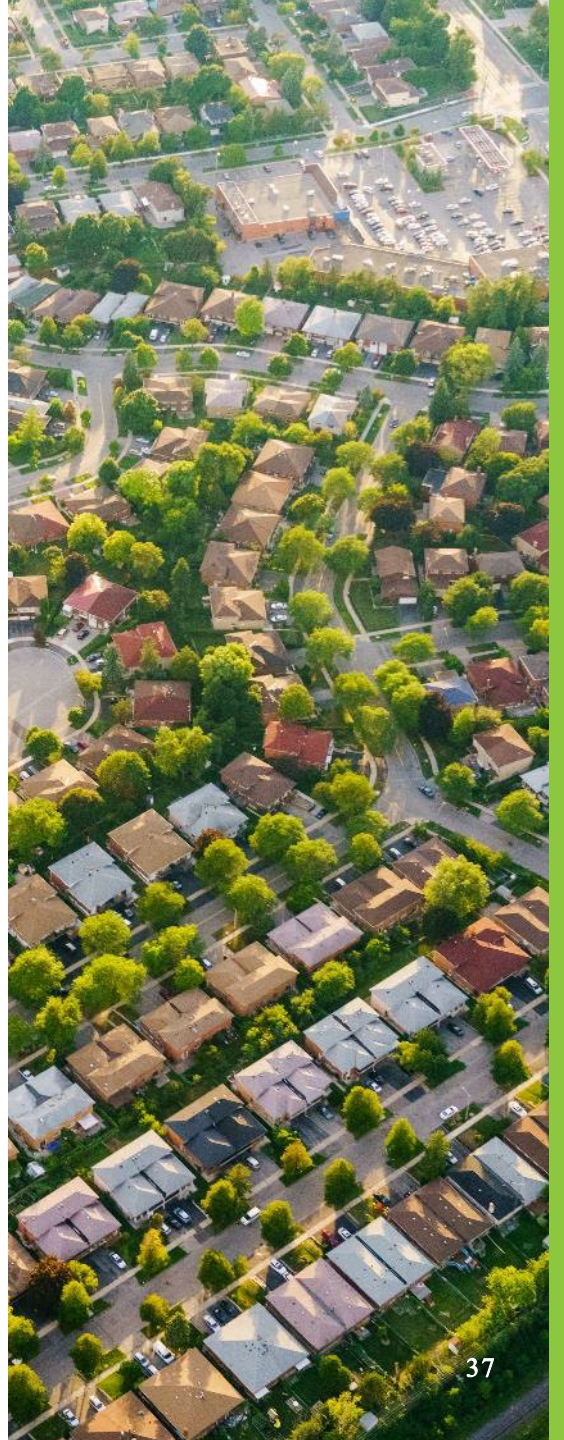
Multi-property owners have been the dominant purchasing segment in Ontario, accounting for a quarter of transactions.

Ontario Movers appear more inclined to move out of local areas, which may be correlated with where new housing stocks are developed.

Those who purchased in late 2021 and 2022 and subsequently sold are doing so at a loss at elevated rates against historical trends.

FTHBs faced tremendous headwind in purchasing their first homes in Ontario, especially those looking for non-condo properties in Toronto. This is likely correlated with the delays in FTHBs getting into the housing market.

These trends and upcoming mortgage renewal cycles may have bilateral effects on one another.



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TAB 11

21st Real Estate Law Summit

Municipal Law Primer

Leo Longo, C.S.
Aird & Berlis LLP

Matthew Longo
City of Toronto Legal Department

April 17, 2024

cpd

21st REAL ESTATE LAW SUMMIT

APRIL 17, 2024

"MUNICIPAL LAW PRIMER"

LEO F. LONGO, C.S.
AIRD & BERLIS LLP

MATTHEW LONGO
CITY OF TORONTO

SPEAKING NOTES & MATERIALS

I – PACE OF LEGISLATIVE CHANGE

- **Legislative Activity in the Past Three Years**

Statute	# of Versions on E-Laws	# of New Regulations
Planning Act, R.S.O. 1990, c. P.13	16	81
Municipal Act, 2001, S.O. 2001, c. 25	24	3
Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34	2	0
Condominium Act, 1998, S.O. 1998, c. 19	8	0
Land Titles Act, R.S.O. 1990, c. L.5	3	0
Mortgages Act, R.S.O. 1990, c. M.40	4	1
Registry Act, R.S.O. 1990, c. R.20	5	0

- **Appeal Tribunal**

Name	Years in Operation
Ontario Municipal Board Act, R.S.O. 1990, c. O.28	1906-2018
Local Planning Appeal Tribunal, 2017, S.O. 2017, c.23, Sched. 1	2018-2021
Ontario Land Tribunal Act, 2021, S.O. 2021, c.4, Sched. 6	2021-

II – PROPERTY OWNER & THIRD PARTY OLT APPEAL RIGHTS BEING ELIMINATED

- In recent years, property owners have lost their right to appeal to the Ontario Land Tribunal on a number of land use planning matters:

- Municipal Official Plan Amendments [OPA] dealing with additional residential unit policies[1], inclusionary zoning policies[2], settlement area boundaries[3], boundaries and policies respecting protected major transit station areas[4] [MTSA]
- No appeal of any Ministerial Decision respecting an OPA[5]
- Municipal Zoning By-Law Amendments [ZBA] dealing with additional residential unit policies[6], inclusionary zoning by-laws[7], settlement area boundaries[8], boundaries and policies respecting protected major transit station areas[9]

- Neighbouring [third party] property owners no longer have any right to appeal decisions respecting the following planning approvals:
  - Plans of Subdivision[10]
  - Consents to Sever[11]
  - Minor Variances & Permissions[12]
  - See *Loeb v. Toronto (City)*, 2024 ONSC 277 (CanLII) – unsuccessful judicial review "public interest" intervenor status application by a third party of a Committee of Adjustment decision.

III – MUNICIPAL BY-LAWS TO CONTROL "RENOVICTIONS"

- There has been recent interest from Ontario municipalities in controlling "bad faith evictions". A question of overlap with provincial powers and the *Residential Tenancies Act* procedures relating to eviction arising from demolition, conversion, or extensive renovations.[13]
- Hamilton City Council directed preparation of a "Renovation Licence and Relocation Listing By-law" to be enacted subject to adoption of a 2024 budget that would fund the program (including staff to monitor the program). That budget was recently approved, and presumably the by-law will be adopted shortly.[14] The by-law proposes a licensing process (and fee) for renovations for tenanted units, and financial penalties up to $10,000 for convictions of first offenses.

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[1] *Planning Act*, R.S.O. 1990, c. P.13, s. 17(24.1) & (36.1)
[2] *Planning Act*, R.S.O. 1990, c. P.13, s. 17(24.1.2) & (36.1.2)
[3] *Planning Act*, R.S.O. 1990, c. P.13, s. 17(24.5)(d) & (36.4), s. 22(7.2)
[4] *Planning Act*, R.S.O. 1990, c. P.13, s. 17(36.1.4)
[5] *Planning Act*, R.S.O. 1990, c. P.13, s. 17(36.5)
[6] *Planning Act*, R.S.O. 1990, c. P.13, s. 34(19.1)
[7] *Planning Act*, R.S.O. 1990, c. P.13, s. 34 (11.0.6) & (19.3)
[8] *Planning Act*, R.S.O. 1990, c. P.13, s. 34(11.0.4)
[9] *Planning Act*, R.S.O. 1990, c. P.13, s. 34(19.5)
[10] *Planning Act*, R.S.O. 1990, c. P.13, s. 51(39), (43) & (48)
[11] *Planning Act*, R.S.O. 1990, c. P.13, s. 53(19) & (27) and "specified person" definition in s. 1(1)
[12] *Planning Act*, R.S.O. 1990, c. P.13, s. 45(12) and "specified person" definition in s. 1(1)
[13] *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s.50. Also see Form N13 Notice.
[14] https://pub-hamilton.escribemeetings.com/Meeting.aspx?Id=bfaf56c0-ab0a-4aa8-ae1a-487c82f0f38a&lang=English&Agenda=Merged&Item=18&Tab=attachments

- London City Council is also wrestling with the issue and considered an "initial Research Report" at its April 2, 2024 meeting.[15]
- Toronto City Council has voted to explore the concept of a by-law, but thus far only endorsed a "framework" and requested further reports.[16]

IV – *ONTARIO HERITAGE ACT* LISTINGS AND BILL 23 – "USE IT OR LOSE IT"

- Bill 23, the More Homes Built Faster Act, 2022, has introduced changes to the heritage "listing" system under the Ontario Heritage Act.
- Formerly, listing a property on the municipal heritage register[17] was a step municipalities would take to provide a minor form of procedural protection for properties "believed to be of cultural heritage value or interest". The impact of a property being listed is that a building on the property could not be demolished without 60 days notice to the municipality. The municipality would then have to move to designated the property under Part IV of the Act,[18] which triggers appeal rights and more substantive protections of identified heritage attributes.
- Bill 23 amends s.27 of the OHA so that properties cannot have "listed" status in perpetuity:
    - ss.(14) For older listings prior to before January 1, 2023, Council must, before January 1, 2025, either: (a) issue a notice of intention to designate the property; or (b) remove the property from the register.
    - ss.(15) For properties listed on or after January 1, 2023 Council must, within two years of the listing date, either: (a) issue a notice of intention to designate the property; or (b) remove the property from the register.
    - ss.(18) for listed properties that do not proceed to a valid designation under s.29 the property cannot be re-listed for five years.
- Perhaps most importantly, listing a property is now a necessary precondition to designating property. See s.29(1.2)(1).

V – "SELF-HELP" REMEDIES TO ENFORCE MUNICIPAL BY-LAWS

- *Municipal Act, 2001*, S.O. 2001, c. 25, s. 440:

    440**.** If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, *the contravention may be restrained by application at the instance of a taxpayer or the municipality* or local board. [emphasis added]

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[15] https://pub-london.escribemeetings.com/Meeting.aspx?Id=f5afd7f1-9c3f-4a1c-a793-c9979cae0db7&Agenda=Agenda&lang=English

[16] https://secure.toronto.ca/council/agenda-item.do?item=2022.PH35.18
https://secure.toronto.ca/council/agenda-item.do?item=2024.PH10.10

[17] see s.27 of *Ontario Heritage Act*, R.S.O. 1990, c. O.18,

[18] See s.29 of *Ontario Heritage Act*.

- For caselaw related to s. 440 applications at the instance of a taxpayer see *Annotated Municipal Act* (2nd ed.; Carswell), S. Auerback & J. Mascarin, editors at section "440:4. Action by Taxpayer"[19]

- Rules of Civil Procedure R.R.O. 1990, Reg. 194, Rule 14.05(3):

  (3) *A proceeding may be brought by application* where these rules authorize the commencement of a proceeding by application or *where the relief claimed is,*

  (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

  (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

  (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

  (d) *the determination of rights that depend on the interpretation of a* deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or *municipal by-law or resolution*;

  (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

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[19] *Suprun v. Bryla* (2007), 41 M.P.L.R. (4th) 174, 64 R.P.R. (4th) 256, 2007 CarswellOnt 8221 (Ont. S.C.J.) - Section 443 [now 440] was clear and unambiguous authority for the applicants to seek to restrain contravention of the fence by-law passed pursuant to the *Municipal Act* and the zoning by-law passed under the *Planning Act.* The respondents consulted with the municipality, but although the defence of due diligence would be available as a defence in the event of a prosecution by the municipality, it was not available as a defence to this application brought by the applicants.
Durham Citizens Lobby for Environmental Awareness & Responsibility Inc. v. Durham (Regional Municipality), 2011 ONSC 7143, 2011 CarswellOnt 14542, 64 C.E.L.R. (3d) 121, 92 M.P.L.R. (4th) 242 (Ont. S.C.J.) - Section 440 conferred on a qualified person a number of important advantages, It gave a taxpayer access to a summary procedure for getting to court. The legislature intended to provide the advantages of s. 440 to those who had a real stake in the municipality as evidenced by their property ownership and taxation. By using the qualifying term "taxpayer" in s. 440, the legislature intended to confine the advantages of the section to a restricted class of persons, those who paid property taxes in the municipality.
Automotive Parts Manufacturers' Association v. Jim Boak, 2022 ONSC 1001, 2022 CarswellOnt 2091, 85 C.P.C. (8th) 405, 28 M.P.L.R. (6th) 329, 504 C.R.R. (2d) 89 (Ont. S.C.J.) - The association brought a motion under the *Municipal Act, 2001*, s. 440 for a statutory interim injunction to restrain and enjoin protesters protesting COVID-19 restrictions by parking multiple vehicles on streets, blocking traffic from crossing the Ambassador Bridge. The motion was granted. The unlawful actions of the protesters were clear violations of the city's by-laws prohibiting people from obstructing roads with vehicles and preventing people from obstructing any highway, in general, as well as leaving vehicles idling.

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) *an injunction, mandatory order or declaration* or the appointment of a receiver *or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application*;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. [emphasis added]

- See *Toronto (City) v. Canadian National Railway* (1993), 22 C.P.C. (3d) 336 (Ont. Gen. Div.)

VI - SHORT TERM RENTALS AND MUNICIPAL ACCOMMODATION TAX

- Municipal approaches respecting of short term accommodations (STAs) and short term rentals (STRs) is as varied as Ontario's 444 municipalities
- Many have no mention of STRs in their zoning by-laws; others are on their second or third generation of STR zoning by-laws [including licensing by-laws]
- See Toronto's current "refresh" of its STR By-Law: https://secure.toronto.ca/council/agenda-item.do?item=2024.PH11.9. More generally, see: Short-Term Rentals – City of Toronto
- See The Blue Mountains current STA regulations: Short Term Accommodations | Town of The Blue Mountains, ON
- Example of STR court decisions: Township of Oro-Medonte v. Oro-Medonte Association for Responsible STRS, 2024 ONSC 1676 (CanLII); Rosen v. Corporation of the Town of Blue Mountains, 2012 ONSC 4215 (CanLII)
- Municipal Transient Accommodation Tax (MATs) – see Part XII.1 of the *Municipal Act, 2001*, S.O. 2001, c. 25, s. 400.1
- Many municipalities impose a 4% rate; e.g. Toronto, Mississauga, Markham and Oakville
- Municipalities now looking at imposing a MAT on STRs

VII – FOURPLEX POLITICAL SHUFFLE

- A proposal to address the housing crisis that has sparked debate among every level of government.
- Private Members bill introduced by Liberal MPP Adil Shamji to permit fourplexes throughout the province - Bill 175, *Building Universal and Inclusive Land Development in Ontario Act, 2024*.[20] Has been sent for second reading.
- Two key amendments to the *Planning Act*:
    - amend s.16(3) which stipulates what *cannot* be included in an official plan to add an additional section:

[20] https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-175

        - (3) No official plan may contain any policy that has the effect of prohibiting the use of four or fewer residential units on a parcel of urban residential land, so long as the units are in a detached house, semi-detached house or rowhouse on the parcel or in up to one additional structure on the parcel that is ancillary to the detached house, semi-detached house or rowhouse.
    - amend s.35.1 which stipulates what *cannot* be included in zoning by-laws:
        - (1) The authority to pass a by-law under section 34 does not include the authority to pass a by-law that prohibits the use of four or fewer residential units on a parcel of urban residential land, so long as the units are in a detached house, semi-detached house or rowhouse on the parcel or in up to one additional structure on the parcel that is ancillary to the detached house, semi-detached house or rowhouse.
- Remaining sections detail different ways that official plans and zoning by-laws (i.e. local municipalities) will not be used to frustrate these goals. For example, they cannot require a minimum number of parking spaces for residential buildings that contain at least 4 units. Pre-empting some creative municipal methods of frustrating the original s.35.1 permitting secondary suites.

VIII – HERITAGE CONSERVATION DISTRICTS

- The *Ontario Heritage Act* permits municipal council to designate heritage conservation districts ("HCDs") in areas that share a collective design, associative, or contextual value that warrant protection under the Act. [21]
- Criteria for designation are more carefully enumerated in O.Reg 9/06.[22] Amendments to the regulation in 2022 more carefully explain the criteria and introduce a requirement that 25% of the properties within the defined area meet two-or-more of the nine criteria.
- When an HCD by-law is adopted in an area notice must be given to every owner with respect to their appeal rights,[23] and following the HCD coming into force notice that property is within an HCD must be registered on title.[24]
- What impact does and HCD have on a property? It depends on the reasons for designation, and the objectives and policies set out in the HCD Plan, which requires a bit more work to interpret. In some cases it may place fairly strict restrictions on demolition of a contributing home, and in other cases it may impose procedural steps in having work approved (e.g. speaking to municipal staff to have a permit issued for external modifications). It is important to investigate with the assistance of a land use planner or heritage professional.

[21] OHA s.41.
[22] O. Reg. 9/06: CRITERIA FOR DETERMINING CULTURAL HERITAGE VALUE OR INTEREST
[23] Ontario Heritage Act, R.S.O. 1990, c. O.18, s.41(3).
[24] Ontario Heritage Act, R.S.O. 1990, c. O.18, s.41(10.1).

IX – TOPICS BEYOND THE SCOPE OF THIS PRESENTATION

- Major Transit Station Areas (MTSAs)
- Inclusionary Zoning By-Laws (IZ)

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TAB 12

21st Real Estate Law Summit

"No Take-Backsies!" Understanding the Law of Repudiation in a Purchase and Sale

Table of Authorities
Jurisprudence

Secondary Sources

Simon Crawford
Bennett Jones LLP

Jordan Oliva
Bennett Jones LLP

April 17, 2024

cpd

"NO TAKE-BACKSIES!" UNDERSTANDING THE LAW OF REPUDIATION IN A PURCHASE AND SALE

Simon Crawford, Bennett Jones LLP

Jordan Oliva, Bennett Jones LLP

I. Introduction

Repudiation occurs when one party, whether through express words or actions, refuses to perform their contractual obligations when performance is due. Anticipatory repudiation occurs when a party indicates to the other party an unwillingness to perform the contract before its performance is due. To determine whether an intention to repudiate the contract has been demonstrated, courts will consider whether a reasonable person would believe that the indicating party no longer intends to be bound by the terms of the agreement.[1] The anticipatory breach assessment parallels the court's analysis of claims of fundamental breach, in which the court examines if the breach deprives the innocent party of substantially the whole benefit of the contract. The test for determining if an anticipatory breach has occurred is an objective test. The court will assess whether there is (i) conduct that amounts to a total rejection of the obligations of the contract; (ii) lack of justification for such conduct; and (iii) acceptance of the repudiation by the innocent party within a reasonable time.[2]

That said, while the courts will look to any express words or actions to determine if one party sought to repudiate the agreement, both vendors and purchasers should be aware that any words or actions that may demonstrate an *intention* to no longer be bound by the agreement before performance is due may also amount to anticipatory repudiation of the contract, even if not *expressly* stated. Such a warning, if heeded by the defendant in *Zoleta v. Singh and RE/MAX Twin City Realty* (*Zoleta*)[3], may have saved him both time and money.

II. The Law of Repudiation

i) Legal Framework and Governing Principles of Repudiation

Before examining the decision of the Ontario Superior Court of Justice in *Zoleta*, it is helpful to provide a brief overview of the legal framework and the governing principles of repudiation, and what in particular has amounted to repudiation in Ontario.

Repudiation can manifest as explicit statements declaring non-compliance with the contract or implicit behavior inconsistent with performance of the contract. Such actions may include ceasing production, expressing an inability or unwillingness to pay an agreed-upon price, or failure to perform any other contractual obligation.

The assessment of whether a party has repudiated a contract follows an objective standard. The court's assessment hinges on whether a reasonable person would perceive that the party no longer intends to honour the terms of the contract. As set out by the Supreme Court of Canada, the court

[1] *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc*., 2008 ONCA 92 at para 37 [*Spirent*].
[2] *Guarantee Co of North America v. Gordon Capital Corp,* [1999] 3 SCR 423, at para 40 [*Guarantee Co*].
[3] *Zoleta v. Singh and RE/MAX Twin City Realty,* 2023 ONSC 5898 [*Zoleta*].

will examine "whether the breach deprives the innocent party of substantially the whole benefit of the contract."[4]

It is important to note that the courts have clarified that the principles governing both anticipatory repudiation and repudiation are substantially the same. The Ontario Court of Appeal states[5]:

> The same principles guide both anticipatory repudiation and repudiation. Courts often use the terms interchangeably because alleged repudiations frequently occur "before the time of performance has arrived."

In *Remedy Drug Store Co. Inc. v. Farnham*, the Court of Appeal echoed the Supreme Court by affirming that repudiation arises when one party to a contract expresses through words or actions an intention not to uphold the contract.[6] The Court clarified that the test for anticipatory repudiation is objective, necessitating consideration of surrounding circumstances to interpret the purported breaching party's intent.[7] The Court emphasized that a finding of anticipatory repudiation is reserved for cases involving serious breaches, and before an anticipated contract breach can be deemed anticipatory repudiation, *it must substantially deprive the innocent party of the contract's primary benefits*.[8]

The test for determining whether an anticipatory repudiation has occurred was set out by the Supreme Court in *Guarantee Co of North America v. Gordon Capital Corp.*[9] The Court stated that three elements must be found to establish the existence of an anticipatory breach[10]:

1. conduct which amounts to a total rejection of the obligations of the contract;

2. lack of justification for such conduct; and

3. acceptance of the repudiation by the innocent party within a reasonable time.

In *Potter v. New Brunswick Legal Aid Services Commission*, the Supreme Court of Canada clarified that an anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future."[11] The Supreme Court also noted that when the anticipated breach concerns crucial contract terms or indicates an intention not to honour the contract in the future, it may amount to anticipatory repudiation. In such instances, the emphasis is on what the party's statements and/or actions imply about future contract performance. For instance, anticipatory repudiation occurs if the language and behavior of the party suggest an intent to breach a contract term that, if breached, would amount to repudiation of the entire contract.[12]

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[4] *Spirent* at para 37.
[5] *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 at para 44 [*Remedy Drug Store*].
[6] *Ibid* at para 42.
[7] *Ibid* at para 46.
[8] *Ibid* at para 50.
[9] *Guarantee Co* at para 40; Also see *Douse v. Mascioli,* [1997] O.J. No. 2570 at para 14 [*Douse*].
[10] *Ibid*.; With reference to *McCallum v. Zivojinovic*, 1977 CanLII 1151 (ON CA) [*McCallum*].
[11] *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para 149 [*Potter*].
[12] *Ibid*.

Moreover, the courts in Canada have set out that "regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation"[13] and that the point in time for assessing whether repudiation or anticipatory breach has taken place is when the party purportedly in breach communicates its inability or intention not to fulfill its obligations.[14]

When acceptance of an anticipatory repudiation is contemplated, the courts have set out that such a repudiation "will not effectively terminate the contract unless the innocent party accepts the repudiation and is prepared to treat the contract as ended."[15] Moreover, the decision to disaffirm the contract must be communicated clearly and within a reasonable amount of time.[16] The Court in *Potter* clarified that[17]:

> If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.

ii) Instances of Anticipatory Repudiation in Real Estate Transactions in Ontario

Even before the decisions in *Guarantee Co.* and *Douse*, courts in Ontario have provided direction concerning what words or actions will likely amount to anticipatory repudiation of an agreement of purchase and sale. However, it is important to note that the determination of whether a specific breach constitutes repudiation will rely on the circumstances of each individual case and the terms of the agreement in question.

Conduct of a purchaser that has been found to amount to an anticipatory repudiation includes: the purchaser failing to pay the deposit and not responding to inquiries from the vendor's lawyer about payment[18]; and the purchaser repeatedly requesting extensions of the closing date and implying or expressly stating an inability to close on the scheduled date due to financing issues.[19]

Conduct of a vendor that has been found to amount to an anticipatory repudiation includes: the vendor unilaterally altering the dimensions of the lots from those outlined in the draft plan of subdivision attached to the APS, and disregarding repeated complaints from the purchaser[20]; the vendor insisting on not closing unless the purchasers agreed to add new conditions to the APS[21]; the vendors citing a lack of a signed resolution authorizing a share transfer required for the closing as the reason for their inability to close[22]; and the vendor improperly declining to close, claiming

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[13] *Kuo v. Kuo*, 2017 BCCA 245 at para 40 [*Kuo*].
[14] *Ibid* at para 16.
[15] *Kaur v. Bajwa*, 2020 BCCA 310 at paras 26 [*Kaur*]; citing G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 595.
[16] *Zeifman Partners Inc. v. Aiello*, 2022 ONSC 611, at para 108 [*Ziefman*].
[17] *Potter* at para 144.
[18] *Ruffolo v. McCalla*, 1989 CarswellOnt 2469 at paras 8, 9, and 18 [*Ruffolo*].
[19] *Valemont Development Corp. v. Royal Bank*, [1996] O.J. No. 1666 at para. 8 [*Valemont*]; *Cachet Summerhill Developments Inc. v. Kaznlson*, 2021 ONSC 2512 at para 18 [*Cachet*].
[20] *Pompeani v. Bonik Inc*., 1997 CanLII 3653 (ON CA) at para 35 [*Pompeani*].
[21] *Kirshenblatt v. Kriss,* 2012 ONSC 6568 at para 24 [*Kirshenblatt*].
[22] *801Assets Inc. v. 605446 Ontario Ltd.*, 2016 ONSC 2772 at paras 51 and 81 [*801 Assets Inc.*].

that the purchaser misrepresented the property as zoned commercial instead of residential, despite no such misrepresentation being made.[23]

One example of repudiation by conduct arose in *Lawrie* v. *Gentry Developments Inc.* In this case, the vendor wrongly asserted that closing had to occur by 4:30 pm on the closing date, and when the purchaser tendered after 4:30 pm (but still on the closing date), the vendor refused to close on the basis that the deadline for closing had passed. As the vendor's assertion of the closing deadline was incorrect, its failure to close was determined to be a repudiation of the contract.[24]

Another similar example was in *377447 Ontario Ltd. v. Saadat*, where there was a failure to close on the agreed-upon closing date specified in the APS. The vendor's lawyer sent a letter to the purchaser's lawyer with a new APS attached, asserting that the purchaser's failure to close released the vendor from any obligation to complete the sale. The Court found that the parties had previously verbally agreed to extend the closing date, therefore the vendor's lawyer had unintentionally repudiated the APS through the letter.[25]

A third example is *Nicolaou v. Sobhani* in which there was a contract for the purchase and sale of a lot in Richmond Hill. Prior to the scheduled closing, the purchaser alleged that the vendor had misrepresented the lot size and thus declared the sale to be "null and void." The purchaser's lawyer subsequently demanded the full return of the deposit, threatening legal action if the deposit was not returned within three business days. The vendor, however, demonstrated that there had been no misstatement regarding the lot size, as the dimensions in the listing agreement were accurate. The Court found that the purchaser's conduct, particularly though the words of the lawyer in the letter, constituted an anticipatory breach of the contract.[26]

III. Discussion: *Zoleta v. Singh and RE/MAX Twin City Realty*

i) Overview

This case concerns a real estate transaction in the Waterloo Region during a volatile market period in early 2022. The plaintiffs, Donna Pontaoe Zoleta and Ronald Allan Anupol Zoleta ("Zoleta"), entered into an Agreement of Purchase and Sale (the "APS") with the defendant, Lovesikander Singh ("Singh"), for the property located at 27 Lemonbalm Street, Kitchener, Ontario, with a sale price of $1,150,000 and a completion date of June 30, 2022. Singh paid a deposit of $50,000 as per the APS.[27]

But, when the real estate market declined, and Singh received an appraisal report that provided for a lower value of the property than agreed upon in the APS, Singh sought a significant reduction in the purchase price of $355,000. On June 23, 2022, Zoleta's lawyer received a letter from Singh's lawyer stating the following[28]:

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[23] *Hatami v. 1237144 Ontario Inc*., 2018 ONSC 668 at para 42 [*Hatami*].
[24] Laura Brazil, *Anticipatory Repudiation in Real Estate Deals: Can You Terminate if the Other Party Will Breach the Agreement of Purchase and Sale?* (McMillan LLP, July 2018) referencing *Lawrie v. Gentry Developments Inc.* (H.C.J.), 1989 CanLII 4094 (ON SC) [*Lawrie*].
[25] *Ibid* referencing *377447 Ontario Limited v. Saadat*, 2008 CanLII 36760 (ON SC) at paras 64-65 [*377447 Ontario*].
[26] *Ibid* referencing *Nicolaou v. Sobhani*, 2017 ONSC 7602 at paras 51-55 [*Nicolaou*].
[27] *Zoleta* at paras 1-5.
[28] *Ibid* at para 12.

> "Please be advised that we act for the purchaser in the above transaction and we understand that you represent the vendors.
>
> We have been advised by our clients that the property has been appraised by $355,000.00 less than the purchase price, therefore, our clients require the abatement for the same.
>
> We trust the foregoing to be satisfactory."

Zoleta was not willing to agree to the abatement. Singh then engaged in closing date extension negotiations[29], but was unable to secure financing and failed to complete the purchase on the scheduled closing date.[30] Singh alleged that Zoleta breached the agreement by relisting the property on the Multiple Listing Service (MLS) six days before the closing date.[31]

Zoleta denied repudiating the agreement and sought a summary judgement for damages totaling $345,121.98 for loss of sale value, carrying costs, and costs to extend the purchase of their new home in Calgary. Singh also denied repudiating the agreement and contended that the relisting of the property by Zoleta before the closing date rendered the agreement "null and void". Singh then sought dismissal of the summary judgment motion, return of his deposit, and damages due to the plaintiffs' breach of contractual obligations.[32]

Zoleta, despite relisting the property, asserted their intent to complete the sale to Singh as scheduled. Zoleta argued that they remained transparent about the relisting and did not enter into any new agreements for the property before the closing date. Singh's failure to object to the relisting or request its removal until after Zoleta offered an extension with an additional deposit further complicated the matter.[33]

Singh alleged that the actions of Zoleta and Re/Max hindered his ability to secure financing, leading to the delay in completing the purchase. Singh contends that Zoleta's conduct, in collusion with Re/Max, caused significant damage and asserted bad faith on their part. Zoleta and Re/Max denied Singh's allegations.[34]

ii) Issues

The Court set out a number of issues in question, three of which will be discussed, including whether Zoleta's relisting of the property constituted a breach of contract and if Singh made sufficient efforts to fulfill his obligations under the APS.[35]

1. Did the plaintiffs repudiate the APS when they re-listed the property for sale on MLS on June 24, 2022, and if so, was the repudiation accepted by the individual defendant, Singh?

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[29] *Ibid* at para 18-20.
[30] *Ibid* at para 17.
[31] *Ibid* at para 6 and 13.
[32] *Ibid* at paras 7-9 and 23.
[33] *Ibid* at para 15.
[34] *Ibid* at para 10-11.
[35] *Ibid* at para 29.

2. If the Court should find that the plaintiffs did not repudiate the APS or, alternatively, any such repudiation was not accepted by Singh, did the plaintiffs have a duty to agree to an extension?

3. Did the individual defendant, Singh, repudiate the APS when he insisted on an abatement of $355,000.00 on June 23, 2022, and if so, was the repudiation accepted by the plaintiffs?

iii) Analysis and Decision

On the first issue, the Court notes that there is minimal jurisprudence which speaks to whether a seller, who relists a subject property for sale, by so doing, repudiates an existing agreement to sell the same property. In *Vanderwal v. Anderson*[36], Justice MacDougall found a similar case of relisting as constituting abandonment due to lack of communication. However, the present case differs as Zoleta notified Singh promptly and expressed intent to proceed with the sale despite relisting. The Court agreed that notice to Singh's realtor was deemed notice to him per *McKee v. Montemarano*.[37]

The Court found that Zoleta demonstrated, through their words and actions, a clear intention and commitment to the agreement[38]:

> The Plaintiffs, through their real estate lawyer, also communicated an intention to complete the Agreement as scheduled by way of a letter sent on June 24, 2022, the same date that the Property was listed for sale, and, thereafter, in the resulting email correspondence with Singh's real estate lawyer.
>
> Whether the re-listing of a property for sale will constitute a repudiation or an abandonment of an existing agreement must, by necessity, turn on the underlying circumstances. The test for a repudiation, as stated in *Spirent Communications*, turns on whether a reasonable person would find that the breaching party, by their words or actions, has intimated that they no longer intend to bound by the contract in question.
>
> The Plaintiffs submit, and I agree, that their words and actions, taken as a totality, unequivocally suggest that they remained committed to completing their sale of the property to Singh as scheduled, and had not repudiated the agreement.

In addition, the Court did not agree that Singh had a valid claim for prejudice due to financing issues. The Court noted that Singh could have requested removal of the relisting to mitigate his financing issue. Moreover, Singh's conduct, such as requesting a closing date extension and sending requisition letters, suggested acknowledgment of the ongoing agreement until June 30,

[36] *Vanderwal v. Anderson*, [1999] O.J. No. 2646 at para 33 [*Vanderwal*].
[37] *McKee v. Montemarano*, 2008 CanLII 36163 at paras 48-51[*McKee*].
[38] *Ibid* at para 61-63.

2022.[39] The Court also clarified that even if the relisting amounted to repudiation, Singh failed to promptly accept it, thus affirming the agreement through his actions until the afternoon of June 30, 2022, when faced with his inability to complete the transaction.[40]

Concerning the second issue, the Court found that Zoleta did not act in bad faith, nor had an obligation to agree to the extension. The facts show that Zoleta agreed to Singh's request for a twenty-one day extension for closing on the condition of an additional non-refundable deposit. The court also clarified that there was no obligation on Zoleta to accept the closing date extension[41]:

> It is well established that a party to a real estate transaction may, in the absence of any bad faith, insist on strict compliance with the agreed upon terms of the contract, and, accordingly, a party to such an agreement has no freestanding obligation to agree to an extension: *Deangelis v. Weldan Properties Inc.,* 2017 ONSC 4155, at paragraphs 34-42.
>
> There is no evidence that the Plaintiffs acted in bad faith and, accordingly, they had no obligation to agree to terms of the extension requested by Singh.
>
> Singh's nebulous claims that he could have raised the funds from other acquaintances who had money in their bank accounts are not germane, and moreover are not cogent.

Finally, regarding the third issue, the Court found that Singh's lawyer's use of "require" implied a demand rather than a request, indicating Singh's refusal to proceed with the purchase unless the abatement was agreed upon.[42] The Court clarified that Singh's demand "unequivocally communicates" his intention not to purchase the property unless he received the abatement.[43] The Court stated that Singh's letter demonstrated his intention to back out of the agreement, thus repudiating it.[44] The Court found that Singh's insistence on the abatement signaled his inability or unwillingness to proceed with the purchase without it. The Court ultimately accepted Zoleta's rejection of the repudiation and their intention to affirm the agreement.[45]

IV. Takeaway

In the intricate web of contractual relationships, the specter of repudiation and anticipatory breach looms ominously, threatening to unravel carefully crafted agreements. For legal practitioners, understanding the nuances of these concepts is paramount to safeguarding the interests of their clients and ensuring the successful closing of a transaction. So, with the courts in Canada providing

[39] *Ibid* at para 65.
[40] *Ibid* at paras 66-67.
[41] *Ibid* at paras 69-71.
[42] *Ibid* at para 48.
[43] *Ibid* at para 48.
[44] *Ibid* at pars 49.
[45] *Ibid* at para 51.

examples as to what amounts to repudiation of an agreement of purchase and sale, what can lawyers learn from the case of *Zoleta*?

For one, maintaining integrity and commitment is paramount to the success of the deal. It is imperative to ensure that every action and word exchanged during closing negotiations is an exact reflection of the dedication of both parties to see the deal through. It is essential to navigate closings with precision, ensuring that no actions or words convey a desire or intention to back out of the agreement. Parties must unequivocally demonstrate their commitment to completing the transaction at every step until closing, leaving no room for misinterpretation.

Furthermore, as conduct may be construed as a desire to repudiate the agreement, it may be helpful to provide legitimate justification for any conduct that may be interpreted as being inconsistent with contractual compliance. Misrepresentation of intentions can lead to accusations of repudiation, damaging the trust between parties and jeopardizing the transaction. Each word and action should be carefully chosen and evaluated to ensure that it aligns with the overarching goal of completing the transaction. By maintaining transparency and honesty in all communications, parties can mitigate the risk of inadvertently breaching the terms of the agreement.

Additionally, parties must be mindful of how their conduct may be perceived by the court in the event of a dispute. Circumstances surrounding the transaction will be analyzed, and behavior deemed to obstruct the completion of the deal could be interpreted as repudiation.

Zoleta serves as a cautionary tale that highlights the importance for lawyers to be cautious with their words and actions prior to closing. For example, once a purchase agreement is signed, by taking aggressive positions to negotiate additional or better terms for their client, lawyers may put the entire transaction at risk. Such conduct could cause the client to breach the contract and be liable for damages. Therefore, it is crucial for lawyers to strike a balance between advocating for their client's interests and avoiding actions that might put the deal and their clients at risk.

This is all to say that parties and their lawyers must be mindful that every word they say, and every action they take throughout the entire life of a deal is consistent with good faith performance of the contract. Ultimately, parties must be aware that if they desire to see the transaction through, they must not say or do anything that might indicate otherwise, because in the eyes of the court, there are no take-backsies.

TABLE OF AUTHORITIES

JURISPRUDENCE

SECONDARY SOURCES

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Law Society of Ontario | Barreau de l'Ontario

TAB 13

21st Real Estate Law Summit

Commercial Agreement of Purchase and Sale

Robert Schwartz
Gardiner Roberts LLP

Tamara Katz
Gardiner Roberts LLP

April 17, 2024

COMMERCIAL AGREEMENT OF PURCHASE AND SALE

21ST REAL ESTATE LAW SUMMIT

ROBERT SCHWARTZ & TAMARA KATZ

GARDINER ROBERTS LLP

AGREEMENT OF PURCHASE AND SALE[1]

THIS AGREEMENT is made as of the ___ day of ___, 202_.

BETWEEN:

[_____][2]

(the "**Vendor**")

-and-

[_____][3]

(the "**Purchaser**")

WHEREAS:

The Vendor has agreed to sell to the Purchaser and the Purchaser has agreed to purchase from the Vendor the Project on the terms and subject to the conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and agreements set out in this Agreement and for other good and valuable consideration (the receipt and adequacy of which are acknowledged), the parties covenant and agree as follows:

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1 There is no rule of thumb as to whether one starts from the Vendor or the Purchaser's form of agreement. Ideally, it is best if one can work from the form received. On some occasions, the form may prove so deficient or extreme, that a lawyer may decide to start fresh. This should be a "last resort" approach.

2 The vendor may be a nominee or a beneficial owner. In this form, the nominee is the vendor, and the beneficial owner is referenced in the agreement. A purchaser will prefer to have the beneficial owner and the nominee sign the agreement as "co-vendors". Ultimately, provided that the beneficial owner is bound by the agreement, including all representations and warranties and a beneficial transfer is provided on closing, this is largely a distinction without a difference.

3 Often a purchaser will enter into an agreement of purchase and sale as "agent" for "a corporation to be incorporated". While at common law, this practice was problematic, pre-incorporation contracts are now governed by Section 21 of the OBCA and Section 14 of the CBCA. These sections permit the adoption of such an agreement within a "reasonable time". A purchaser wishing to limit its liability via such a strategy should include "and with no personal liability whatsoever" in its signature line. From a vendor's perspective, it is preferable to have an entity as purchaser (either a company or individual) with assignment rights, that may indeed include the release of the named purchaser's covenant on assignment or closing.

ARTICLE 1
INTERPRETATION

1.1 Definitions

The terms defined herein shall have, for all purposes of this Agreement, the following meanings, unless the context expressly or by necessary implication otherwise requires:

"Adjustments" means the adjustments to the Purchase Price for the Project provided for and determined pursuant to Sections 2.6 and 2.7.

"Agreement" means this agreement of purchase and sale and the attached Schedules, as amended from time to time, and "**Article**", "**Section**" and "**Schedule**" mean the specified article, section or schedule, as the case may be, of this Agreement.

"Applicable Laws" means, with respect to any Person, property, transaction or event, all laws, by-laws, rules, regulations, orders, judgments, decrees, decisions or other requirements having the force of law, all codes, directives, policies or guidelines of any Governmental Authority and all common law relating to or applicable to such Person, property, transaction or event.

"Assignment and Assumption of Contracts" means an assignment by the Vendor of all right, title and interest of the Vendor in and under the Assumed Contracts and the New Contracts and all covenants, guarantees and indemnities thereunder, and an assumption by the Purchaser of all obligations, duties and liabilities of the Vendor in and under the Assumed Contracts and the New Contracts and all covenants, guarantees and indemnities thereunder, in the form to be agreed upon by the Vendor and the Purchaser, each acting reasonably.[4]

"Assignment and Assumption of Leases and Rents" means an assignment by the Vendor of all of its right, title and interest in and under the Leases and all covenants, guarantees and indemnities thereunder, and an assumption by the Purchaser of all obligations, duties and liabilities of the Vendor in and under the Leases and all covenants, guarantees and indemnities thereunder, in the form to be agreed upon by the Vendor and the Purchaser, each acting reasonably, which shall include, without limitation, an indemnity by the Vendor in favour of the Purchaser (which indemnity shall expire and be of no further force and effect following the Survival Date)[5] in respect of Claims against the Purchaser due to any default by the Vendor under the Leases, occurring prior to Closing and an indemnity by the Purchaser in favour of the Vendor in respect of Claims against

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[4] To the extent that contracts are assumed, the purchase should request an indemnity in the same form as granted with respect to the assignment of leases. The purchaser is far more likely to make a claim under such an indemnity than will the vendor and it is in the purchaser's favour to include such language.

[5] The vendor will argue that the indemnities should expire as at the survival date, as do the representations and warranties. The purchaser will argue that the vendor should be willing to provide an unlimited indemnity for its actions / inactions during the term of the lease. Note that this language limits the indemnities to Claims that result from a default as opposed to any matter. Some vendors will also attempt to further limit their indemnity so that it doesn't relate to things like repair obligations in respect of matters that existed prior to closing in respect of which the purchaser would have satisfied itself.

the Vendor due to any default by the Purchaser, its nominee or any successor landlord, under the Leases, occurring on or after Closing.

"Assumed Contracts" has the meaning given to it in Section 7.3.[6]

"Beneficial Owner" means [_____], by its general partner [_____].

"Buildings" means all buildings, structures, erections, improvements and appurtenances located on, in or under the Lands; and "**Building**" means any one of the Buildings.

"Business Day" means any day other than a Saturday, Sunday or statutory or civic holiday in the Province of Ontario.

"Chattels" means all furniture, equipment, carpets, blinds, maintenance and caretaking equipment, supplies and other personal property and chattels, if any, owned by the Vendor, situate in any Buildings and used in the operation, administration and management of any Building, excluding all computers, accounting systems and software, wherever located, that belong to the Vendor or their property manager that are used in connection with the Project.[7]

"Claim" means any claim, demand, action, cause of action, damage, loss, cost, liability or expense, including reasonable professional fees and all costs incurred in investigating or pursuing any of the foregoing or any proceeding relating to any of the foregoing.

"Closing" means the closing of the transaction of purchase and sale of the Project contemplated by this Agreement, including the satisfaction of the Purchase Price for the Project and the electronic delivery of the Closing Documents for the Projectat 3:30 p.m. (Toronto time)[8] on the Closing Date.

"Closing Date" means the [___] days following delivery by the Purchaser of the Due Diligence Termination Waiver.[9]

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6 A vendor may wish to include mandatory assumed contracts, such as elevator maintenance or security contracts which may be costly to terminate on relatively short notice; the purchaser should resist such inclusion.

7 The purchaser may wish to request a schedule of all chattels being transferred so as to provide certainty. A vendor will likely resist this request as too burdensome, especially within the context of a commercial/retail building (as opposed to, for example, an apartment building, where it is prudent to enumerate the appliances etc.). A vendor may wish to specifically exclude computer, accounting systems and software. If there is other machinery / equipment that either party wishes to specifically exclude or include, this should be explicitly set forth on a schedule to avoid complications at or after closing. If an industrial plant is being sold, containing a lot of equipment, some of which might be construed as fixtures, it is prudent to clarify what is included and what is excluded.

8 The purchaser will want this time to be as close to end of day as possible so as to enable it to receive necessary funds from a lender. A vendor will prefer to have an earlier closing time so as to allow for delays in the delivery of funds and to avoid any per diem amounts due on debt that is being paid out of the closing proceeds.

9 The purchaser will prefer that the Closing Date be premised on the later of the delivery of the waiver and the Due Diligence Date so as to permit additional time for closing. A vendor will argue that the purchaser has the ability to control the date of the delivery of the waiver and, if it has completed its requisite review, closing should follow promptly thereafter.

"Closing Documents" means the agreements, instruments and other documents to be delivered by the Vendor to the Purchaser or the Purchaser's Solicitors pursuant to Section 6.1 and the agreements, instruments and other documents to be delivered by the Purchaser to the Vendor or the Vendor's Solicitors pursuant to Section 6.2.

"Contracts" means: (i) those contracts and agreements (other than the Leases) in existence on the date of this Agreement with arms' length third parties entered into by the Vendor, or by which it is bound, in connection with the maintenance, repair, operation, cleaning, security, fire protection, servicing or any other service contracts in connection with the Property[10], and (ii) all amendments, modifications, renewals or supplements to the contracts and agreements described in item (i) above, in each case, to the extent in existence on the date of this Agreement.

"Damage Deduction" has the meaning given to it in Section 3.3.

"Deposit" has the meaning given to that term in Section 2.3.2.

"Due Diligence Date" means [__] day following the Execution Date.[11]

"Due Diligence Documents" means the documents and information relating to the Project that are described in Schedule "B" hereto, to the extent within the Vendor's possession or control.[12]

"Due Diligence Termination Waiver" has the meaning given to it in Section **3.2**.

"Encumbrance" means any lien, charge, mortgage, encumbrance, easement, right-of-way, or restrictive covenant registered against the Vendor's freehold interest in the Lands.[13]

"Environmental Laws" means all Applicable Laws concerning pollution or protection of the natural environment or otherwise relating to the environment or occupational health or safety matters, including Applicable Laws pertaining to (i) reporting, licensing, permitting, investigating and remediating the presence of Hazardous Substances, and (ii) the storage, generation, use, handling, manufacture, processing, transportation, treatment, Release and disposal of Hazardous Substances.

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[10] The purchaser should seek to add "ownership, development, construction, management" to this list so as to make it as broad as possible.

[11] The purchaser should argue that the Due Diligence Date should be based on the delivery of the Due Diligence Documents as it cannot meaningfully start its review of the property without same. The vendor will prefer the certainty of a date based on the Execution Date. A compromise may be to require a certificate from the purchaser when the Due Diligence Documents have been delivered so as to provide certainty as to the Due Diligence Date.

[12] The vendor will – and should – insist that all deliveries required be limited to those in its possession or control.

[13] The purchaser should seek to broaden this definition so as to include, pledges, security agreements, security interest, leases, subleases, title retention agreements, encroachment, option or adverse Claim of any kind or character whatsoever and to remove the reference to registered instruments.

"Estoppel Certificate" means a certificate in the form prescribed by the particular Lease, or if not so prescribed, in the form of Schedule "D" attached, or in a form customarily provided by a national or regional Tenant.[14], [15]

"Estoppel Date" has the meaning given to it in Section 5.1.4.

"**Execution Date**" means the date on which the last of the Vendor and the Purchaser have executed this Agreement and delivered it to the other.

"**Existing Leases**" means all executed offers to lease, agreements to lease, leases, renewals of leases, tenancy agreements, rights of occupation, licenses or other occupancy agreements granted by or on behalf of the Vendor, or its predecessors in title, to possess or occupy space within the Property or any part thereof in existence as of the date of this Agreement, together with all security, guarantees and indemnities of any Tenant's obligations thereunder, in each case, as amended, extended, assigned, renewed or otherwise modified to the date of this Agreement and including any parking and storage space leases in existence as of the date of this Agreement. **"Governmental Authority"** means any government, regulatory authority, governmental department, agency, commission, board, tribunal or court or other law, rule or regulation-making entity having jurisdiction on behalf of any nation, province or state or other subdivision thereof or any municipality, district or other subdivision thereof.

"Hazardous Substances" means any substance or material that is prohibited, controlled or regulated by any Governmental Authority pursuant to Environmental Laws, including contaminants, pollutants, dangerous substances, dangerous goods, liquid wastes, industrial wastes, hauled liquid wastes, radioactive wastes, toxic substances, hazardous wastes, hazardous materials or hazardous substances.

"HST" means the harmonized sales tax payable pursuant to the *Excise Tax Act* (Canada).

"including" means including without limitation.

"Initial Deposit" has the meaning given to that term in Section 2.3.1.

"Inspection Period" has the meaning given to that term in Section3.1.

"Interim Period" means the period between the Execution Date and the Closing Date.

"Landlord Certificates" has the meaning given to it in Section 7.4.

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[14] The purchaser should delete the reference to "a form customarily provided by a national or regional Tenant" and replace it with "a form specified in a particular tenant's lease.

[15] See Section 5.1.4 for further requirements in connection with Estoppel Certificates.

"Lands" means the lands and premises described in Schedule "A" and outlined in black in Schedule A-1, together with and subject to all easements, rights-of-way and other rights appurtenant thereto.[16]

"Leases" means: (i) the Existing Leases; and (ii) the New Leases; and **"Lease"** means any one of the Leases.

"LL Permits" has the meaning given to it in Section 7.8.

"Major Tenants" means [_____].[17]

"Minimum Estoppels" has the meaning given to it in Section 5.1.4.[18]

"Named Agents" has the meaning given to it in Section 8.13.

"New Contracts" means (i) all contracts in connection with the ownership, development, construction, management, maintenance, repair, operation, cleaning, security, fire protection, servicing or any other aspect of the Property, in each case entered into at any time after the Due Diligence Date in accordance with the provisions of Section 7.1.3; (ii) any and all guarantees, indemnities or other agreements relating to the agreements referred to in (i) of this definition of "**New Contracts**"; (iii) any modifications, renewals or extensions of Contracts entered into at any time after the Due Diligence Date in accordance with the provisions of Section 7.1.33; and (iv) all assignments entered into at any time after the Due Diligence Date in accordance with the provisions of Section 7.1.3. **"New Contract"** means any one of the New Contracts.

"New Leases" means: (i) all executed offers to lease, agreements to lease, leases, renewals of leases, tenancy agreements, rights of occupation, licenses or other occupancy agreements granted by or on behalf of the Vendor to possess or occupy space within the Property or any part thereof in each case entered into at any time during the Interim Period in accordance with the provisions of Section 7.1.2; (ii) any and all guarantees, indemnities or other collateral agreements relating to offers to lease, agreements to lease, leases, renewals of leases, tenancy agreements, rights of occupation, licenses or other occupancy agreements referred to in item (i) of this definition of "**New Leases**"; and (iii) any renewals or extensions of Leases in existence as of the date of this Agreement, entered into at any time during the Interim Period in accordance with the provisions of Section 7.1.2; and (iv) all assignments entered into during the Interim Period in accordance with the provisions of Section 7.1.2. **"New Lease"** means any one of the New Leases.

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[16] Purchaser should always try to attach a survey or sketch, showing the lands. On occasion, a vendor might leave out a portion of the lands in the description; of greater concern is that sometimes an adjacent undeveloped parcel is intended to be included and without a survey or sketch attached, this can be more easily overlooked. As my first and most important mentor taught me: "you're not buying a legal description!".

[17] The definition of "Major Tenants" should be negotiated by the parties – a purchaser will want to include as many tenants as possible, with particular focus on those tenants who are in possession of large or expensive spaces; a vendor will want to limit this definition as much as possible.

[18] The definition of "Minimum Estoppels" should be negotiated by the parties – a purchaser will want to include as many tenants as possible; a vendor will want to limit this definition as much as possible. The definition also goes further than the number of estoppels obtained.

"Non-Assignable Rights" has the meaning given to it in Section 7.6.

"**Notice**" has the meaning given to it in Section 8.13.1.

"Permitted Encumbrances" means those Encumbrances and other matters affecting title to the Property as set out in Schedule "C", and any other Encumbrance which has been consented to or accepted by the Purchaser in writing.

"Person" is to be broadly interpreted and includes an individual, a corporation, a partnership, a trust, an unincorporated organization, the government of a country or any political subdivision thereof, or any agency or department of any such government, and the executors, administrators or other legal representatives of an individual in such capacity.

"Project" means:

(a) the Property;

(b) the Leases, together with all rents, income, benefits and other advantages to be derived therefrom;

(c) the Assumed Contracts and New Contracts; and

(d) the Chattels.

"Property" means the Vendor's fee simple interest in the Lands and the Buildings, known municipally as [_____], [_____] Ontario.

"**Purchaser**" means [_____] and its successors and permitted assigns.

"Purchase Price" means the purchase price for the Project as set out in Section 2.2

"Purchaser's Solicitors" means [_____] and/or such other firm or firms of solicitors or agents as are retained by the Vendor from time to time and Notice of which is provided to the Purchaser.

"Release" has the meaning given to it under any applicable Environmental Laws, including any release, spill, leak, pumping, pouring, emission, emptying, discharge, injection, escape, leaching, disposal, dumping, deposit, spraying, burial, abandonment, incineration, seepage or placement.

"Representative" of any Person means a director, officer, employee, agent, solicitor, accountant or other advisor or representative of such Person.

"Second Deposit" has the meaning given to that term in Section 2.3.2.

"**Survival Date**" has the meaning given to it in Section 4.6.

"Tenant Receivables" has the meaning given to it in Section 2.8.

"Tenants" means all Persons having a right to use or occupy any part of the Property pursuant to a Lease and **"Tenant"** means any one of the Tenants.

"Vendor" means [_____] and its successors and assigns.

"Vendor's Solicitors" means [_____] and/or such other firm or firms of solicitors or agents as are retained by the Vendor from time to time and Notice of which is provided to the Purchaser.

"Warranties" means all warranties and guarantees entered into prior to the date of this Agreement, if any, remaining in existence, in respect of the construction, the condition and the existing operation of the Buildings forming part of the Property, to the extent the same are assignable.

"Work Notice" has the meaning given to it in Section 7.2.

1.2 Business Days

Where anything is required to be done under this Agreement on a day that is not a Business Day, then the day for such thing to be done shall be the next following Business Day.

1.3 Schedules

The following Schedules are attached to and form part of this Agreement:

Schedule A - Legal Description of Lands and Buildings
Schedule B - Due Diligence Documents
Schedule C - Permitted Encumbrances
Schedule D - Estoppel Certificate

1.4 Interpretation

1.4.1 Headings and Table of Contents. The division of this Agreement into Articles and Sections, the insertion of headings, and the provision of any table of contents are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

1.4.2 Number and Gender. Unless the context requires otherwise, words importing the singular include the plural and vice versa and words importing gender include all genders.

1.4.3 Entire Agreement. This Agreement and all of the Schedules to this Agreement, together with any other agreements, instruments, certificates and other documents contemplated to be executed and delivered pursuant to this Agreement, constitute the entire agreement between the parties with respect to the subject matter of this Agreement and, except as stated in this Agreement and any of the Schedules to this Agreement and the other agreements, instruments, certificates and other documents to be executed and delivered pursuant to this Agreement, contain all of the representations, undertakings and agreements

of the parties. This Agreement supersedes all prior negotiations or agreements between the parties, whether written or verbal, with respect to the subject matter of this Agreement.

1.4.4 Currency. All references to money shall refer to Canadian funds. All certified cheques or bank drafts to be tendered pursuant to this Agreement shall be drawn on one of the six largest Schedule I Canadian chartered banks.

1.4.5 Severability. If any provision contained in this Agreement or its application to any Person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such provision to Persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected, and each provision of this Agreement shall be separately valid and enforceable to the fullest extent permitted by law.

1.4.6 Statute References. Any reference in this Agreement to any statute or any section thereof shall, unless otherwise expressly stated, be deemed to be a reference to such statute or section as amended, restated or re-enacted from time to time.

1.4.7 Time. Notwithstanding that interest will accrue on any late payments hereunder, time shall be of the essence of this Agreement. Except as expressly set out in this Agreement, the computation of any period of time referred to in this Agreement shall exclude the first day and include the last day of such period. The time limited for performing or completing any matter under this Agreement may be extended or abridged by an agreement in writing by the parties or by their respective solicitors.

1.4.8 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the applicable laws of Canada.

1.4.9 Accounting Principles. All references to generally accepted accounting principles shall be references to the principles recommended from time to time in the Handbook of the Canadian Institute of Chartered Accountants, and all accounting terms not otherwise defined in this Agreement shall have the meanings given to them in accordance with Canadian generally accepted accounting principles.

1.4.10 Liability of Officer. If any statement is made in this Agreement or in any document or instrument contemplated to be delivered in this Agreement by any individual who is an officer of any party hereto, such statement shall be deemed to have been made in his or her capacity as an officer of such party and shall be made without personal liability to that individual.

ARTICLE 2
AGREEMENT OF PURCHASE AND SALE

2.1 Agreement of Purchase and Sale

The Vendor hereby agrees to sell, transfer, assign, set over and convey the Project to the Purchaser, and the Purchaser hereby agrees to purchase, acquire and assume the Project from the Vendor for the Purchase Price, on and subject to the terms and conditions of this Agreement.

2.2 Purchase Price

The purchase price for the Project (the "**Purchase Price**") shall be [_____] Dollars ($[_____].00) plus applicable HST.

2.3 Payment of Purchase Price

The Purchase Price payable by the Purchaser for the Project, subject to the Adjustments, shall be paid and satisfied as follows:

2.3.1 within two (2) Business Days after the Execution Date, by payment to the Vendor's Solicitors by bank draft or wire transfer to the Vendor's Solicitor's trust account, the sum of $[_____].00 as a deposit (the "**Initial Deposit**") to be held in trust by the Vendor's Solicitors pending completion or other termination of this Agreement and to be credited on account of the Purchase Price on Closing;

2.3.2 within two (2) Business Days after delivery by the Purchaser or Purchaser's Solicitors to the Vendor or Vendor's Solicitors of the Due Diligence Termination Waiver, by payment to the Vendor's Solicitors by bank draft or wire transfer to the Vendor's Solicitor's trust account, the sum of $[_____].00 as a further deposit (the "**Second Deposit**") to be held in trust by the Vendor's Solicitors pending completion or other termination of this Agreement and to be credited on account of the Purchase Price on Closing. For the purposes of this Agreement, the expression "**Deposit**" means the Initial Deposit together with the Second Deposit if such Second Deposit has been paid; and

2.3.3 as to the balance of the Purchase Price, subject to the Adjustments, by wire transfer to the Vendor's Solicitor's trust account, on the Closing Date, or as the Vendor may direct in writing, such funds not to be received later than 3:30 p.m. (Toronto time).

2.4 Interest on Deposit

Upon the delivery to, and receipt of the Deposit by the Vendor's Solicitors, the Vendor's Solicitors shall hold and invest the Deposit in accordance with the terms of this Section 2.4.The Vendor's Solicitors are hereby irrevocably authorized and directed by the parties hereto to invest the Deposit in an interest-bearing term certificate or trust account pending the Closing Date or sooner termination of this Agreement and to hold the Deposit in accordance with the provisions of this Agreement.

The Deposit, together with all interest earned thereon, shall be held by the Vendor's Solicitors, pending completion of the transaction contemplated by this Agreement or earlier termination of this Agreement and shall be credited against the Purchase Price and paid to the Vendor on Closing. If the transaction contemplated by this Agreement is not completed for any reason, other than as a result of the breach or default of the Purchaser pursuant to this Agreement, the Deposit, including interest thereon, shall be forthwith returned to the Purchaser. If the transaction contemplated by this Agreement is not completed[19] as a result of the default or breach of the Purchaser pursuant to

[19] The purchaser should require that the word "solely" be inserted here.

this Agreement, the Deposit, including all interest thereon, shall be forfeited to the Vendor, as its only remedy against the Purchaser for the Purchaser's default or breach.[20] If the transaction is not completed as a result of the default or breach of the Vendor, the Purchaser's remedy against the Vendor shall be limited to a claim in damages not to exceed the sum of the Deposit that has been paid to the Vendor, except if the Vendor is in default of its obligation under Section 7.10and it terminates this Agreement without legal basis, in which case the foregoing limitation shall not apply.[21], [22]

2.5 Obligations of Deposit Trustee

In holding and dealing with the Deposit and interest earned thereon pursuant to this Agreement, the Vendor's Solicitors are not bound in any way by any agreement other than this Agreement and the Vendor's Solicitors shall not be considered to assume any duty, liability or responsibility other than to hold the Deposit and interest in accordance with the provisions of this Agreement and to pay the Deposit and interest thereon to the Person becoming entitled thereto in accordance with the terms of this Agreement. Provided, however, in the event of a dispute between the parties as to the entitlement to the Deposit and any interest earned thereon, the Vendor's Solicitors may, in its sole and unfettered discretion, pay the Deposit and interest earned thereon in dispute into court, whereupon the Vendor's Solicitors shall have no further obligations relating to the Deposit and any interest earned thereon. The Vendor's Solicitors will not, under any circumstances, be required to verify or determine the validity of any notice or other document whatsoever delivered to the Vendor's Solicitors and the Vendor's Solicitors are hereby relieved of any liability or responsibility for any loss or damage which may arise as a result of the acceptance by the Vendor's Solicitors of any such notice or other document in good faith (provided that the Vendor's Solicitors shall not be relieved of any liability or responsibility for any loss or damage which may arise if the Vendor's Solicitors releases the Deposit or any interest earned thereon to a party hereto after having received prior written notice from the other party claiming entitlement to such Deposit or advising of a dispute with respect to such entitlement).

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[20] The purchaser should insist that the retention of the deposit is the only remedy of the vendor where there is a purchaser default. In the event that this language is not included, the purchaser could be responsible for damages well in excess of the deposit – for instance in the event of a market crash. This is preferable (from purchaser's point of view) to relying on using a "shell" acquisition company as purchaser, as it leaves open to the vendor, trust and agency arguments.

[21] The provisions addressing the limitations of claims as against the vendor are a hot topic. Many vendors will try to limit the remedies of the purchaser to the amount of the deposit under the theory that each party should have the same amount at risk. The purchaser should reject such attempts, as the purchaser will be required to jump through many more hoops than the vendor in the event of a claim. In the event that such a cap is agreed to, the purchaser should carve out a non-marketing clause so that the vendor does not have incentive to negotiate a purchaser price with a third party that accounts for the limited loss of the amount of the deposit. Currently, the market seems to be driving this provision. In fact, it is becoming more commonplace for vendors (particularly large institutional ones) to attempt to limit their post-closing liability as well, sometimes to the amount of the deposit.

[22] A solicitor acting for the purchaser should be careful that the limitation language in the deposit section does not extend to post-closing damages (i.e. for a failure to comply with a covenant or a breach of a representation or warranty).

2.6 Adjustments

2.6.1 Adjustment Date. Adjustments for the Project shall be made as of the Closing Date on an accrual basis. Except as otherwise provided in this Agreement, the Vendor shall be responsible for all expenses and shall be entitled to all revenues accrued with respect to the Project for the period ending on the day before the Closing Date. Except as otherwise provided in this Agreement, the Purchaser shall be responsible for all expenses and shall be entitled to all revenues accruing with respect to the Project for the period from and including the Closing Date. The Closing Date shall be for the account of the Purchaser.

2.6.2 Adjustment Items. The Adjustments for the Project shall include all current rents under the Leases, including current basic rent and current additional rent and other charges for the Property under the Leases, prepaid rents under the Leases, prepaid monthly parking charges, security deposits under the Leases, realty taxes, local improvement rates and charges, water and assessment rates, prepaid amounts under Assumed Contracts and New Contracts, current amounts payable under Assumed Contracts and New Contracts, operating costs, utilities, utility deposits, fuel, licenses necessary for the operation of the Property, and all other items normally adjusted between a vendor and purchaser in respect of the sale of a property similar to the Property. In addition, the Adjustments for the Project shall include the other matters referred to in this Agreement stated to be the subject of adjustment and, notwithstanding the foregoing, shall exclude the other matters referred to in this Agreement stated not to be the subject of adjustment.

2.6.3 Statement of Adjustments. A statement of Adjustments shall be delivered to the Purchaser by the Vendor at least four (4) Business Days prior to the Closing Date and shall have annexed to it details of the calculations used to arrive at all debits and credits on the statement of Adjustments. The Vendor shall give the Purchaser's Representatives reasonable access to all working papers and back-up materials in order to verify the statement of Adjustments.

2.6.4 Readjustment. If the final cost or amount of an item which is to be adjusted has not been determined at Closing, then an initial calculation or adjustment for such item shall be made at Closing, such amount to be estimated by the Vendor and agreed to by the Purchaser, each acting reasonably, as of the Closing Date on the basis of the best evidence available at Closing as to what the final cost or amount of such item will be provided that in no case will the Vendor receive a credit for an amount that has not yet been paid by a Tenant. In each case, when such cost or amount is determined (such determination to be made as soon as possible and in any event prior to the first anniversary of Closing), including where such item was omitted from the statement of adjustments through inadvertence or otherwise, the Vendor or Purchaser, as the case may be, shall, within 30 days of determination, provide a complete statement thereof to the other and within 30 days thereafter, the Vendor and the Purchaser shall make a final adjustment as of the Closing Date for the item in question. In the absence of agreement by the parties, the final cost or amount of an item shall be determined by independent chartered accountants, acceptable to the Vendor and the

Purchaser, acting reasonably, with the cost of such chartered accountants' determination being shared equally between the Vendor and the Purchaser.[23]

2.6.5 Tenant Recoveries. Operating and other costs recoverable from Tenants (including real property taxes) shall be adjusted as soon as possible after Closing upon receipt of the necessary information from the Tenants and in accordance with the requirements of the Leases. Such adjustment of operating and other costs recoverable from Tenants will be done on a pro rata basis between the Vendor and the Purchaser with such proration to be based on the number of days in each reporting period that are attributable to the ownership of the Property by the Vendor and the Purchaser, respectively. For certainty, the Vendor and Purchaser shall adjust, on Closing, any additional rent that is payable by Tenants monthly.[24]

2.6.6 Percentage Rent for the Leases. For each of the Leases in existence on the Closing Date, after the end of the percentage rent year of each Tenant in which the Closing occurs, an adjustment shall be made on account of percentage rent, if any, payable under each such Lease for such Tenant's percentage rent year. The adjustment on account of percentage rent applicable to the Leases shall be calculated as follows:

2.6.6.1 The Purchaser's share of the percentage rent for the Leases shall be the aggregate percentage rent payable by each Tenant pursuant to its Lease for the percentage rent year in which the Closing occurs multiplied by a fraction, the numerator of which is the number of days from and including the Closing Date to the last day of such percentage rent year and the denominator of which is 365 (or 366, as the case may be) (the amount of the Purchaser's share so determined being referred to as the "**Purchaser's Pro-Rata Share**");

2.6.6.2 The Vendor's share of the percentage rent for the Leases payable pursuant to each Lease, shall be determined by deducting the Purchaser's Pro-Rata Share from the amount of percentage rent payable by the Tenant pursuant to its Lease for the percentage rent year in which the Closing occurs (the amount of the Vendor's share so determined being referred to as the "**Vendor's Pro-Rata Share**");

2.6.6.3 If the Vendor has collected or received payments on account of percentage rent for the Leases for the applicable percentage rent year from a Tenant under a Lease in excess of the Vendor's Pro-Rata Share, then the Vendor shall pay to the Purchaser the amount of that excess; and

2.6.6.4 If the Purchaser has collected or received payments on account of percentage rent for the Leases for the applicable percentage rent year from a Tenant

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[23] The parties may wish to limit the right of readjustment to prior to the Survival Date so as to close the door to any future adjustments. Most readjustment claims should be able to be resolved well prior to a 1 year time frame.

[24] Some vendors will try to adjust on closing for under recoveries of operating costs. Purchasers should resist this as it is tantamount to adjusting for arrears, which should not be done.

under a Lease in excess of the Purchaser's Pro-Rata Share, then the Purchaser shall pay the Vendor the amount of that excess.

The adjustments of percentage rent payable under any Lease will be made within 30 days of the end of the relevant percentage rent year of the particular Tenant.

2.7 Specific Adjustment Items

2.7.1 Tax Appeals and Refunds. To the extent the Purchaser receives payment of any refund or reassessment of realty taxes for any period up to but not including the Closing Date, the Purchaser shall hold the Vendor's interest in such refund or reassessment payment in trust for the Vendor and shall deliver to the Vendor all such payment cheques forthwith upon receipt; provided that to the extent any refund or reassessment is payable to Tenants pursuant to the provisions of their respective Leases, the Purchaser shall remit the appropriate amount, less any costs incurred by the Vendor with respect thereto, to the Tenants. Similarly, to the extent the Purchaser is reassessed and is required to pay an increase in taxes for any period up to but not including the Closing Date, the Vendor shall be responsible for and shall pay all of such tax increase, but only to the extent such amount is not recoverable from Tenants pursuant to the provisions of their respective Leases. [25]

2.7.2 Third Party Leasing Commissions. The Vendor shall be responsible for payment of all leasing commissions in respect of Existing Leases, but excluding those payable under renewals or extensions of the Existing Leases after the Execution Date or amendments to the Existing Leases made after the Execution Date (which if made after the Execution Date and prior to the Due Diligence Date, have been disclosed to the Purchaser and if made thereafter and prior to the Closing Date, have been approved by the Purchaser in accordance with Section 7.1.2).[26] The Purchaser shall be responsible for payment of all leasing commissions under all other Leases, including under New Leases entered into after the Execution Date pursuant to Section 7.1.2 and renewals, extensions and amendments of Existing Leases after the Execution Date.

2.7.3 Tenant Inducements and Allowances. The Vendor shall be responsible for payment of all tenant inducements and tenant allowances in respect of the Existing Leases, but excluding those payable under renewals or extensions of the Existing Leases after the Execution Date or amendments to the Existing Leases made after the Execution Date, (which if made after the Execution Date and prior to the Due Diligence Date, have been disclosed to the Purchaser and if made thereafter and prior to the Closing Date, have been approved by the Purchaser in accordance with Section 7.1.2).[27] The Purchaser shall be responsible for payment of all tenant inducements and tenant allowances under all other Leases, including

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[25] See Rider 1 attached for a provision that a purchaser should ask for, which gives them control of tax appeals.

[26] The purchaser may attempt to negotiate that it is only responsible for such expenses incurred after the Due Diligence Date, since it only had approval rights from and after that date. The vendor will respond that the purchaser had notice of the expenses prior to waiver and, as such, controls its responsibility therefor.

[27] The purchaser may attempt to negotiate that it is only responsible for such expenses incurred after the Due Diligence Date, since it only had approval rights from and after that date. The vendor will respond that the purchaser had notice of the expenses prior to waiver and, as such, controls its responsibility therefor.

under New Leases entered into after the Execution Date pursuant to Section 7.1.2 and renewals, extensions and amendments of Existing Leases after the Execution Date. Notwithstanding the foregoing, the Purchaser shall not receive credit in respect of any free, deferred or reduced rent or other inducements or entitlements that have been or will be extended to or to which any Tenant is entitled as a result of the COVID-19 pandemic, provided same are disclosed to the Purchaser prior to the Due Diligence Date.

2.7.4 Initial Landlord's Work. The Vendor shall be responsible for the payment of all costs and expenses of any initial landlord's work required pursuant to the Existing Leases, but excluding those payable under renewals or extensions of the Existing Leases after the Execution Date or amendments to the Existing Leases made after the Execution Date (which if made after the Execution Date and prior to the Due Diligence Date, have been disclosed to the Purchaser and if made thereafter and prior to the Closing Date, have been approved by the Purchaser pursuant to Section 7.1.2).[28] For greater certainty, the Purchaser shall be responsible for work relating to ongoing landlord obligations under the Existing Leases and for initial landlord's work and the cost thereof in respect of all other Leases, including under New Leases entered into after the Execution Date pursuant to Section 7.1.2.

2.8 Tenant Receivables

Any rental arrears and accounts receivable and any other Claims against a Tenant payable or accrued prior to the Closing Date and unpaid on the Closing Date (the "**Tenant Receivables**") shall remain the property of the Vendor and there shall be no adjustment in favour of the Vendor on the statement of Adjustments for such amounts.[29] After the Closing Date, the Vendor shall have the right to recover from Tenants the Tenant Receivables but in no event shall be permitted to file a petition in bankruptcy against any Tenant or to proceed to any seizure of the Tenant's assets which are situated within such Tenant's premises in the Property in respect of such arrears of rent. The Purchaser shall provide reasonable assistance to and cooperation with the Vendor in its efforts to collect the Tenant Receivables. Any amount of rent received or collected by the Purchaser after the Closing Date from a Tenant that owes Tenant Receivables to the Vendor shall be credited, first, to current month's rent, second, to any arrears of rent owing to the Purchaser and accruing from and after the Closing Date, and third, to any Tenant Receivables owed to the Vendor. Notwithstanding the foregoing, the Purchaser agrees that in the event the Closing Date occurs prior to the fifth day of the month, the Vendor shall be entitled to a credit for its share of the rent payable by any Tenants but uncollected for the month of Closing, provided such Tenant is not in arrears of rent for the previous month. No such credit will be available to the Vendor for such uncollected rent if Closing occurs on or after the fifth day of the month or in respect of any Tenant who is in

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[28] The purchaser may attempt to negotiate that it is only responsible for such expenses incurred after the Due Diligence Date, since it only had approval rights from and after that date. The vendor will respond that the purchaser had notice of the expenses prior to waiver and, as such, controls its responsibility therefor.

[29] The vendor may wish to assign the tenant receivables to the purchaser under the theory that the vendor will not have an opportunity to appropriately seek remedies for such receivables. The purchaser should refuse such assignment as it is not responsible for defaults occurring prior to its ownership.

arrears of rent for the previous month.[30] Following Closing, upon the request of the Vendor, the Purchaser shall provide receivables reports to the Vendor to enable the Vendor to determine the status of the Tenant Receivables, until the earlier of: (i) the Tenant Receivables being paid in full; and (ii) one (1) year following the Closing Date. The foregoing provision shall survive closing.

The Purchaser acknowledges that as at the Execution Date, certain Tenants have been granted rent deferrals as a result of the Covid-19 Pandemic, and that the Vendor may grant further deferrals during the Interim Period, subject to complying with Section 7.1.2, pursuant to which it will be required to disclose any such deferrals to the Purchaser and seek the Purchaser's approval in respect of any such deferrals that are granted after the Due Diligence Date. The Purchaser acknowledges and agrees that any rent disclosed in the List of Deferred Rent, in respect of the period prior to Closing, shall remain the property of the Vendor and shall be paid to the Vendor by the Purchaser upon its receipt of same, in the same manner as are Tenant Receivables, mutatis mutandis.

ARTICLE 3
DUE DILIGENCE AND INSPECTIONS

3.1 Access to Information and Inspection Period

On or before the 5th Business Day after the Execution Date, to the extent not already delivered or made available by the Vendor to the Purchaser, and to the extent in its possession, the Vendor shall, at its option, either deliver or make available to the Purchaser, for inspection and copying at the Vendor's or Vendor's property manager's office, or for downloading from a "virtual" (online) data room, the Due Diligence Documents. However, with respect to Tenant files and plans and drawings, the Vendor shall provide the Purchaser with access to review same at its property manager's office.

The Purchaser and its representatives shall have a period (the "**Inspection Period**") commencing on the Execution Date and expiring at 5:00 p.m. (Toronto time) on the Due Diligence Date:

(a) to review the terms and conditions of the Leases, the Contracts and other Due Diligence Documents;

(b) to have access to the Property, subject to the rights of or restrictions in favour of the Tenants and upon reasonable notice and during regular business hours, at all reasonable times, for the purposes of carrying out reasonable physical inspections thereof and to carry out prudent tests and inspections of the Property including, without limitation:

(i) its structure and the electrical, mechanical, plumbing, heating, air-conditioning, ventilating, garbage disposal, fire alarm, security and other systems servicing the Buildings; and

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[30] As a general rule, it is best not to schedule real estate closings for the beginning of a month. If such scheduling is unavoidable, the parties should clearly identify how rents for the month of closing are to be handled. What is provided for here should in most instances be rejected by a purchaser.

(ii) the surface and sub-surface (including ground water) testing of the Lands by means of such soil tests, bore holes, test pits and other excavation as the Purchaser deems prudent, acting reasonably; and

(c) for the purpose of ensuring compliance of the Property with Applicable Laws, including Environmental Laws.

Notwithstanding anything to the contrary contained herein, the Purchaser shall not be permitted to carry out any intrusive testing or investigations without the prior written consent of the Vendor, which consent shall not be unreasonably withheld or delayed and which testing and investigations shall be carried out in accordance with the conditions and requirements of the Vendor and, at the option of the Vendor, be carried out in the presence of a representative of the Vendor. Furthermore, the Purchaser shall not directly or indirectly contact any of the Tenants without providing at least 3 Business Days' written notice to the Vendor and an opportunity for the Vendor or its representative to be present at any such meeting (including any virtual meetings) with a Tenant or to participate in any telephone, email or other conversation or communication with the Tenant, all of which shall be conducted during regular business hours. The Purchaser shall not conduct any meetings with any Tenants after the Due Diligence Termination Waiver has been delivered by the Purchaser.[31]

During the Inspection Period, the Purchaser, in its sole and unfettered discretion, may elect to cancel this Agreement in accordance with Section 3.2.

3.2 Cancellation during Inspection Period

If the Purchaser is not satisfied, in its sole and unfettered discretion, with the results of any test, review or inspection carried out in respect of the Project or if the Purchaser has not received the approval of its investment committee, the Purchaser may elect to cancel this Agreement at any time during the Inspection Period by delivery of written notice from the Purchaser or Purchaser's Solicitors to the Vendor or the Vendor's Solicitors to this effect. Upon delivery of such written notice, this Agreement will be null and void, save and except for the obligations contained in Sections 3.3 and 3.5, and the Deposit, together with interest earned or accrued thereon, if any, will be returned to the Purchaser without deduction, except the Damage Deduction, if applicable. If no such notice is delivered to the Vendor or the Vendor's Solicitors before the end of the Inspection Period, the Purchaser will be deemed to have elected to terminate this Agreement and the Deposit, together with interest earned or accrued thereon, will be returned to the Purchaser without set-off or deduction, except the Damage Deduction, if applicable. The Purchaser may waive its foregoing right to terminate this Agreement by delivering or by having the Purchaser's Solicitors deliver written notice to this effect to the Vendor or the Vendor's Solicitors prior to the end of the Inspection Period (the "**Due Diligence Termination Waiver**").

[31] The purchaser should seek to delete this particularly where insufficient estoppel certificates are to be provided.

3.3 Access to Property until Closing and Indemnity

Subject to the rights of the Tenants and the provisions of Section 3.1, any tests and inspections permitted hereunder will be conducted in such manner so as to comply with the Leases and provided that if any such tests or inspections cause damage to the Property, it will be restored and repaired forthwith to its former condition at the Purchaser's expense and the Purchaser will indemnify and hold harmless the Vendor for any costs, losses, damages or liability which the Vendor may suffer or incur as a result of such tests or inspections. If this Agreement is terminated and the Purchaser is entitled to the return of the Deposit, if the Purchaser does not restore and repair the Property as aforesaid, after written notice from the Vendor, the Vendor shall be entitled to deduct the reasonable estimated cost of such restoration and repair from the Deposit, as determined by its qualified expert, acting reasonably (the "**Damage Deduction**") and in such case, the Vendor's Solicitors are hereby irrevocably authorized and directed to pay the Damage Deduction amount to the Vendor. The foregoing amount shall be subject to readjustment based on the actual cost, once such work has been completed and invoiced. The foregoing provision shall survive the termination of this Agreement. [32]

The Purchaser shall be entitled to request information from municipal, building department, zoning department, environmental department, fire department and such other authorities as the Purchaser or the Purchaser's Solicitors may consider necessary or advisable at any time and from time to time prior to Closing in order to ensure compliance with all Applicable Laws, provided it does not directly or indirectly request that any of such parties conduct an inspection of the Property. The Vendor shall provide any consents or authorizations (written or otherwise) that are prepared by the Purchaser's Solicitors as are required to enable the Purchaser or the Purchaser's Solicitors to request such information (provided that such authorizations on their face indicate that inspections are neither requested nor authorized), as soon as reasonably practicable after request therefore and provision of the form of same to the Vendor's Solicitors.

3.4 Title Examination

Provided that the title of the Vendor to the Property on Closing will be good and free from all registered Encumbrances, except for the Permitted Encumbrances.

The Purchaser will be allowed until 4:00 p.m. (Toronto time) on the Due Diligence date to examine the title to the Property at the Purchaser's expense. If, during that time, any valid objection to title is made in writing to the Vendor which the Vendor is unable or unwilling to remove, remedy or satisfy[33] and which the Purchaser will not waive, this Agreement will, notwithstanding any intermediate acts or negotiations in respect of such objections, be null and void, save and except for the obligations contained in Sections 3.3 and 3.5, and the Deposit together with interest, if any, that has been earned or accrued thereon will be returned to the Purchaser without set-off or

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[32] This has become a market term, particularly where recourse against the purchaser is limited to the deposit. The purchaser should insist on reasonable notice and details of what it allegedly has not repaired or restored and should attempt to limit any right of set-off to actual physical damage or disrepair.

[33] The purchaser should seek to remove the words "or unwilling" and "remedy or satisfy", which may permit the vendor to cancel the contract rather than attend to the requisitioned matter, although case law requires a *bona fide* effort to satisfy the requisition.

deduction except the Damage Deduction, if applicable. Save as to any valid objections so made and save as to any objections going to the root of title and any Encumbrances arising after one (1) Business Day prior to the Due Diligence Date, the Purchaser will be conclusively deemed to have accepted the title of the Vendor to the Property.

The Purchaser shall also satisfy itself in its sole and unfettered discretion, by the Due Diligence Date as to all off-title matters, subject to the Vendor agreeing to deal with Work Orders in the manner described in Section 7.2.

3.5 Confidentiality

Subject to Section 8.6, the Purchaser shall[34] keep confidential all information and documentation (the "**Information**") obtained by the Purchaser pursuant to or in connection with this Agreement other than[35]:

(a) information or documentation in the public domain at the time of receipt by the Purchaser; and

(b) information or documentation which thereafter becomes public through no fault or act of the Purchaser.[36]

The Purchaser shall not use any of the Information for any purposes not related to the transaction contemplated by this Agreement. The Purchaser may disclose the Information to its financial institutions, lenders or professional advisors[37], provided that the Purchaser advises them of the provisions of this Section 3.5 and the Purchaser's obligations hereunder. For greater certainty, the Purchaser shall not be permitted to disclose any Information for the purposes of soliciting prospective investors.[38]

If this Agreement is terminated, the Purchaser shall promptly return to the Vendor or delete or destroy, as instructed by the Vendor, all Information, and all copies of the Information in the possession or control of the Purchaser. Notwithstanding the foregoing, if for any reason the transaction contemplated by this Agreement is not completed, the Purchaser shall be permitted to retain, and shall not be required to provide any copies to the Vendor of, any reports or studies commissioned by the Purchaser in connection with the Property, unless the Vendor agrees to

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[34] The purchaser should add "use reasonable efforts" to this provision.

[35] The purchaser should exclude the agreement of purchase and sale and other agreements and documents negotiated between the parties pursuant to the agreement of purchase and sale from the definition of "Information."

[36] The purchaser should include language permitting it to release all information to the extent such release is required by law.

[37] The purchaser will want this to be as broad as possible, so as to include the purchaser, its affiliates and affiliate's shareholders, unitholders and investors.

[38] The purchaser should seek to delete this last sentence and to include "investors" in the list of persons to whom information can be released. The vendor should attempt to avoid a situation in which a broad circulation is made to prospective investors, particularly via email or other mass communication medium.

reimburse the Purchaser for the cost thereof.[39] The provisions of this Section 3.5 shall survive the termination of this Agreement.

ARTICLE 4
REPRESENTATIONS AND WARRANTIES

4.1 Representations and Warranties of Vendor[40]

The Vendor represents and warrants to and in favour of the Purchaser that, as of the date of this Agreement and as of Closing:

4.1.1 Status. The Vendor is a subsisting company under the laws of the Province of Ontario. The Vendor has all necessary power, authority and capacity to enter into this Agreement and all other agreements contemplated by this Agreement and to perform its obligations under this Agreement and all other agreements contemplated by this Agreement;

4.1.2 Authorization. The execution and delivery of this Agreement and all other agreements contemplated by this Agreement by the Vendor and the consummation of the transactions contemplated by this Agreement by the Vendor have been or on Closing will be duly authorized by all necessary action;

4.1.3 No Breach of Instruments or Laws. Neither the entering into nor the delivery of this Agreement nor the completion by the Vendor of the transactions contemplated hereby will conflict with, or constitute a default under, or result in a violation of any of the provisions of the constating documents or by-laws of the Vendor or any Applicable Laws;

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[39] The purchaser should seek to delete this language as it may wish to maintain the confidentiality of some of the studies and reports it has procured. In any event, the purchaser should add language prohibiting the vendor's reliance on any such reports without the appropriate reliance letter from the party commissioned to prepare such report, for which it should not be responsible to provide or pay.

[40] A vendor's form of agreement will invariably contain limited representations and warranties. Depending on the details of a particular transaction, a purchaser should seek to include some or all of the following: (1) no work orders; (2) status of leases and accuracy of scheduled rent roll; (3) no remedial orders; (4) no employees to be assumed / no collective bargaining agreements; (5) status of contracts; (6) no approvals or consents required in respect of the transaction; (7) environmental status; (8) no construction liens; (9) ownership / encumbrances of chattels; (10) accuracy of information provided; (11) maintenance of insurance; (12) compliance with laws; (13) no ROFR's; and (14) compliance with permitted encumbrances. A purchaser should also require that the vendor covenant to update all Due Diligence Documents provided as updates become known or available. See Rider 2 for a sample of some of these. Depending on the market and the context, vendors will often reject providing representations and warranties with respect to the property, that the purchaser can readily ascertain by ordinary, vigilant inspection. However, the purchaser can legitimately argue that it would not otherwise embark on a costly and time-consuming exercise if it knew at the outset about certain issues. For example, if a vendor is aware of a pending environmental order, it should disclose this; and it should be in a position to warrant that there are no options to purchase or ROFRs (if that is the case)If there is a ROFR that has not been disclosed, the vendor is equally at risk, so this a way to "remind" the vendor that it may need to comply with the terms of a ROFR. Rider 2 is attached with a sample of additional representations and warranties. Often, vendors will not provide representations and warranties with respect to matters relating to the property that might be ascertained by a purchaser through ordinary, vigilant due diligence inquiries and investigations. But this is usually the subject of negotiation and often depends on the context, including the particular market, the nature of the property etc.

4.1.4 Enforceability of Obligations. This Agreement has been validly executed and delivered by the Vendor and is a valid and legally binding obligation of the Vendor, enforceable against the Vendor in accordance with its terms, subject to the limitations with respect to enforcement imposed by Applicable Laws in connection with bankruptcy, insolvency, liquidation, reorganization or other similar laws affecting the enforcement of creditors' rights generally and subject to the availability of equitable remedies such as specific performance and injunction which are only available in the discretion of the court from which they are sought;

4.1.5 Residence. Neither the Vendor nor the Beneficial Owner is a non-resident of Canada for the purposes of the *Income Tax Act* (Canada);

4.1.6 No Bankruptcy. The Vendor (i) is not an insolvent person within the meaning of the *Bankruptcy and Insolvency Act* (Canada) or the *Winding-up and Restructuring Act* (Canada), (ii) has not made an assignment in favour of its creditors or a proposal in bankruptcy to its creditors or any class thereof, (iii) has not had any petition for a receiving order presented in respect of it, and (iv) has not initiated proceedings with respect to a compromise or arrangement with its creditors or for its winding up, liquidation or dissolution;

4.1.7 Title. The Vendor is the registered owner of the Lands, holding same in trust for the Beneficial Owner;

4.1.8 No Litigation. Other than as disclosed in the Due Diligence Documents, there is no litigation outstanding, or, to the best of its knowledge, threatened against the Vendor respect to the Property or otherwise involving the Property, that would preclude the Vendor from carrying out the provisions of this Agreement and conveying the Property to the Purchaser in accordance with the terms of this Agreement or have a material adverse effect on the value of the Property;

4.1.9 No Expropriation. To the best of the knowledge of the Vendor, no written notice of any expropriation or condemnation affecting the Property has been issued or received; and

4.1.10 Options to Purchase. There are no options to purchase or rights of first refusal to purchase with respect to the Property or the Project that have not expired or been waived.

4.2 Representations and Warranties of Purchaser

The Purchaser covenants, represents and warrants to and in favour of the Vendor that, as of the date of this Agreement and as of Closing:

4.2.1 Status. The Purchaser and its permitted assignee has and will have all necessary power, authority and capacity to enter into this Agreement and all other agreements contemplated by this Agreement and to perform its respective obligations under this Agreement and all other agreements contemplated by this Agreement;

4.2.2 Authorization. The execution and delivery of this Agreement and all other agreements contemplated by this Agreement by the Purchaser and the consummation of the

transactions contemplated by this Agreement by the Purchaser have been duly authorized by all necessary action on the part of the Purchaser;

4.2.3 No Breach of Instruments or Laws. Neither the entering into nor the delivery of this Agreement nor the completion by the Purchaser or its permitted assignee of the transactions contemplated hereby will conflict with, or constitute a default under, or result in a violation of (i) any of the provisions of the constating documents or by-laws of the Purchaser's permitted assignee; or (ii) any Applicable Laws;

4.2.4 Enforceability of Obligations. This Agreement has been validly executed and delivered by the Purchaser and is a valid and legally binding obligation of the Purchaser, enforceable against the Purchaser in accordance with its terms, subject to the limitations with respect to enforcement imposed by Applicable Laws in connection with bankruptcy, insolvency, liquidation, reorganization or other similar laws affecting the enforcement of creditors' rights generally and subject to the availability of equitable remedies such as specific performance and injunction which are only available in the discretion of the court from which they are sought;

4.2.5 No Bankruptcy. The Purchaser (i) is not an insolvent person within the meaning of the *Bankruptcy and Insolvency Act* (Canada) or the *Winding-up and Restructuring Act* (Canada), (ii) has not made an assignment in favour of its creditors or a proposal in bankruptcy to its creditors or any class thereof, (iii) has not had any petition for a receiving order presented in respect of it, and (iv) has not initiated proceedings with respect to a compromise or arrangement with its creditors or for its winding up, liquidation or dissolution;

4.2.6 HST. The Purchaser or its permitted assignee will on Closing be an HST registrant under the *Excise Tax Act* (Canada) and will provide its registration number or the registration number of its permitted assignee to the Vendor on or before the Closing Date;

4.2.7 Regulatory Approvals and Consents. No approval or consent of any Governmental Authority is required in connection with the execution and delivery of this Agreement by the Purchaser and the consummation of the transactions contemplated by this Agreement by the Purchaser; and

4.2.8 Agent. The Purchaser has not retained the services of any real estate agent or broker in connection with the sale of the Project to the Purchaser other than the Purchaser's Broker.

4.3 Non-Waiver

No investigations made by or on behalf of the Vendor or the Purchaser at any time shall have the effect of waiving, diminishing the scope of or otherwise affecting any representation or warranty made by the other parties pursuant to this Agreement. Prior to Closing, each party covenants to give written notice to the other parties if it becomes aware of any breach of any representation or warranty given by another party contained in this Agreement, and if such party completes the transactions contemplated by this Agreement, such party shall be deemed to have waived such representation or warranty, the breach of which was known to it. No waiver of any condition or other provision contained in this Agreement, in whole or in part, shall constitute a waiver of any

other condition or provision (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

4.4 Acknowledgements of the Purchaser

The Purchaser acknowledges that, subject to its right to terminate this Agreement as provided in Section 3.2:[41]

a) on Closing, title to the Property will be subject to the Permitted Encumbrances;

b) in entering into this Agreement, the Purchaser has relied and will continue to rely entirely and solely upon its own inspections and investigations with respect to the Project, including, the physical and environmental condition of the Property and the review of the documentation made available to the Purchaser pursuant to this Agreement and the Purchaser acknowledges that it is not relying on any verbal information furnished by the Vendor or any information furnished by any other Person (whether or not furnished on behalf of or at the direction of the Vendor) in connection with the Project;

c) the Project is being purchased and assumed by the Purchaser on an "as is, where is" basis as of the Closing Date and without any express or implied agreements, representations or warranties of any kind whatsoever, including in connection with the condition, suitability for development, land area, leaseable area, fitness for a particular purpose, merchantability, title, physical characteristics, profitability, use or zoning, environmental condition, existence of latent defects, quality, or any other aspect or characteristic of the Project. Except as provided in Section 4.1, there is no express or implied agreement, representation or warranty as to the accuracy, currency or completeness of any information or documentation supplied or to be supplied in connection with the Project and without limiting the foregoing, the Purchaser hereby releases the Vendor with respect to any claims the Purchaser may have regarding the correctness, adequacy or accuracy of any documents or reports provided by the Vendor to the Purchaser in connection with environmental matters relating to the Property;

d) the Vendor shall have no obligations or responsibility to the Purchaser after Closing with respect to any matter relating to the Property or the condition thereof save as otherwise provided in this Agreement or in the Closing Documents; and

e) the obligations of the Vendor hereunder are not and will not be binding on any of the limited partners of the Beneficial Owner and resort shall not be

[41] The purchaser should seek to delete / limit this section to the best of its ability.

had to, nor shall recourse or satisfaction be sought from, any of the limited partners (or their assignees) or the assets of any of such limited partners (or their assignees).

4.5 Updated Representations[42]

Should information affecting any representation or warranty made by the Vendor contained in this Agreement become available to the Vendor at any time after the Execution Date, and prior to the Due Diligence Date, the Vendor shall immediately advise the Purchaser with respect thereto in writing (the "**Substituted Representation**"). In the event that the Vendor provides written notice to the Purchaser of a Substituted Representation prior to the Due Diligence Date, the Substituted Representation shall be deemed to be the original representation and warranty in the relevant subsection of Section 4.1 and the Vendor shall have no liability for the original representation or warranty made by it as initially contained in this Agreement.

4.6 Survival

The representations and warranties contained in this Agreement shall not merge on Closing but shall continue in full force and effect for the benefit of the party entitled thereto for a period of 9 months[43] following the Closing Date (the "**Survival Date**"). The representations and warranties contained in this Agreement will cease to have effect 9 months following the Closing Date except to the extent that written notice of a Claim has been made thereunder prior to that date.

4.7 Construction Act

The Vendor shall indemnify and hold the Purchaser harmless from and in respect of any construction liens or deficiencies in holdbacks required to be retained under the *Construction Act* (Ontario) affecting the Vendor's interest in the Property with respect to work or services contracted or performed by or for the account of the Vendor or materials supplied to or for the account of the

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[42] Sometimes this even goes further and relates to the period right up until closing. The purchaser should delete such provisions. Sometimes the vendor will attempt to distinguish between a matter that was accurate at the time a representation or warranty was given but became inaccurate as a result of a change in circumstances or the passage of time; or more broadly, breaches that were inadvertent and not deliberate. The purchaser should attempt to hold vendor to account for any breach, whether deliberate or inadvertent, whether material in effect or not; if the purchaser becomes aware of a breach but closes, it is arguable that such breach should be waived but often it is cold comfort to avail the purchaser of the right to terminate after they have spent considerable time and effort, so closing should not necessarily take away their right to claim for a breach of representation or warranty even if they were aware of it prior to closing.

[43] The purchaser will want the representations and warranties to survive as long as possible. Anywhere between 12 to 18 months appears to be standard.

Vendor before Closing. The Vendor shall provide the foregoing indemnity to the Purchaser by way of a separate Closing document.

ARTICLE 5
CONDITIONS AND CONSENTS[44]

5.1 Conditions of the Purchaser[45]

The obligation of the Purchaser to complete the transactions contemplated by this Agreement on Closing shall be subject to the following conditions:

5.1.1 Due Diligence. By 5:00 p.m. on the Due Diligence Date, the Purchaser shall have conducted such searches, inspections and tests that the Purchaser, in its sole and unfettered discretion, deems advisable with respect to the Project including physical and engineering inspections, environmental audits, financial audits, operating costs analysis, review of the Leases, Contracts, rental revenue from the Property, and is satisfied, in its sole, unfettered and subjective discretion, with the results of such searches, as evidenced by delivery to the Vendor or the Vendor's Solicitors of the Due Diligence Termination Waiver. For certainty, if the Purchaser or the Purchaser's Solicitors have not delivered the Due Diligence Termination Waiver by 5:00 p.m. on the Due Diligence Date, the foregoing condition shall be deemed not to have been satisfied or waived; [46]

5.1.2 Performance of Obligations. On the Closing Date, all of the terms, covenants and conditions of this Agreement to be complied with or performed by the Vendor shall have been complied with or performed in all material respects;

5.1.3 Releases and Discharges. Subject to Section 8.13, on Closing, the Vendor shall have delivered to the Purchaser, or to such Person as it may in writing direct, title to the Property free and clear of all Encumbrances other than the Permitted Encumbrances;

5.1.4 Estoppel Certificates. The Vendor shall have delivered to the Purchaser on or before 3:00 p.m. (Toronto time) two (2) Business Days prior to the Closing Date (the "**Estoppel Date**")[47],Estoppel Certificates from Tenants representing in the aggregate not less than 65%, by leasable area[48], of all leasable premises in the Property that are occupied by Tenants,

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[44] The purchaser should add a requirement that each party proceed in good faith, promptness and reasonable diligence to fulfill its conditions, other than the Due Diligence Condition.

[45] The purchaser can try to include additional conditions relating to work orders or remedial orders, major leases being in good standing and no material adverse changes. In the current market, status of leases and MAC clauses are generally not accepted. The position of the vendor is generally, that any change after waiver of DD conditions, except to the extent covered by the risk provisions; negligence of the vendor; and work orders, are treated no differently than if they occurred a day after closing.

[46] It is important to be very clear about what happens if no waiver is provided. Both parties want to avoid uncertainty. In virtually all cases, the "default" is that if no waiver, the condition is deemed not to have been waived.

[47] The purchaser should ask that this period be at least 4 business days. It's important to note that this is a condition and not a covenant of the vendor to deliver these estoppels and that it is in the interest of both parties to get as many estoppels as possible. See Section 7.4.

[48] The purchaser should attempt to negotiate this percentage as high as possible.

which include the Estoppel Certificates from the Major Tenants (collectively, the "**Minimum Estoppels**"). [49] If the foregoing condition has not been satisfied or waived as aforesaid, the Purchaser or Vendor[50], may at its option, extend the Closing Date in three (3) Business Day increments by providing Notice to the other from 3:01 p.m. (Toronto time) until 5:00 p.m. (Toronto time), on the Estoppel Date, as the same may be extended, up to an aggregate of fifteen (15) Business Days, in order to permit the aforesaid condition to be satisfied; and

5.1.5 Representations and Warranties. On the Closing Date, all of the representations and warranties of the Vendor set out in Section 4.1 shall be true and accurate in all material respects as of the Closing Date.

The conditions set out in this Section 5.1 are for the sole benefit of the Purchaser and may be waived in whole or in part by the Purchaser, in its sole and unfettered discretion, by written notice to the Vendor.

5.2 Conditions of the Vendor

The obligation of the Vendor to complete the transactions contemplated by this Agreement on Closing shall be subject to the following conditions:

5.2.1 Performance of Obligations. On the Closing Date, all of the terms, covenants and conditions of this Agreement to be complied with or performed by the Purchaser shall have been complied with or performed in all material respects; and

5.2.2 Representations and Warranties. On the Closing Date, all of the representations and warranties of the Purchaser set out in Section 4.2 shall be true and accurate in all material respects as of the Closing Date.

The conditions set out in this Section 5.2 are for the sole benefit of the Vendor and may be waived in whole or in part by the Vendor, in its sole and unfettered discretion, by written notice to the Purchaser.

5.3 Non-Satisfaction of Conditions

5.3.1 Conditions for the Benefit of the Purchaser. If any of the conditions set out in Section 5.1 are not satisfied or waived (or deemed not satisfied or waived) on or before the date applicable to the satisfaction thereof, as set out in Section 5.1 (the "**Applicable Conditional Date**"), the Purchaser may terminate this Agreement by notice in writing to the Vendor given on or before the Applicable Conditional Date (in the case of the condition pursuant to Section 5.1.1, if the Purchaser or Purchaser's Solicitors have not delivered the Due Diligence Termination Waiver by 5:00 p.m. on the Due Diligence Date, the Purchaser

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[49] The definition of Minimum Estoppels should also stipulate that such Estoppels cannot be dated no earlier than 30 days prior to closing; disclose information that is consistent with the Rent Rolls provided to the purchaser; and confirms that the vendor is not in default.

[50] The purchaser can also ask for the right to abridge this 2 (or 4) business day period.

shall be deemed to have elected to terminate this Agreement), in which event: (i) the Deposit, together with interest earned or accrued thereon, will be returned to the Purchaser without deduction, except the Damage Deduction, if applicable,, (ii) this Agreement shall be null and void and of no further force or effect whatsoever, (iii) the Purchaser shall be released from all of its liabilities and obligations under this Agreement, save and except pursuant to Sections 3.3 and 3.5 and, (iv) the Vendor shall also be released from all of its liabilities and obligations under this Agreement. However, the Purchaser may waive compliance with any of the conditions set out in Section 5.1 in whole or in part if it sees fit to do so, without prejudice to its rights of termination in the event of non-fulfilment of any other condition contained in Section 5.1 in whole or in part but such waiver shall disentitle the Purchaser to recover damages for the breach of any representation, warranty, covenant or condition so waived.

5.3.2 Conditions for the Benefit of the Vendor. If any of the conditions set out in Section 5.2 are not satisfied or waived on or before the Closing Date, the Vendor may terminate this Agreement by notice in writing to the Purchaser given on or before the Closing Date, in which event: (i) this Agreement shall be null and void and of no further force or effect whatsoever, (ii) the Vendor shall be released from all of its liabilities and obligations under this Agreement, and (iii) if the condition that has not been satisfied is pursuant to Section 5.2.1 or 5.2.2[51], the Deposit, together with interest accrued thereon, will be forfeited to the Vendor, without prejudice to the Vendor's other rights and remedies under this Agreement, at law and in equity[52]. The Vendor may waive compliance with any of the conditions set out in Section 5.2 in whole or in part if it sees fit to do so, without prejudice to its rights of termination in the event of non-fulfilment of any other condition contained in Section 5.2 in whole or in part.

5.3.3 Closing Conditions. All conditions to be satisfied on Closing shall be deemed to be satisfied if Closing occurs.

5.4 Not Conditions Precedent

The conditions set out in Sections 5.1 and 5.2 are conditions to the obligations of the parties to this Agreement and are not conditions precedent to the existence or enforceability of this Agreement.

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[51] The purchaser should add: "and same were not satisfied solely as a result of the default of the Purchaser and each of the conditions set out in Section 5.1 are satisfied or waived."

[52] This should be consistent with Section 2.4, so if the vendor has agreed to limit its recourse to the deposit, the purchaser should seek to delete this last clause and replace it with the following: "as its only remedy against the Purchaser (and the Purchaser will be released from all obligations and liabilities under this Agreement). In all other circumstances, the Deposit together with all interest earned or accrued thereon, will be returned to the Purchaser without deduction."

ARTICLE 6
PREPARATION OF CLOSING DOCUMENTS

6.1 Vendor's Closing Documents[53]

On or before Closing, subject to the provisions of this Agreement, the Vendor shall cause to be prepared and the Vendor shall execute or cause to be executed and shall deliver or cause to be delivered to the Purchaser the following items:

6.1.1 a registrable transfer of land for the Property to the Purchaser, or as it may direct in accordance with this Agreement, including completion of the compliance statements pursuant to Section 50 of the *Planning Act* (Ontario) by the Vendor and the Vendor's Solicitors;[54]

6.1.2 the Assignment and Assumption of Leases and Rents, executed by the Vendor;

6.1.3 directions to Tenants respecting payment of rent from and after the Closing Date from the Vendor;

6.1.4 the Assignment and Assumption of Contracts, executed by the Vendor;

6.1.5 a certificate of the Vendor confirming that:

(a) the Vendor is not a non-resident of Canada within the meaning of Section 116 of the *Income Tax Act* (Canada)[55];

(b) the Vendor's representations and warranties contained in this Agreement are true and accurate in all material respects as of the Closing Date;

6.1.6 an undertaking by the Vendor to readjust the Adjustments, subject to Section 2.6.4;

6.1.7 all letters of credit and other security delivered by any Tenants as security deposits, if applicable[56];

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53 The purchaser should include in this list any indemnities negotiated.

54 The purchaser should require a beneficial transfer from the beneficial owner, wherein it transfers all of all of its right, title and interest in the Project to the purchaser; a direction and authorization to the vendor, authorizing and directing it to provide all closing documents; and agreement to be jointly and severally bound by all provisions of the purchase agreement and closing documents as though it has executed and delivered all, along with the vendor. From a purchaser's perspective, it is therefore preferable that the beneficial owner be the vendor and that the nominee title holder be a party to the purchase agreement and join in relevant assignments of transfers (such as assignments of leases which it probably will have entered into).At the very least, the beneficial owner should be party to the agreement and should confirm that it is bound by all terms and conditions thereof and under all closing documents.

55 The purchaser should require this statement from each of the vendor and the beneficial owner, if any.

56 The purchaser should consider requiring a letter of credit agreement with respect to such items, to the extent not assignable, as generally, letters of credit are not assignable.

6.1.8 the Minimum Estoppels and any other Estoppel Certificates, to the extent same are available, in accordance with Sections 5.1.4 and 7.4;

6.1.9 copies of all Assumed Contracts, New Contracts and Leases;

6.1.10 an assignment of all Warranties affecting the Property, if any, to the extent assignable;

6.1.11 any post-dated cheques duly endorsed (without recourse) issued by the Tenants;

6.1.12 any Landlord Certificate pursuant to Section 7.4;

6.1.13 all master keys (and duplicate keys and security cards, if any) to all locks in the Buildings and which are in the Vendor's possession;

6.1.14 original copies of the Due Diligence Documents, to the extent in the Vendor's possession or control; and

6.1.16 such other transfers, assignments and documents relating to the completion of the transactions contemplated by this Agreement as the Purchaser may reasonably require to transfer title to the Project, from the Vendor to the Purchaser,

all in form and substance satisfactory to the Purchaser and the Vendor, each acting reasonably and in good faith, provided that none of the Closing Documents shall contain covenants, representations or warranties that are in addition to or more onerous upon either the Vendor or the Purchaser than those expressly set forth in this Agreement, including this Section 6.1.

6.2 <u>Purchaser's Closing Documents</u>

On or before Closing, subject to the provisions of this Agreement, the Purchaser shall execute or cause to be executed and shall deliver or cause to be delivered to the Vendor the following items:

6.2.1 the Transfer;

6.2.2 the Assignment and Assumption of Leases and Rents;

6.2.3 the Assignment and Assumption of Contracts;

6.2.4 directions to Tenants respecting payment of rent from and after the Closing Date, executed by the Purchaser;

6.2.5 the declaration and indemnity referred to in Section 6.3 hereto with respect to HST;

6.2.6 a certificate of the Purchaser confirming that the representations and warranties of the Purchaser set out in Section 4.2 are true and accurate in all material respects as of the Closing Date;

6.2.7 an undertaking by the Purchaser to readjust the Adjustments, subject to Section 2.6.4; and

6.2.8 such further documentation relating to the completion of this Agreement as the Vendor may reasonably require,

all in form and substance satisfactory to the Purchaser and the Vendor, each acting reasonably and in good faith, provided that none of the Closing Documents shall contain covenants, representations or warranties that are in addition to or more onerous upon either the Vendor or the Purchaser than those expressly set forth in this Agreement, including this Section 6.2.

6.3 HST

The Purchaser hereby represents and warrants to the Vendor as follows:

6.3.1 the Purchaser or its permitted assignee(s) shall be purchasing the Property on the Closing Date, as principal for its own account or as an agent, trustee or otherwise on behalf of another person(s); provided that in the event that the Purchaser is purchasing the Property as agent, nominee or trustee on behalf of another person(s) or entity as beneficial owner(s) (a "**Purchaser Beneficial Owner**"), the Purchaser's HST Certificate shall contain the HST registration numbers of the Purchaser and/or such Purchaser Beneficial Owner(s) and shall be signed by Purchaser and/or such Purchaser Beneficial Owner(s);

6.3.2 the Purchaser (or the Purchaser Beneficial Owner, as the case may be) shall be registered under subdivision d of Division V of Part IX of the *Excise Tax Act* (Canada) (the "**HST Act**") for the purposes of collection and remittance of harmonized sales tax ("**HST**");

6.3.3 the Purchaser (and the Purchaser Beneficial Owner, if any) shall be liable, shall self-assess and remit to the appropriate governmental authority all HST which is payable under the HST Act in connection with the transfer of the Property made pursuant to the Agreement, all in accordance with the HST Act; [57]

6.3.4 the Vendor shall not collect HST on Closing regarding the Property and shall allow the Purchaser (and the Purchaser Beneficial Owner(s), if any) to self-assess and remit HST to the Receiver General in accordance with the HST Act;

6.3.5 the Purchaser (and the Purchaser Beneficial Owner(s), if any) shall indemnify and save harmless the Vendor from and against any and all HST, penalties, costs and/or interest which may become payable by or assessed against the Vendor as a result of any inaccuracy, misstatement or misrepresentation made by the Purchaser on the

[57] Purchasers should keep in mind that if they intend to use a nominee to hold title on closing, they will need to obtain and provide to the vendor, the HST registration number of its underlying beneficial owner and they will need to provide a certificate on closing confirming that such nominee is not holding title as agent or nominee on behalf of any other party. An HST registration for the title nominee will not suffice.

Closing Date in connection with any matter raised in this Section 6.3 or contained in any declaration referred to herein; and

6.3.6 the Purchaser (and the Purchaser Beneficial Owner(s), if any) shall tender on Closing a certificate and indemnity in a form acceptable to the Vendor, acting reasonably, including verification of its registration number issued by Canada Revenue Agency under the *Income Tax Act* (Canada) (the "**Purchaser's HST Certificate**").

6.4 Registration and Other Costs

The Vendor shall be responsible for the costs of the Vendor's Solicitors in respect of this transaction. The Purchaser shall be responsible for the costs of the Purchaser's Solicitors in respect of this transaction. The Purchaser shall be responsible for and pay any land transfer taxes payable on the transfer of the Property, all registration fees payable in respect of registration by it of any documents on Closing (other than discharges of Encumbrances which are required to be made by the Vendor, if applicable, which shall be the responsibility of the Vendor) and all federal and provincial sales and other taxes payable by a purchaser upon or in connection with the conveyance or transfer of the Property, including provincial retail sales tax and HST, subject to Section 6.3.

The Purchaser shall indemnify and save harmless the Vendor and its shareholders, directors, officers, employees, advisors and agents from all claims, actions, causes of action, proceedings, losses, damages, costs, liabilities and expenses incurred, suffered or sustained as a result of a failure by the Purchaser:

6.4.1 to pay any federal, provincial or other taxes payable by the Purchaser in connection with the conveyance or transfer of the Property whether arising from a reassessment or otherwise, including provincial retail sales tax and goods and services tax/harmonized sales taxes, if applicable; and/or

6.4.2 to file any returns, certificates, filings, elections, notices or other documents required to be filed by the Purchaser with any federal, provincial or other taxing authorities in connection with the conveyance or transfer of the Property.

This Section shall survive and not merge on Closing.

6.5 Escrow Closing and Registration

The Vendor and Purchaser covenant and agree to cause their respective solicitors to enter into a document registration agreement (the "**DRA**") in the form recommended by the Law Society of Ontario to govern the electronic submission of the transfer/deed for the Property to the applicable Land Registry Offices. The DRA shall outline or establish the procedures and timing for completing all registrations electronically and provide for all Closing Documents and closing funds to be held in escrow pending the submission of the transfer/deeds to the Land Registry Offices and their acceptance by virtue of each registration document being assigned a registration number. The DRA shall also provide that if there is a problem with the Teraview electronic registration system that does not allow the parties to electronically register all registration

documents on Closing, the Closing Date shall be deemed to be extended until the next day when the system is accessible and operating for the Land Registry Offices applicable to the Property.

6.6 Closing Arrangements

This Agreement shall be completed on the Closing Date by mutual electronic exchange of documents, by no later than 5:00 p.m. (Toronto time).[58]

ARTICLE 7
OPERATION UNTIL CLOSING AND SPECIAL PROVISIONS[59]

7.1 Operation Until Closing

7.1.1 Continued Management. During the Interim Period, the Vendor shall cause the Project to be operated, managed and maintained in the ordinary course of business consistent with its past practice. During the Interim Period, the Vendor shall continue in force all policies of insurance currently maintained with respect to the Project and shall give all notices and present claims under all insurance policies in a timely fashion.[60]

7.1.2 Future Leases. During the Interim Period, the parties acknowledge and confirm that all New Leases and any amendments or surrenders of Existing Leases will be forwarded to the Purchaser for its review. The Vendor shall be free to enter into any New Leases or amendments or surrenders of Existing Leases up until two (2) Business Days prior to the Due Diligence Date, without requiring the Purchaser's approval.[61] From and after two (2)

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[58] The purchaser should require that vacant possession of the Property be delivered on closing, subject to any leases.

[59] The purchaser should attempt to include the following language: "Other Obligations. The Vendor shall: (i) not further encumber the Project from and after the Execution Date and shall, subject to and in accordance with the terms of this Agreement, discharge all Encumbrances affecting the Project on or before Closing, other than the Permitted Encumbrances and except for all New Contracts and New Leases approved by the Purchaser pursuant to and in accordance with this Section; (ii) not remove from the Property any Chattels or other personal property assets owned by the Vendor and used in connection with the operation, maintenance or repair of the Property, except: (a) in the ordinary course of business in accordance with sound business and management practices as would a prudent owner of similar property; and (b) any computers, accounting systems and software, wherever located, that belong to the Vendor or their property manager; (iii) continuously and promptly notify the Purchaser of any litigation commenced against the Vendor pertaining to the Property; (iv) continuously and promptly deliver to the Purchaser copies of any work orders, deficiency notices or other similar notices of non-compliance with respect to the Property that the Vendor receives from any Governmental Authority or otherwise; and (v) continuously and promptly notify the Purchaser in writing of any defaults by the Tenants under any payment provisions or under any other material provisions of the Leases."

[60] The purchaser should request language that the vendor will keep the purchaser informed of all material developments in respect of the Property, including any material requests received by the Vendor from any Governmental Authority and material repairs and maintenance. The purchaser may also want to limit the ability of the vendor to undertake any capital expenditures at the Property without the prior written consent of the purchaser.

[61] The purchaser should argue that it requires approval rights over such new leases, with such approval not to be unreasonably withheld. The vendor's response is that until the purchaser has waived, it must proceed as though there may be no sale and can't risk losing a particular prospective tenant. As a practical matter, it is generally prudent to advise a purchaser and if they tell the vendor they will not waive if the vendor enters into a particular lease, the vendor may re-consider.

Business Days prior to the Due Diligence Date, if this Agreement continues, all New Leases and amendments or surrenders of Existing Leases shall be subject to the prior written approval of the Purchaser until Closing, which approval may be given or withheld in the Purchaser's sole and unfettered discretion. If the Purchaser does not respond to any request for approval within three (3) Business Days after such request is made in writing to it, the Purchaser shall be deemed not to have approved such New Lease, or amendment or surrender of Existing Leases, as the case may be. Notwithstanding the foregoing, the Purchaser shall not unreasonably withhold or delay its approval in connection with any requests made by Tenants, from and after two (2) Business Days prior to the Due Diligence Date for consents to assignments or sublets in connection with their Leases.

7.1.3 New Contracts. During the Interim Period, the parties acknowledge and confirm that all New Contracts will be forwarded to the Purchaser for its review. The Vendor shall be free to enter into any New Contracts prior to the Due Diligence Date, without requiring the Purchaser's approval [62]. From and after the Due Diligence Date, if this Agreement continues, all New Contracts shall be subject to the prior written approval of the Purchaser until Closing, which approval may be given or withheld in the Purchaser's sole and unfettered discretion. If the Purchaser does not respond to any request for approval within three (3) Business Days after such request is made in writing to it, the Purchaser shall be deemed not to have approved such New Contract. Notwithstanding the foregoing, the Vendor may enter into any New Contracts without requiring the Purchaser's approval, if the term of same expire prior to the Closing Date or if they are terminated by the Vendor prior to Closing.

7.2 Work Orders

7.2.1 If the Vendor receives a notice prior to Closing (the "**Notice**") advising the Vendor of any outstanding work orders and/or LL Permits that have been issued at any time prior to Closing by any Governmental Authority in respect of the Property that are not the responsibility of any Tenant (the "**Work Orders**"), the Vendor will promptly give a copy thereof to the Purchaser (unless the Purchaser provided such Notice to the Vendor).

7.2.2 Subject to Sections 7.2.3 and 7.2.4 the Vendor will make reasonable efforts to rectify the Work Orders prior to Closing. If it determines that it is unable or unwilling to do so, it will obtain a written estimate (the "**Estimate**") from a professionally qualified architect, engineer or contractor, of the cost that will be required to satisfy the Work Orders and will provide the Purchaser with a copy of such Estimate. The Vendor will undertake in writing to the Purchaser to satisfy the Work Orders as soon as commercially reasonably possible following Closing, taking into consideration all relevant factors, including weather limitations. The Purchaser shall be entitled to cause the Vendor's Solicitors to maintain a holdback out of the Closing proceeds in an amount equal to 125% of the Estimate (the "**Holdback**"), until the Work Orders have been satisfied and upon such satisfaction, the Holdback and all interest earned thereon will be released to the Vendor forthwith. The

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[62] The purchaser should argue that it requires approval rights over such new contracts, with such approval not to be unreasonably withheld.

Purchaser will provide reasonable cooperation to the Vendor to enable it to carry out the foregoing remedial work, including by providing access to the Vendor and its Representatives to the Property after Closing.

7.2.3 If the aggregate Estimate for all Work Orders exceeds $[_____], the Vendor may elect, in its sole and unfettered discretion, within five (5) Business Days after receiving the Estimate, to deliver a notice (the "**Refusal Notice**") to the Purchaser stating that it is unwilling to complete the work required to satisfy the Work Orders. If the Vendor does not deliver a Refusal Notice, the provisions of Section 7.2.2 above shall apply. If the Vendor delivers a Refusal Notice, the Purchaser shall be entitled, in its sole and unfettered discretion, within five (5) Business Days after receiving the Refusal Notice, to deliver a notice (the "**Termination Notice**") to the Vendor stating that the Purchaser wishes to terminate the Agreement, in which case, unless the Vendor delivers a notice (the "**Waiver Notice**") to the Purchaser within five (5) Business Days of receiving the Termination Notice, stating that the Vendor rescinds the Refusal Notice, this Agreement shall be considered null and void, the Deposit, together with accrued interest shall be returned to the Purchaser without deduction, except the Damage Deduction, if applicable and the parties shall be released from all further obligations under the terms of this Agreement. If the Purchaser does not deliver a Termination Notice as aforesaid, it shall be deemed to have elected to accept the Property subject to the Work Orders, in which case the Purchase Price shall be reduced by $[_____] and the Purchaser will release the Vendor from any responsibility in connection with the Work Orders. If the Vendor delivers the Waiver Notice, the provisions of 7.2.2 shall apply.

7.2.4 Notwithstanding any provision to the contrary contained herein, the Vendor's obligations pursuant to this Section 7.2 shall be limited to work orders or outstanding building permits that are the responsibility of the Vendor. If any work orders or outstanding building permits are the responsibility of any Tenant pursuant to its Lease, the Vendor shall provide notice to the Tenant of such work orders and/or building permits and request that the Tenant comply with same in accordance with its Lease, but the Vendor shall not be required to rectify same nor shall the Purchaser be entitled to any abatement or termination right in respect thereof. Furthermore, the Vendor will not be required to rectify any Work Orders that arise prior to the Due Diligence Date (in respect of which the Purchaser, having made due inquiry of the applicable Governmental Authority on or prior to the Due Diligence Date, could reasonably have determined the existence of same) unless the Purchaser has advised the Vendor of same and requisitions their rectification on or prior to the Due Diligence Date.[63]

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[63] The purchaser should seek to replace this language with language requiring the vendor to rectify all items indicated in a "a notice from any Governmental Authority (including from the Purchaser or the Purchaser's Solicitors), or if any notice is currently outstanding, advising of any defects in the construction, state of repair or state of completion of the Property, including any of the Buildings or ordering or directing that any alterations, repairs, improvements or other work be done or relating to non-compliance with any building permit, building or land use by-law, ordinance or regulation, or any open permit, which is the responsibility of the Vendor to correct" prior to closing. From a vendor's perspective, this should never apply to any matters that are the responsibility of current tenants. If the parties agree on a compromise, as contemplated by this form, the purchaser should ask for

7.3 Assumed Contracts

On or before the Due Diligence Date[64], the Purchaser shall advise the Vendor in writing regarding those other Contracts which the Purchaser wishes to assume on Closing (the "**Assumed Contracts**"). The Vendor, at its sole cost and expense, shall terminate on or before the Closing Date, all Contracts other than the Assumed Contracts and the New Contracts.

7.4 Estoppel Certificates

The Vendor shall use commercially reasonable efforts to obtain, on or before Closing, Estoppel Certificates from all Tenants. To the extent the Vendor is unsuccessful in obtaining Estoppel Certificates from any Tenants it shall on Closing deliver a certificate of the Vendor in lieu of such Estoppel Certificates (the "**Landlord Certificate**"). Such Landlord Certificate shall confirm the same matters contained in such Estoppel Certificates (with such changes thereto as to accurately set out the current status of the Lease and except that the information in paragraphs 6, 8 and 9 of the Estoppel Certificate will only be certified to the best of the Vendor's knowledge) and the Vendor and Purchaser shall complete the Agreement on that basis. Any such Landlord Certificate shall be treated as a representation and warranty of the Vendor that survives Closing for 9 months from the Closing Date and any bona fide claim with respect to any such Landlord Certificate must be made in writing within such 9 month period, failing which the Purchaser will have no recourse in respect thereto. If the Vendor delivers executed Estoppel Certificates to the Purchaser following Closing in respect of any Leases for which it provided the Landlord Certificate, the Landlord Certificate shall be deemed to be amended by deleting therefrom any reference to such Lease(s) and the Vendor's liability under the Landlord Certificate shall cease with respect to such Lease(s). The obligation of the Vendor to provide the Landlord Certificate in respect of any Leases for which it was unable to obtain an Estoppel Certificate, shall not serve to modify the condition in favour of the Purchaser contained in Section 5.1.4. [65]

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as high a cap as possible, while the vendor wants it to be as low as possible. Of course, the size of the deal is relevant.

[64] The purchaser may require time after the Due Diligence Date within which to notify the vendor of the contracts it wishes to assume.

[65] Vendors often attempt to limit their obligation to provide landlord certificates to the threshold agreed upon and in fact, often try to require the purchaser to accept landlord certificates for any threshold/minimum estoppels that are required. The purchaser should resist. First, they should not compromise on the threshold estoppel level. It is a condition in their favour which they may, in their sole discretion choose to waive and accept a landlord certificate in lieu; second, the purchaser should try to require the vendor to deliver landlord certificates for all missing estoppels. To the extent a landlord certificate was delivered on closing in lieu of an estoppel, there should be a time limit on how long after closing the purchaser must partially release it if an estoppel was delivered post-closing and in any event, they should only release the vendor from its covenant under the landlord certificate if the subsequently delivered estoppel is consistent in all material respects with the unsigned estoppel that was appended to the landlord certificate. A purchaser should keep in mind that no matter how strong the covenant of a landlord under the landlord certificate, they are far better off with an estoppel certificate from the tenant. A subsequent dispute where they are relying on a landlord certificate means they must ultimately make a claim against the vendor rather than offering a direct defence to a claim by a tenant that is dealt with in an estoppel certificate.

7.5 Risk

7.5.1 General. The Property shall be at the risk of the Vendor until Closing. Until Closing, the Vendor shall maintain, at its sole cost and expense, insurance against fire and other perils and against third party liability with respect to the Property in such amounts as a careful and prudent owner of similar property and premises would maintain. All such insurance shall be held for the benefit of the parties as their interests may appear. If any loss or damage to the Property occurs on or before the Closing Date, the Vendor will retain an independent expert to estimate the cost of repair and shall promptly deliver a written notice (the "**Notice of Loss**") to the Purchaser specifying the nature and extent of the loss or damage.

7.5.2 Damage Less than $[_____][66]. If the estimated total aggregate of all losses and damage to the Property is less than or equal to $[_____], the Purchaser shall have no right to terminate this Agreement pursuant to this Section and the Purchaser shall complete this Agreement within 30 days of the Closing Date, shall be entitled to receive any insurance proceeds in respect of such loss or damage (including the proceeds of rental interruption insurance, but only in respect of the period from and after the Closing Date) and the Vendor shall release its interest in any such insurance proceeds (other than the proceeds of rental interruption insurance in respect of the period prior to the Closing Date). In addition, the Purchase Price shall be reduced by the amount of the deductible under the Vendor's insurance coverage, if the Vendor has not already paid the deductible[67].

7.5.3 Damage More than $[_____].[68] If the estimated total aggregate of all losses and damage to the Property is more than $[_____], the Purchaser may elect to terminate this Agreement by giving notice of termination to the Vendor on or before the 5th Business Day following delivery of the Notice of Loss, in which case this Agreement shall be terminated, be null and void and of no further force or effect whatsoever and the Deposit, together with all interest accrued thereon, shall be returned to the Purchaser forthwith without deduction, except the Damage Deduction, if applicable. If the Vendor fails to deliver a Notice of Loss disclosing losses or damages of more than $[_____] within sufficient time to enable the Purchaser to have 5 Business Days within which to respond prior to the Closing Date, the Closing Date shall be extended accordingly. If the Purchaser fails to deliver such notice of termination within such 5 Business Days following delivery to it of the Notice of Loss, the Purchaser shall be deemed to have elected to terminate this Agreement and it shall be entitled to the return of the Deposit with interest and without deduction, except the Damage Deduction, if applicable. If the Purchaser does not elect to terminate this Agreement, it shall complete this Agreement on the Closing Date and it shall receive all

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66 The purchaser should include that such damage should be less than $[x] ***and*** repairable within 60 days. Typically, the vendor will require that the threshold amount is approximately 10% of the purchase price, whereas the purchaser will require that this be limited to around 5%.

67 The purchaser should add "and by any shortfall between the available proceeds under the vendor's insurance coverage and the amount required to repair or replace the loss or damage." The vendor will typically resist this.

68 The purchaser should include language that their termination right applies where the damage is more than $[x] ***or is not*** repairable within 60 days.

insurance proceeds in respect of the Property (including the proceeds of rental interruption insurance, but only in respect of the period from and after the Closing Date) and the Vendor shall release its interest in any insurance proceeds in respect of the Property (other than the proceeds of rental interruption insurance in respect of the period prior to the Closing Date). In addition, the Purchase Price shall be reduced by the amount of the deductible under the Vendor's insurance coverage, if the Vendor has not already paid the deductible[69].

7.6 Non-Assignable Rights

Nothing in this Agreement shall be construed as an assignment to the Purchaser of, or an attempt to assign to the Purchaser, any Assumed Contract or New Contract that is (i) not assignable, or (ii) not assignable without the approval or consent of the other party or parties thereto, without obtaining such approval or consent (collectively, the "**Non-Assignable Rights**"). In connection with such Non-Assignable Rights, the Vendor shall, at the request of the Purchaser acting reasonably, co-operate with the Purchaser in any reasonable and lawful arrangements designed to provide the benefits of such Non-Assignable Rights to the Purchaser, including holding any such Non-Assignable Rights in trust for the Purchaser or acting as agent for the Purchaser. For greater certainty, this Agreement is not conditional upon the Vendor obtaining the aforesaid consents.[70]

7.7 Termination of Employees

The Vendor covenants to terminate all employees (or in lieu of termination, may relocate such employees to the Vendor's other properties) at the Property effective Closing, at its sole cost and expense, and shall execute, on Closing, an indemnity whereby it indemnifies and saves harmless the Purchaser with respect to any and all costs and expenses resulting from any claims that may be made by such employees as a result of such termination or otherwise.

7.8 Outstanding Permits

The Vendor shall not be required to clear any outstanding building permits in connection with the Property that are, as in accordance with the terms of a particular Lease, the responsibility of a Tenant. The Purchaser agrees to accept such outstanding building permits, subject to satisfying itself with respect to same prior to the Due Diligence Date. Any outstanding building permits relating to prior tenants or the Landlord (the "**LL Permits**") must be cleared by the Vendor, subject to Section 7.2.

7.9 Expropriation

If the Property or any material part thereof is condemned or expropriated by any public or other lawful authority on or before the Closing Date, the Purchaser shall have the right to (i) elect by notice in writing to take the damages awarded or compensation, as the case may be, and complete the transaction contemplated by this Agreement, or (ii) terminate this Agreement by notice in

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[69] The purchaser should add "and by any shortfall between the available proceeds under the Vendor's insurance coverage and the amount required to repair or replace the loss or damage.". The vendor will typically resist.

[70] The purchaser should include language requiring that the vendor apply for and use all reasonable efforts to obtain the necessary consents and approvals at vendor's sole cost and expense.

writing to the Vendor, in which latter case the Purchaser shall be entitled to the return, with interest and without deduction, of the Deposit**,** except the Damage Deduction, if applicable. .

7.10 No Marketing or Sale

Until the Due Diligence Date, and thereafter following the delivery of Due Diligence Termination Waiver, until the Closing Date or earlier termination, the Vendor shall not directly or indirectly list, market, advertise or offer the Property for sale; solicit offers for, agree to sell or attempt to sell the Property; or enter into an agreement to sell the Property or any part thereof or otherwise cooperate with any other prospective purchaser of the Property. [71]

ARTICLE 8
GENERAL[72]

8.1 Obligations as Covenants

Each agreement and obligation of the parties contained in this Agreement, even though not expressed as a covenant, shall be considered for all purposes to be a covenant.

8.2 Amendment of Agreement

Subject to Section 8.5, no modification or amendment of this Agreement shall be binding unless executed in writing by the parties in the same manner as the execution of this Agreement.

8.3 Further Assurances

Each of the parties shall from time to time hereafter and upon any reasonable request of the other party, make or cause to be made all such further acts, deeds, assurances and things as may be required or necessary to more effectually implement and carry out the true intent and meaning of this Agreement.

8.4 Waiver

Subject to Section 4.3, no waiver of any default, breach or non-compliance under this Agreement shall be effective unless in writing and signed by the party to be bound by the waiver or its solicitor. Subject to Section 4.3, no waiver shall be inferred from or implied by any failure to act or delay in acting by a party in respect of any default, breach or non-observance or by anything done or omitted to be done by the other party. The waiver by a party of any default, breach or non-compliance under this Agreement shall not operate as a waiver of that party's rights under this Agreement in respect of any continuing or subsequent default, breach or non-observance (whether of the same or any other nature).

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[71] The vendor should resist including this unless this is part of what is contemplated under 2.4, where recourse against the vendor is limited to the deposit.

[72] In the case of multiple vendors, the purchaser should insist on the inclusion of joint and several liability language.

8.5 Solicitors as Agents

Any notice, approval, waiver, agreement, instrument, document or communication permitted, required or contemplated by this Agreement may be given or delivered and accepted or received by the Purchaser's Solicitors on behalf of the Purchaser and by the Vendor's Solicitors on behalf of the Vendor and any tender of Closing Documents and the balance of the Purchase Price may be made upon the Purchaser's Solicitors and the Vendor's Solicitors, as the case may be.

8.6 Public Announcements and Confidentiality

Subject to the requirements of any Applicable Law, the parties to this Agreement shall not issue any press release or make any other public statement pertaining to the existence of this Agreement and/or the subject matter of or the transactions contemplated by this Agreement without the agreement of all parties hereto.

8.7 Assignment

The Purchaser shall not have the right to assign this Agreement or effect a change in control of the Purchaser except with the prior written consent of the Vendor, which consent may be unreasonably or arbitrarily withheld. In the event of such assignment, the Purchaser shall not be released from any of its obligations, covenants or liability under this Agreement upon such assignment and it shall be required to execute all closing documents, together with its assignee(s).[73]

8.8 Permitted Encumbrances

The Purchaser shall satisfy itself in all respects with the Permitted Encumbrances by the Due Diligence Date and the Purchaser covenants to assume the obligations and responsibilities of the Vendor under the Permitted Encumbrances and shall indemnify and save the Vendor harmless from all costs, losses, damages and liabilities in connection with such Permitted Encumbrances

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[73] The purchaser should argue for the free right of assignment particularly where – as here – it remains liable for the completion of the transaction and/or recourse against it is limited to the deposit. However, the vendor has several concerns with an unrestricted right to assign: a) usually, the vendor has agreed to sell to a particular purchaser or purchaser group, knowing that they probably won't be wasting the vendor's time and tying up the property while they look for investors or alternate purchasers; b) vendors don't like "flips" before closing, particularly for more money; c) even if a particular buyer is a "shell" acquisition company and even though recourse might be limited to the deposit, the vendor usually knows or has some comfort that the group "behind" the purchaser have the wherewithal to close; and d) no vendor wants to find itself ending up with a litigious or disreputable purchaser, which could occur if there is an unrestricted right of assignment. A compromise might be to add wording such as: "Notwithstanding the foregoing, the Purchaser shall have the right, on not less than 10 Business Days' prior Notice to the Vendor, to assign its rights and obligations under this Agreement to a company that is an affiliate of the Purchaser, (as that term is defined in the Corporations Act (Ontario)), provided such assignee assumes all the covenants and obligations of the Purchaser under this Agreement." Ideally, the purchaser will ask to be released on assignment. Sometimes, particularly in larger deals, the parties will negotiate a right of assignment to a partnership or co-ownership in which certain named principals of the purchaser directly or indirectly hold a certain minimum financial interest in the ultimate assignee and will be the general partner or manager of the project. A purchaser will also require language that the vendor will not assign its interest in the agreement and that the purchaser may direct title to any person on closing.

from and after Closing, which covenant and indemnity shall be contained in a closing document (the "**Permitted Encumbrance Assumption and Indemnity**"). [74]

8.9 Planning Act

This Agreement and the transactions reflected herein are subject to compliance with Section 50 of the *Planning Act* of Ontario.

8.10 Institutional Mortgages

In the event that a discharge of any Charge/Mortgage or collateral security thereto (including PPSA registrations related thereto) held by a chartered bank, trust company or insurance company, is not available on Closing, the Purchaser shall accept the Vendor's Solicitor's personal undertaking to obtain, out of the closing funds, a discharge and to register or cause to be registered same within a reasonable period following Closing and to provide registration particulars to the Purchaser's Solicitors; provided that on or before Closing, the Vendor shall provide to the Purchaser a mortgage discharge statement from the mortgagee that sets out the balance required to obtain the discharge, together with the Vendor's direction to pay to the mortgagee out of the closing funds the amount required to obtain the discharge.

8.11 Successors and Assigns

All of the covenants and agreements contained in this Agreement shall be binding upon the parties and their respective successors and permitted assigns and shall enure to the benefit of and be enforceable by the parties and their respective successors and permitted assigns pursuant to the terms and conditions of this Agreement.

8.12 Notices

8.12.1 Addresses for Notice. Any notice, demand, certificate, consent, determination or other communication required or permitted to be given or made under this Agreement (the "**Notice**") shall be in writing and shall be effectively given and made if (i) delivered personally, (ii) sent by prepaid courier service, or (iii) sent by fax or other similar means of electronic communication, in each case to the applicable address set out below:

(a) in the case of the Vendor addressed to it at:

---

[74] The purchaser should ask for a reciprocal indemnity from the vendor in respect of the period prior to closing. If the vendor agrees to this, they should carve the leases out, as this is dealt with in the Assignment of Leases.

_____
c/o _____
_____

Attention: _____
email: _____

with a copy to:

Gardiner Roberts LLP
Bay Adelaide Centre – East Tower
22 Adelaide Street West, Suite 3600
Toronto, Ontario M5H 4E3

Attention: Robert K. Schwartz/Tamara Katz
email: rschwartz@grllp.com/tkatz@grllp.com

(b) and in the case of the Purchaser addressed to it at:

_____

Attention: _____
email: _____

with a copy to:

_____

Attention: _____
email: _____

8.12.2 Receipt of Notice. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of sending by means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered, emailed or sent prior to 5:00 p.m. (Toronto time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

8.12.3 Change of Address. Any party may from time to time may change its address under this Section by notice to the other party given in the manner provided by this Section.

8.13 Commissions

The Vendor shall be solely responsible for the payment of all commissions or fees payable to any real estate agent or broker in connection with this transaction (including the Named Agents) and shall indemnify and save harmless the Purchaser in respect thereto. The Purchaser represents and warrants that it has not retained any realtor, agent, broker or other person to whom commissions would be payable except for [_____] and [_____] (the "**Named Agents**") and the Purchaser will indemnify the Vendor from any claims to the extent the Purchaser has retained anyone other than the Named Agents, whose commissions or fees are binding on the Vendor.

8.14 Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument. Counterparts may be executed either by paper signature or by electronic signature and may be delivered electronically (in .pdf format) or otherwise, and the parties accept any such electronic signatures as original signatures of the parties.

[THE NEXT PAGE IS THE SIGNATURE PAGE]

IN WITNESS WHEREOF the parties have executed this Agreement.

_____

By:_____
Name:
Title:

I have authority to bind the Corporation

_____

By:_____
Name:
Title:

I have authority to bind the Corporation

SCHEDULE A

LEGAL DESCRIPTION OF LANDS

SCHEDULE B

DUE DILIGENCE DOCUMENTS[75]

1. Copies of all Leases.

2. A current rent roll in respect of the Property.

3. Current realty tax assessment and tax bills for the past 2 years and year to date.

4. Copies of all Contracts in respect of the Property (other than the current property management agreement) which are in force at or come into force after the date hereof, it being understood that there will be no obligation by the Purchaser to assume any Contract, except the Assumed Contracts and New Contracts.

5. All architectural, structural, mechanical and electrical plans or as built plans of the Property, if available, to be made available for inspection.

6. Existing survey, site plans and floor plans (if available).

7. Any property condition reports in the Vendor's possession, that have been prepared by or for the Vendor in the past 5 years.

8. Copies of correspondence to and from Tenants relating to outstanding issues associated with the Property will be made available for inspection.

9. An accounts receivable report.

---

[75] The purchaser will prefer a longer list of Due Diligence Documents. A sample proposed list is attached hereto as Rider 3. The specifics of the deliverables will depend on the transaction and the bargaining power of each party.

SCHEDULE C

PERMITTED ENCUMBRANCES

"Permitted Encumbrances" means:

1. Encumbrances for real property taxes (which term includes charges, rates and assessments) or charges for electricity, power, gas, water and other services and utilities in connection with the Property that have accrued but are not yet due and owing or, if due and owing, are adjusted for in favour of the Purchaser pursuant to Section 2.6.

2. Registered and unregistered easements, rights-of-way, restrictive covenants and servitudes and personal servitudes and other similar rights in land granted to, reserved or taken by any Governmental Authority or public utility that do not materially impair the use, operation or marketability of the Property, provided such have in each case been complied with in all material respects.

3. Any subsisting reservations, limitations, provisos, conditions or exceptions, including royalties, contained in the original grants of the Properties from the Crown that do not materially impair the use, operation or marketability of the Property.

4. All Leases and registrations, notices, memorials or caveats with respect to the Leases and leasehold mortgages or security interests relating to any Tenant secured by such Tenant's interest in the Leases.

5. Agreements with municipalities or public utility or hydro commissions or Governmental Authorities, including development agreements, site plan agreements, subdivision agreements and other similar agreements provided same have been complied with and do not materially interfere with the current use or the value of the Property.

6. Any existing encroachment emanating from the Property onto adjoining lands, and any existing encroachment emanating from the adjoining lands onto the Property.

7. All instruments registered on title to the Lands as of the date of this agreement with the exception of registrations in respect of or relating to any existing financing affecting the Property, subject to Section 8.11.[76]

[76] The purchaser should request the deletion of this listed encumbrance and the property specific registrations should be set out.

SCHEDULE D

ESTOPPEL CERTIFICATE[77]

TO: _____. and its affiliates and related parties and its assigns (the "Purchaser") and the Purchaser's lender from time to time

RE: SALE - _____ (the "**Property**")

The undersigned, being the Tenant under a lease dated ● (the "**Lease**") made between ●, as Landlord and ●, as Tenant, [reference any assignments, extensions, amendments] respecting the premises known as ●, Ontario (the "**Leased Premises**"), hereby certifies and acknowledges the following:

1. The current term commenced on ●. The term of the Lease expires on ●. The Tenant has ● right to extend the term of the Lease for a term of ● (●) years on the terms and conditions contained in the Lease.

2. The annual base rent is as follows: **[INSERT DETAILS]**

3. The Lease has not been altered or amended except as expressly set out herein and is in full force and effect and is enforceable against the Tenant in accordance with its terms.

4. The Tenant is in possession of the Leased Premises.

5. The amount of prepaid rent or security deposit held by the Landlord is $● (inclusive of HST) and no interest or other monies are owing in respect of same [or there has been no prepaid rent or security deposit].

6. The Leased Premises have been completed in accordance with all obligations of the Landlord and such work has been satisfactorily completed, and to the best of the Tenant's knowledge, there is no subsisting default on the part of the Landlord of any of its obligations under the Lease, other than as set out below:

7. No default on the part of the Tenant has occurred and is continuing. To the best of the Tenant's knowledge, there is no existing or continuing default in respect of the Lease on the part of the Landlord, other than as set out below and no event or condition exists that would permit the Tenant to terminate the Lease or withhold payment of rent.

---

[77] As a rule, the purchaser will want this form to be as comprehensive as possible, while the vendor will want to limit it to the extent possible. Ultimately, if it is too long and complicated, it is less likely to be delivered by the tenant, which isn't in the interest of either the vendor or the purchaser. Practically, larger national tenants will insist on using their own form regardless of the form attached to the purchase agreement. The Purchaser should ask that the tenant confirm possession, additional rent amounts paid to date for the lease year, confirmation re. percentage rent, as applicable and include an attornment clause and they should require that the estoppel be addressed to the purchaser, its intended assignee and its intended mortgage lender.

8. The Tenant presently has no claim, defense, set-off or counterclaim against the Landlord under the Lease or otherwise.

9. The Lease has not been assigned and the Leased Premises have not been sublet, except as set out below:

10. There are no tenant inducements, tenant allowances or other incentives payable or to be performed by the Landlord which have not been paid in full and there are no future rent-free or rent-reduced periods under the Lease, except as set out below:

The contents of this certificate may be relied upon by the Purchaser of the Property and by any mortgagee or lender in connection with any financing of the Property by the Purchaser.

DATED at ● this ● day of ●, 202_.

[INSERT NAME OF TENANT]
Per:

_____

_____
I have the authority to bind the Corporation.

Rider 1

2.7.1 Tax Appeals and Refunds. In the event that there are any realty or business tax appeals for the period prior to the Closing Date, the Vendor shall transfer all of its right, title and benefit therein to the Purchaser (subject to the provisions of this section) and the Purchaser shall be entitled to continue such appeals and shall be entitled to receive all payments resulting therefrom. The Vendor shall direct the municipality to pay any refund or reassessment of such realty or business taxes to the Purchaser. The Purchaser shall pay any refund or reassessment of such realty or business taxes received by it (net of any fees and disbursements payable to any consultant or advisor) as follows:

2.7.1.1 Tenants that were in possession of premises at the Property during the period to which any such refund or reassessment relates and are still in possession of premises at the Property when the refund or reassessment is received by the Purchaser shall receive a share of any such refund or reassessment attributable to their leased premises for the period they were in possession of such premises in accordance with the provisions of their Leases. In this regard, the Vendor will cooperate fully with the Purchaser in providing all necessary information and documentation that is reasonably required by the Purchaser in order to determine amounts due to Tenants or former Tenants;

2.7.1.2 the Vendor and/or the Purchaser (each in accordance with its *pro rata* entitlement for the year in which the Closing Date occurs, the Vendor exclusively for years prior to the year in which the Closing Date occurs and the Purchaser exclusively for years following the year in which the Closing Date occurs) shall receive a share of any such refund or reassessment attributable to any space that was vacant during the period to which any such refund or reassessment relates or for which the original Tenant that was in possession during the period to which any such refund or reassessment relates has vacated such premises; and

2.7.1.3 the Vendor and/or the Purchaser shall receive any balance of any such refund or reassessment (each in accordance with its *pro rata* entitlement for the year in which the Closing Date occurs, the Vendor exclusively for years prior to the year in which the Closing Date occurs and the Purchaser exclusively for years following the year in which the Closing Date occurs).

To the extent the Vendor receives any of the aforementioned payments on or after the Closing Date, it shall hold such payments in trust for the Purchaser and forthwith remit them to the Purchaser

Rider 2

4.1.1 No Bankruptcy. None of the Vendor, GP or Nominee (i) is an insolvent person within the meaning of the *Bankruptcy and Insolvency Act* (Canada) or the *Winding-up and Restructuring Act* (Canada), (ii) has made an assignment in favour of its creditors or a proposal in bankruptcy to its creditors or any class thereof, (iii) has had any petition for a receiving order presented in respect of it, or (iv) has initiated proceedings with respect to a compromise or arrangement with its creditors or for its winding up, liquidation or dissolution;

4.1.2 Legal Title and Beneficial Interest. The Nominee is the registered owner of the Project, holding the Project in trust, only for the Vendor.

4.1.3 Notices. As of the Closing Date there will be no outstanding obligations relating to any existing written notice from any Governmental Authority ordering or directing that any alteration, repair, improvement or other work be done with respect to any Buildings or relating to any non-compliance with any Applicable Laws that are not being attended to by the Vendor;

4.1.4 Leases.

(a) The only Existing Leases affecting the Property as of the date hereof are listed in the Rent Roll attached as **Schedule C** to this Agreement. The Rent Roll is true and correct in all material respects. True and complete copies of all Leases will be delivered to the Purchaser on or before to the third Business Day after the date of this Agreement.

(b) With respect to each Lease:

(i) the Vendor is not in default of any of its material obligations as landlord under any of the Leases and, to the best of the knowledge of the Vendor, the Tenant under each Lease is not in default of any of its material obligations as tenant under any such Lease;

(ii) neither the Vendor nor any Person relate thereto has received written notice from any Tenant of any ongoing material dispute involving any terms of its Lease except as has been disclosed to the Purchaser in writing prior to the date hereof; and

(iii) except as otherwise set out in the Due Diligence Documents, no written notice has been received by the Vendor or any Person related thereto from any Tenant indicating an intention to vacate its premises in the Property or any part thereof or terminate its Lease prior to the date of the expiration of its Lease.

4.1.5 Remedial Orders. As of the Closing Date there will be no outstanding obligations relating to any existing written notice of any Remedial Order from any Governmental Authority with respect to the Property;

4.1.6 No Employees. There will be no salaried or contract employees of the Vendor or any other Person for whom the Purchaser will be required to assume any responsibility or liability on the Closing Date, other than as disclosed in the Due Diligence Documents;

4.1.7 No Litigation. There is no litigation outstanding, or, to the best of its knowledge, threatened against the Vendor or any Person related thereto with respect to the Property or otherwise involving the Property;

4.1.8 No Expropriation. To the best of the knowledge of the Vendor, no written notice of any expropriation or condemnation affecting the Property has been issued or received;

4.1.9 Contracts. The Contracts shall be delivered to the Purchaser as part of the Due Diligence Documents. Except as may be disclosed to the Purchaser during the Inspection Period, and approved by the Purchaser in accordance with Section ____, none of the Contracts has been amended, extended, assigned or renewed and each of the Contracts is in good standing and the Vendor has performed its obligations thereunder;

4.1.10 Regulatory Approvals and Consents. No approval or consent of any Governmental Authority is required in connection with the execution and delivery of this Agreement by the Vendor and the consummation by it of the transactions contemplated by this Agreement;

4.1.11 Environmental Data. Copies of all reports pertaining to any environmental assessment/audits relating to the Property, including any inspections, investigations and tests relating to the Property that were obtained by, or in the possession or control of, or carried out on behalf of the Vendor or its Representatives have been or will be delivered to the Purchaser as part of the Due Diligence Documents;

4.1.12 Construction Liens. All accounts owing for work, labour, materials, services and equipment performed for or on behalf of the Vendor or any Person related thereto in respect of or relating to the Property have been fully paid for, and no Person has the right to file a lien in respect thereof and the Vendor has not received notice of any claim of any Person, in respect of any construction lien, except as may be shown on the registered title to the Property or in the Due Diligence Documents;

4.1.13 Chattels. The Chattels, as herein described, are owned by the Vendor, constitute all of the equipment, furnishings and fixtures used by the Vendor in connection with the Property;

4.1.14 Options to Purchase. There are no options to purchase or rights of first refusal to purchase with respect to the Property or the Project that have not expired or been waived;

4.1.15 Accuracy of Information. The statements and information provided to the Purchaser present fairly the revenue and expenses related to the Property for the period reported on and

the financial statements have been prepared in accordance with generally accepted accounting principles;

4.1.16 Environmental Matters. The Vendor is not aware of the Release of any Hazardous Substance on, in, around, from or in connection with the Property, other than as may be revealed in the environmental reports provided by the Vendor as part of the Due Diligence Documents. Furthermore, to the best of the Vendor's knowledge, no Building, structure or improvement located on the Lands is or ever has been insulated with urea formaldehyde insulation nor do such Buildings, structures or improvements contain asbestos or polychlorinated biphenyls or toxic mold nor are there any underground storage tanks located on or under the Lands nor has the Property ever been used as a waste disposal site or burial grounds or cemetery;

4.1.17 Maintenance of Insurance. The Vendor maintains, and is in good standing in respect of such fire, boiler, public liability, property damage and rental insurance covering the Property as would be maintained by a prudent owner of a similar property and as required under the Leases, which insurance in respect of loss or damage to the Buildings is in an amount at least equal to the replacement value thereof;

4.1.18 No Collective Bargaining Agreement. There are no trade union collective bargaining agreements with any persons employed by the Vendor or any of its affiliates or their property manager or any other party not at arm's length from the Vendor in connection with the Property or its maintenance or operation and on the Closing Date, the Purchaser will not, by reason of its purchase of the Property from the Vendor, be bound by any trade union collective bargaining agreement or other similar trade union labour type agreement;

4.1.19 Compliance with Laws. To the best of the Vendor's knowledge, the present uses of the Property are lawful and comply with all Applicable Laws;

4.1.20 Permitted Encumbrances Complied With. To the best of the Vendor's knowledge, the Permitted Encumbrances are in good standing and have been complied with to date; and

4.1.21 Vendor to Update Due Diligence Documents. The Vendor will continue to disclose or update the Due Diligence Documents as the Vendor becomes aware of any material changes or modifications thereto

Rider 3

(i) all Leases and all lease files for the Property;

(ii) if available, copies of “as built” plans and specifications, floor plans, mechanical plans, electrical plans and fire plans for the Property;

(iii) all Tenant files, including correspondence with Tenants;

(iv) area certificates for Tenants' space in the Property, if available;

(v) an up to date Rent Roll;

(vi) all environmental, roof, structural, electrical, mechanical or other consultants reports related to the physical condition of the Lands and Buildings in the possession of the Vendor, including any existing Phase I and Phase II environmental reports for the Property;

(vii) audited operating statements for the Property if available; otherwise unaudited, for the last 3 fiscal years, certified by the chief financial officer or other senior official of the Vendor having knowledge to be true and correct in all material respects;

(viii) current year to date operating statements for the Property;

(ix) budget for 202_ and current operating budget for the Property;

(x) a list of all capital expenditures for 20__-20__;

(xi) leasing plans and site plans, both full size and reductions, if possible, for the Property;

(xii) aged receivables report for the Property;

(xiii) Tenant sales reports for the last three fiscal years and year to date for all tenants reporting sales, to the extent available;

(xiv) existing survey for the Property and a certificate of a land surveyor certifying the number of existing parking spaces, if available for the Property;

(xv) a list of Chattels;

(xvi) realty tax assessments, notices and tax bills relating to the Property, in respect of the past 3 years, in the possession or control of the Vendor and copies of any notices of any outstanding realty tax appeals and correspondence relating thereto, including copies of any working papers issued by the applicable assessment authorities used in calculating a notional allocation of the assessment;

(xvii) common area, realty tax and operating expense recovery statements and reports of billings submitted to each tenant for the Property for the past 2 fiscal years, and the current fiscal year to date;

(xviii) Tenant operating cost and tax reconciliation statements for the past three years with relevant calculations and backup materials;

(xix) rental advice notices submitted to each Tenant for the Property for the current year;

(xx) a list of outstanding work orders, notices, directives and letters of non- compliance issued by any governmental or other authority affecting the Property received by the Vendor, if any, and a copy of each of them;

(xxi) all documents relevant to litigation, arbitration, mediation or other proceedings, actual, threatened or pending, if any, against the Property or against the Vendor affecting the Property;

(xxii) each notice, if any, from any Tenant stating that it intends to vacate its premises in the Property prior to or at the scheduled expiry date and a list of outstanding requests, if any, from Tenants in respect of assignments of their Leases or the subletting of their premises;

(xxiii) copies of all Contracts including all employment contracts, service or maintenance contracts, it being understood that the Purchaser shall not be required to assume any of same;

(xxiv) the standard form of Lease for the Property;

(xxv) a schedule of all unpaid free rent, future rent concessions, allowances, unpaid leasing commissions and unfulfilled obligations for Tenants' improvements/Landlord’s Work and any other leasing costs and particulars of outstanding Landlord’s Work;

(xxvi) all warranties and guarantees relating to the construction of the Property, including parking lots;

(xxvii) copies of all information, by-laws, site plans and material in the Vendor's possession relating to the zoning, construction and density of the Property;

(xxviii) schedules in respect of the Property, specifying the name of each Tenant (or, if applicable, any assignee or sublessee of the Tenant), and its store number, the commencement and expiration dates of the term of each Lease and any unexercised renewal rights, the area occupied by each Tenant, the amounts of monthly rent and additional rent currently paid by each of the Tenants (including percentage rent, if applicable), details of rental rate changes through the term of the Leases, the current amount of any rental arrears, the amount of any security deposits, damage deposits and prepaid rents held by the Vendor and the particulars of any unexpired rent free

periods, allowances or other outstanding or unpaid Tenant inducements or lease take over costs;

(xxix) copies of any outstanding proposals to lease, offers that have not been accepted or letters of intent to lease;

(xxx) copies of all zoning applications and related materials, including reports, architectural drawings and plans and correspondence in connection with the proposed addition of a pad building on the Property;

(xxxi) authorizations executed by the Vendor, addressed to all Governmental Authorities (who require such authorizations) having jurisdiction over the Property, authorizing them to release to the Purchaser or the Purchaser's Solicitors all information in their respective files in relation to the Property, including details of all orders, notices to comply, outstanding permits and deficiency notices but not requiring or authorizing inspections; and

(xxxii) all documentation relating to the intellectual property rights of the Vendor or its related parties in connection with the ownership and management of the Property, including the use of the name "_____".

Law Society of Ontario | Barreau de l'Ontario

TAB 14

21st Real Estate Law Summit

What's New in Fraud & Social Engineering (PPT)

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

April 17, 2024

What's New in Fraud & Social Engineering

LSO 21st Real Estate Law Summit

April 17, 2024

Raymond G. Leclair
Vice-president, Public Affairs

LawPRO

1

AGENDA

Social Engineering

Fraud

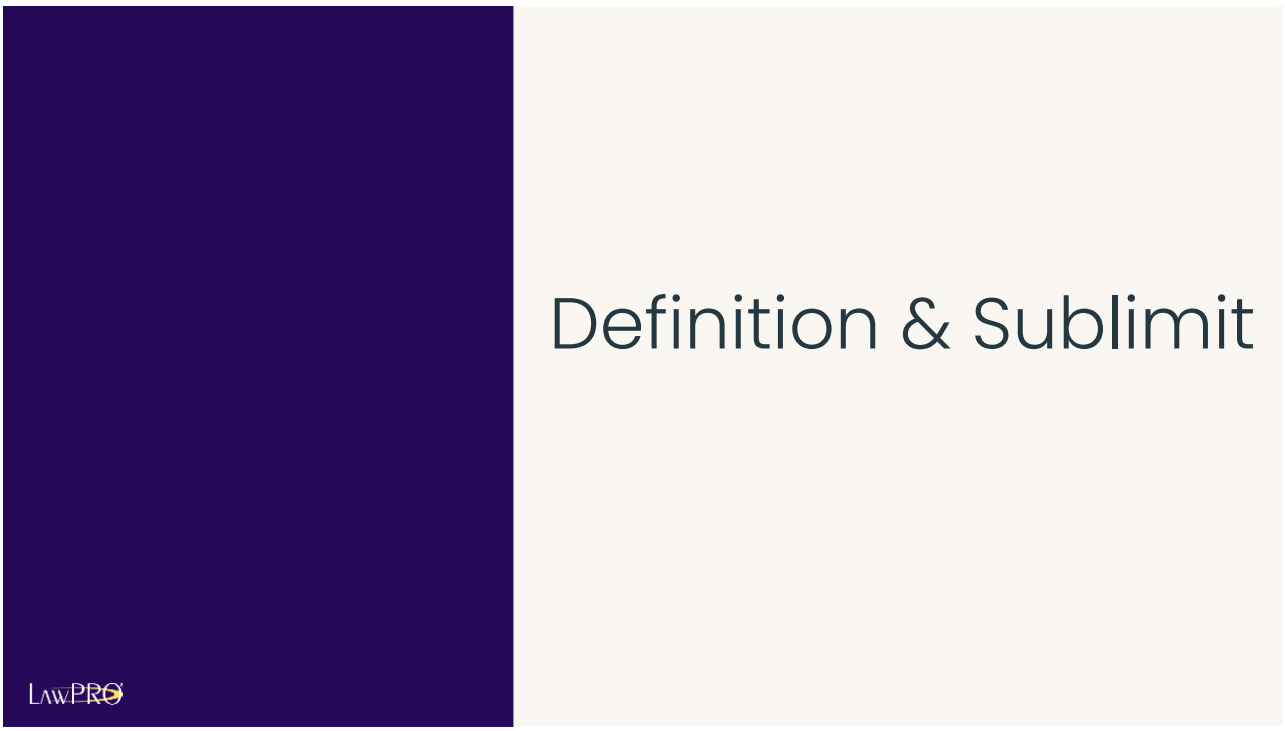
Tips to avoid being a victim of fraud

Resources

Questions

2

3



4

14-2

What is Social Engineering?

It is the use of deception or manipulation to coerce you or your staff into divulging or transferring personal or confidential information or property

This includes, but is not limited to, actions by another party that intentionally induce a lawyer or their staff to transfer funds or assets to the wrong party or account

LawPRO

5

Human characteristics Contribute to Risks

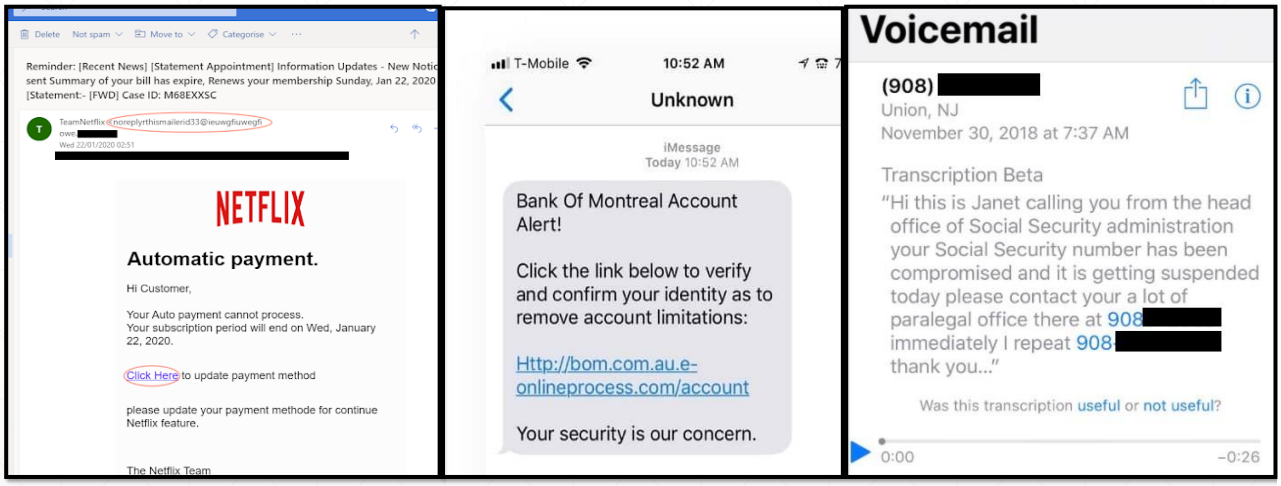
- Greed
- Trust
- Fear
- Ignorance
- Curiosity
- Laziness
- Anger

2024 LAWPRO Policy Update – Social Engineering Toolkit

6

Phishing/Smishing/Vishing

Understand the dangers & how to identify them



PHISHING **SMISHING** **VISHING**

7

DEEPFAKES & VOICE CLONING!

https://www.youtube.com/watch?v=J0FjQeMGJnU

8

14-4

What is the Social Engineering Fraud Sublimit?

Claims related to or arising out of social engineering are covered to a sublimit of $250,000 per claim and in the aggregate,

but you can extend the "social engineering coverage" to the standard $1 million limit per claim and $2 million in the aggregate

As of January 1, 2024

LawPRO

9

Overview of Steps: Policy Requirements

LawPRO

10

1. Specific retainer letter language

A. Include written Instructions in a retainer (or other agreement) for the receipt, release, and transfer of any funds or assets

B. Advise in the written retainer (or other agreement) that the client or another party to which you owe a duty of care should not ordinarily expect to receive any revised instructions from you or your firm for the transfer of funds or assets

C. Advise in the written retainer (or other agreement) if the client or another party to which you owe a duty of care receive revised instructions for the transfer of funds or assets, they should immediately contact you by way of a telephone number specified in the written retainer (or other agreement)

LawPRO

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2. What you (lawyer/law firm) must do

A. Ensure the appropriate language in the previous slide is in the retainer (or other written) agreement.

B. Contact the client or other party you owe a duty of care
If you or your staff:
a) receive any changes to the contact information of a client or other party to which you owe a duty of care, or
b) any changes to established instructions for the transfer of funds or assets
you confirm those changes by:
c) either calling the client or other party to which you owe a duty of care using contact information previously confirmed to be that of the client or other party, or
d) by meeting with the client or other party.

C. Maintain in writing any updated contact information for a client or other party to which you owe a duty of care, and any updated instructions for the transfer of funds or assets.

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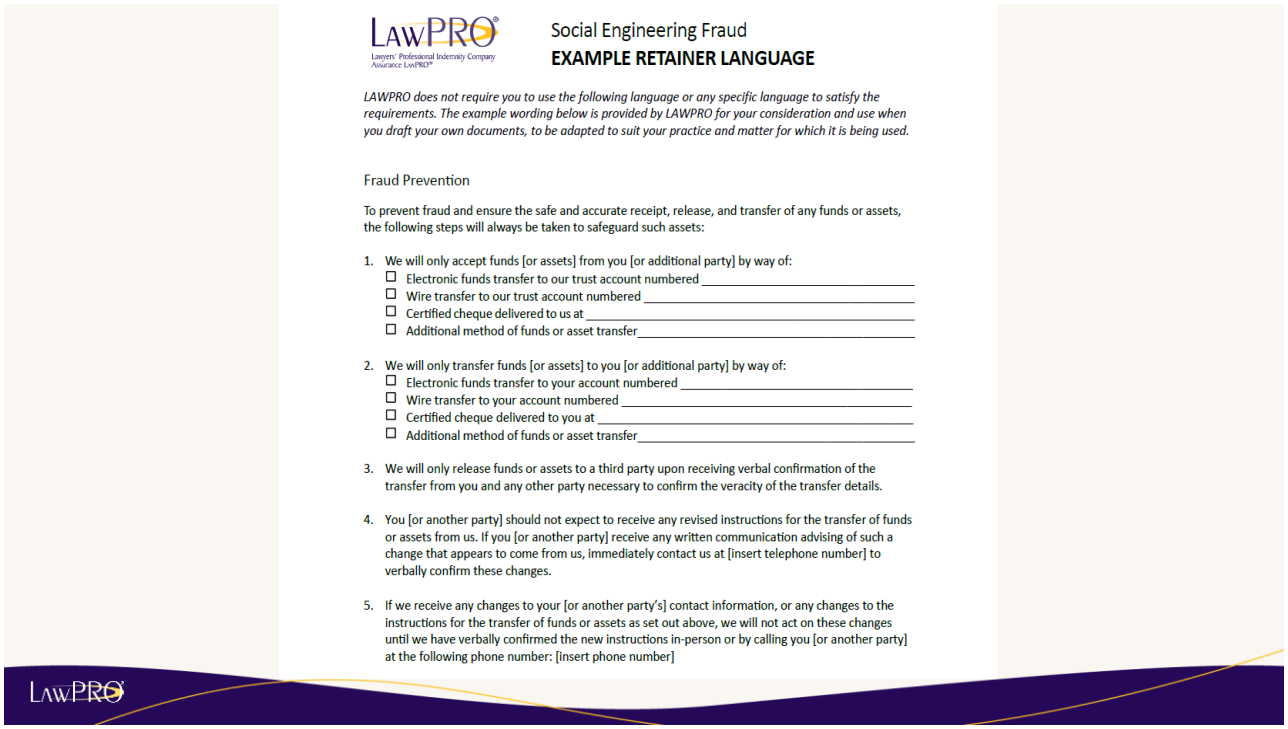
12

14-6



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Lawyers' Professional Indemnity Company
Assurance LawPRO®

Social Engineering Fraud
EXAMPLE RETAINER LANGUAGE

LAWPRO does not require you to use the following language or any specific language to satisfy the requirements. The example wording below is provided by LAWPRO for your consideration and use when you draft your own documents, to be adapted to suit your practice and matter for which it is being used.

Fraud Prevention

To prevent fraud and ensure the safe and accurate receipt, release, and transfer of any funds or assets, the following steps will always be taken to safeguard such assets:

1. We will only accept funds [or assets] from you [or additional party] by way of:
   - ☐ Electronic funds transfer to our trust account numbered _____
   - ☐ Wire transfer to our trust account numbered _____
   - ☐ Certified cheque delivered to us at _____
   - ☐ Additional method of funds or asset transfer _____
2. We will only transfer funds [or assets] to you [or additional party] by way of:
   - ☐ Electronic funds transfer to your account numbered _____
   - ☐ Wire transfer to your account numbered _____
   - ☐ Certified cheque delivered to you at _____
   - ☐ Additional method of funds or asset transfer _____
3. We will only release funds or assets to a third party upon receiving verbal confirmation of the transfer from you and any other party necessary to confirm the veracity of the transfer details.
4. You [or another party] should not expect to receive any revised instructions for the transfer of funds or assets from us. If you [or another party] receive any written communication advising of such a change that appears to come from us, immediately contact us at [insert telephone number] to verbally confirm these changes.
5. If we receive any changes to your [or another party's] contact information, or any changes to the instructions for the transfer of funds or assets as set out above, we will not act on these changes until we have verbally confirmed the new instructions in-person or by calling you [or another party] at the following phone number: [insert phone number]

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Frequently Asked Questions

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Your example retainer language suggests putting my firm's trust account number into the retainer letter.

I am not comfortable putting my trust account information in the retainer agreement, do I have to do this?

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If clients only send me payment for fees to my general account and I do not transfer money to my clients, do I need to include the sample language or meet the policy requirements pertaining to social engineering fraud?

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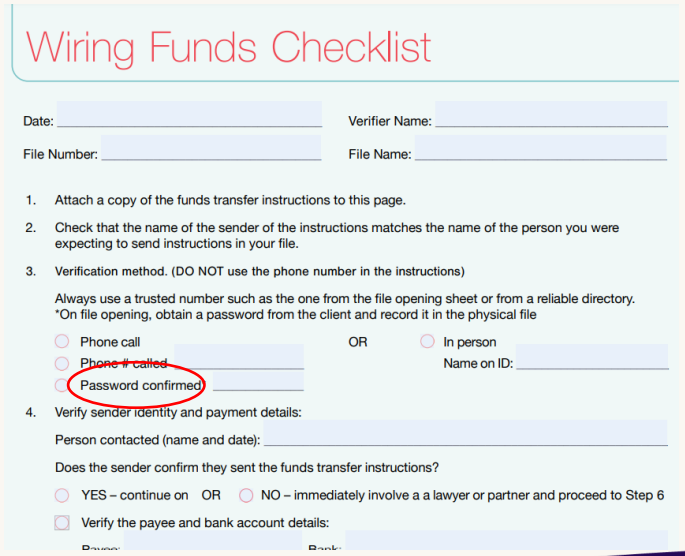
14-8

Is the **Wiring Funds Checklist** mandatory to use to comply with the policy requirements?



Wiring Funds Checklist

Date: _____ Verifier Name: _____

File Number: _____ File Name: _____

1. Attach a copy of the funds transfer instructions to this page.
2. Check that the name of the sender of the instructions matches the name of the person you were expecting to send instructions in your file.
3. Verification method. (DO NOT use the phone number in the instructions)

   Always use a trusted number such as the one from the file opening sheet or from a reliable directory.
   *On file opening, obtain a password from the client and record it in the physical file

   ○ Phone call OR ○ In person
   ○ ~~Phone # called~~ _____ Name on ID: _____
   ○ Password confirmed _____
4. Verify sender identity and payment details:

   Person contacted (name and date): _____

   Does the sender confirm they sent the funds transfer instructions?

   ○ YES – continue on OR ○ NO – immediately involve a a lawyer or partner and proceed to Step 6

   ☐ Verify the payee and bank account details:

   Payee: Bank:

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General Tips to Manage Your Risk

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Fraud

Wire funds diversion fraud
Greatest concern presently with many funds lost to fraudsters by lawyers and clients

Private mortgage fraud
There is presently a surge of private mortgage fraud

ID fraud
Individuals & corporations are victims of ID theft
New Ontario Business Registry?

Power of attorney fraud
Remain a problem in fraud scenarios
Fraudulently created or improper use of legitimate ones

"Bad" cheque fraud
This continues to be a troublesome source of loss for lawyers

Other frauds
Value fraud; internal fraud; straw-buyer; phishing/smishing/vishing and others continue to be seen

AvoidAClaim.com – Search/Subscribe

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Funds Redirection Scam

- Lawyer or client will receive email (from hacked email account)
  - with wire directions or redirection
  - hacked account may be lawyer's; client's; 3rd party in email thread
  - fraudsters monitoring email exchange for payment request
- **Need to verify independently the banking details every time!**
- Lawyer, staff & clients need to be forewarned & attentive to diversion
- Very real looking & convincing scenarios:
  - Law firm request for client to send funds
  - Mortgage discharge statement modified as to wire instructions

Action: - Call before you click!

- Call to verify bank details before sending funds

- Advise clients to call to verify

- https://avoidaclaim.com/2021/wire-fraud-scams-on-the-rise-5-tips-to-reduce-your-risk/
- https://avoidaclaim.com/2021/what-to-do-if-money-is-diverted-to-a-fraudsters-account/

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14-10

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Bad cheque frauds

- 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

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14-11

Gift card scam

Authority figure or trusted individual scam

From: "Kathleen A. Waters" <kathleen.waters@lawpro.ca>
To: iveri.boudville@lawpro.ca
Date: 09/09/16 01:25 PM
Subject: Request for September 9, 2016

Hello Iveri,

Hope your day is going well? I will need you to disburse few payments for me today. Kindly let me know how soon you could complete my request.

Thanks,
Kathleen A. Waters

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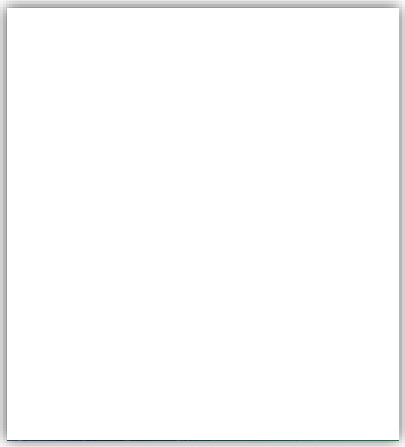
Good Password Practices

- Ø Regularly change passwords on key accounts
- Ø Change compromised passwords **immediately**
- Ø Use passphrases of twelve characters or more with mixed types of characters
- Ø Use different passwords for different accounts
- Ø Use a password manager
  - Ø PCMagazine - Best Password Managers (each year)
- Ø Use biometric scanners
- Ø **Use Two-step authentication / 2FA**



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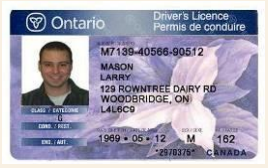
14-12

TIPS WHEN VERIFYING ID DOCUMENTATION IN-PERSON:

- Do NOT simply copy & file!
- Does the picture match the client sitting in front of you?
- Pictures on various ID documents the same?
- Is the person in the picture smiling?
- Apparent age in picture vs date of ID document
- Ontario driver's license number
  - starts with 1st letter of last name
  - Ends with person's date of birth
  - Women's month date – 0 replaced by a 5; 1 by a 6;
- Signature in ID document match your client's signature?
- Laminated ID no longer valid



Search validity of Ontario driver's license for free: www.dlc.rus.mto.gov.on.ca

- AGCO – Responsible Service Tip Sheet: Checking ID

ID Authentication Provider Chart – practicePRO/IDVvendors

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CORPORATE RECORDS FRAUD

- Form of identity theft but 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:
  - Last filing 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/

October 19, 2021 – New Ontario Business Registry https://news.ontario.ca/en/release/1000749/province-launches-new-modern-ontario-business-registry

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OBR – ONTARIO BUSINESS REGISTRY

- Ontario Business Registry launched on October 19, 2021
- Government-authorized service providers:
  - ecore by Dye & Durham Corporation
  - ESC Corporate Services Ltd.
  - OBR Partner Portal (Beta release) - Application
- 8 (1) - The Minister shall enter into a record the information from every return and notice received under this Act. 1995, c. 3, s. 4. (*Corporations Information Act, R.S.O. 1990, CHAPTER C.39*)
- 21 - The Minister may accept the information contained in any return or notice filed under this Act without making any inquiry as to its completeness or accuracy. R.S.O. 1990, c. C.39, s. 21; 1994, c. 17, s. 42.
- Issue of reliability of Form 1 information (directors/officers/registered office)
- Reliance on Corporate Profile Report – see *Am-Stat Corporation v. Ontario*, 2018 ONCA 877 – "We agree with the motion judge's conclusion that reliance by third parties on the information accepted by the Ministry is not contemplated by the Act."

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Prevent fraud

Call before you click!

Always independently verify wire instructions by calling to confirm them before transferring funds

Train your lawyers and staff

Make sure all staff are aware of risks and always call to double check any wire transfer instructions received by email

Warn your clients

Alert your clients of the dangers and advise them to verbally confirm with your firm any bank account details received by email

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Internet of Things (IOT)

When working from home, be cautious during phone calls and any oral conversation, when electronic devices are listening.
Be wary of any of the following:

In your home:	• Personal assistants: Amazon Alexa, Google Home/Nest, Google Nest, Amazon Echo, or Apple Homepod • Smart appliances and other: Smart TV, smart fridge, Ring doorbell, etc.
On your smartphone:	• Apple Siri, Google assistant or Samsung Bixby
On your personal computer:	• Microsoft Cortana or Apple Siri
On your wrist:	• Modern smartwatches have a virtual assistant, similar to smartphones
In your car:	• Siri with Apple CarPlay, or Google Assistant with Android Auto.

Smart devices, also referred to as Internet of Things (IoT) devices, often remain in a listening mode, and all voice commands being captured are processed over the internet and often recorded by Apple, Google or Amazon

If you are in a highly confidential call or teleconference, make sure that:	• A virtual assistant is not in the same room as you, or • the virtual assistant is fully de-activated or powered off

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Places to Learn More

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Social Engineering Toolkit

Policy Requirements Chart: This chart states the policy requirements and provides sample corresponding example language. (Word and PDF)

Example Retainer Language: For your convenience, this sample wording can be used or adapted to your needs. (Word and PDF)

Exemple de langage de mandat de représentation en justice (Word and PDF)

Wiring Funds Checklist: Use this checklist for every transaction that involves wiring funds from your trust account

Frequently Asked Questions: See the commonly asked questions about the social engineering policy requirements.

FOR FILES THAT ARE ALREADY OPEN:

We highly encourage you to send your client a revised retainer letter or an addendum to the current retainer agreement you have in place. At the minimum, we suggest you send the following reminder: "Funds transfer fraud is on the rise. Please note, we will never email you with a request to change or update any banking or transfer information. If you receive a request like that by email, please phone us immediately using a previously known number. In addition, if we receive any banking or transfer information from you, we will confirm this by independent means. If you have questions or concerns, please contact us."

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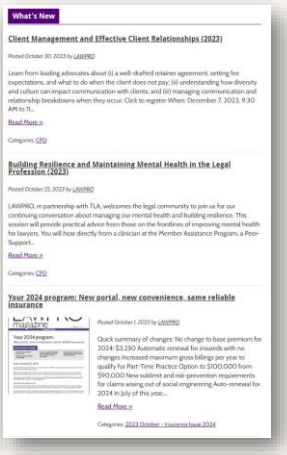

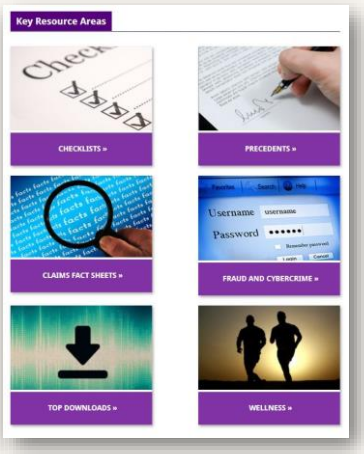

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Fraud Prevention

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Thank You & Stay in Touch!

Raymond G. Leclair
Vice-president, Public Affairs
LAWPRO, Toronto, Ontario

Connect with me:
ray.leclair@lawpro.ca

www.Lawpro.ca
www.PracticePro.ca
www.AvoidAClaim.com

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Law Society of Ontario | Barreau de l'Ontario

TAB 15

21st Real Estate Law Summit

Issues in Condominium Conveyancing

Schedule A
Condominium Resale Agreement of Purchase and Sale

Audrey Loeb, LLM, LSM, OOnt
Shibley Righton LLP

Evan Holt
Shibley Righton LLP

April 17, 2024

cpd

ISSUES IN CONDOMINIUM CONVEYANCING

Audrey Loeb and Evan Holt-
Shibley Righton LLP

As developers continue to use a more diverse array of land development strategies in respect of condominium communities, and as older condominium corporations grapple with budgeting decisions related to inflation and aging infrastructure, a purchaser's lawyer has a unique opportunity to provide real value to purchaser clients by understanding and explaining, in plain language, a variety of circumstances that can significantly impact the use and enjoyment of the condominium property, and financial wellbeing of a unit owner. Below is our commentary on a variety of matters related to condominium purchases that we feel demonstrate this opportunity.

Understanding Condominiums

As more Ontarians make condominium communities their homes of choice, it has become glaringly apparent that many purchasers do not fully appreciate or understand the governance structure of a condominium community. It is important that prospective purchasers understand this before entering into a binding agreement to purchase a unit.

Below is a QR code to *Buying and Owning a Condominium: What You Need to Know,* by Audrey Loeb. This book explains, the division of the condominium property, the role of the condominium corporation, and the general responsibilities of unit owners. While particularly useful to those that may be new to condominium living, this booklet can be provided to any prospective purchaser of a condominium unit and is a good read for any lawyer.

Use of Property

Generally, a purchaser will have specific intentions as to how the condominium property being purchased will be used following closing. The governing documents of a condominium corporation can, and often do, contain restrictions as to the use of the property (for example, there are often restrictions on the leasing of units and the specific types of businesses permitted to operate in commercial units. In addition, a purchaser's lifestyle decisions (for example, smoking, pet ownership, or the playing of a musical instrument) the use of units, including parking and storage, will also be governed by the governing documents of a condominium corporation. Understanding how a purchaser intends to use the condominium property and the general nature of the purchaser's lifestyle will inform the review of the status certificate and may alert a purchaser's lawyer to direct the purchaser to make further inquiries regarding their intended use.

In particular, if a purchaser client wants to renovate all or part of the unit, most condominium corporations require that the renovations be approved by the board of directors and an agreement entered into before work can commence – similar to the agreement that is required under section 98 of the *Condominium Act, 1998* for alterations to common elements. It is possible that a board of directors will not approve all of the proposed alterations to the unit and, if approved, the agreement will contain constraints regarding manner of construction of the renovation. Adding and relocating plumbing fixtures and appliances can be problematic in most high rises and will often not be permitted. Purchasers should be made aware of any such restrictions prior to entering into a binding agreement of purchase and sale.

S.98 Alteration Agreements

Agreements to permit an alteration to the exclusive use common elements or the installation of an electric vehicle charging system should appear in the status certificate and be registered on title. Prior to the requisition date, any such agreement should be provided to a purchaser and reviewed to ensure that the alteration remains and that the purchaser understands that the purchaser will be bound by the agreement following closing.

If the alteration has been removed from the property, a purchaser's lawyer should requisition that the agreement to be deleted from title prior to closing. If the alteration remains, a purchaser's lawyer should requisition evidence of the vendor's compliance with the agreement.

Special Assessments

An unexpected special assessment can cause serious financial consequences. The standard form agreement of purchase and sale does not provide purchasers with any protection in the event of a special assessment between execution of the agreement and final closing.

If afforded an opportunity to review an agreement of purchase and sale prior to execution, inserting language that requires the vendor to notify the purchaser of any new special assessment and to provide a credit in favour of the purchaser of an amount equal to the then outstanding special assessment provides a purchaser with a clear remedy in the event of an unexpected special assessment. This language is especially useful in instances where the scheduled closing is not for many months following execution of the agreement of purchase and sale. Accordingly, we recommend that a status certificate be requested prior to the closing and/or that the purchaser's lawyer obtain a verbal confirmation from the condominium corporation that there are no material changes to the original status certificate as of the date of closing. (See our Schedule A attached)

Extent of Unit and Purchased Interests

Obtaining a copy of the registered condominium plans and highlighting the location of the property being purchased as well as any applicable cross-sectional diagrams demonstrating the boundaries of the purchased property continues to be an important step in ensuring that a purchaser client will obtain the property contracted for and protect a purchaser's lawyer in the event of a claim. In the case of exclusive use areas or other interests in the condominium property that are not designated as units, a purchaser's lawyer should explain how these areas are governed and the nature of the purchaser's use of these areas.

Common Elements Condominium Purchase Considerations

Deposits

Developers/Builders continue to exploit a loop- hole in the *Condominium Act, 1998*, permitting deposit money, paid in connection with the purchase of the freehold land and building that will become a parcel of tied land ("POTL") following registration of the condominium, to be paid to the developer/builder directly. Accordingly, the deposit monies are not afforded the same protections as deposits paid in connection with the purchase of a proposed unit in a condominium.

While it is unlikely that a developer would agree to an amendment requiring deposit monies to be paid into trust, it is important that a purchaser's lawyer reviewing the agreement of purchase and sale and explain to the purchaser both the extent of the deposit protections offered by Tarion and the risks associated in making excess deposit payments if not to be held in trust by the Vendor's legal counsel.

Restrictive Covenants

While the condominium governing documents will govern only the common elements of the condominium plan and not the POTL's it is becoming more common that a developer will register restrictive covenants against the POTL's to govern the use and aesthetic of the POTL's and the buildings constructed thereon . These registered restrictions will impact a purchaser's use and future alteration of the POTL. Accordingly, it is important that any restrictive covenants registered against title to the POTL be reviewed and explained to a purchaser by the purchaser's lawyer.

New Construction

As the construction industry continues to recover following the COVID-19 pandemic, new condominium closings continue. A reminder to advise purchasers, preferably in an initial letter,

- to forward all notices regarding a change in occupancy date so that a determination can be made if delayed closing compensation maybe payable;

- of the obligation to pay occupancy fees and restrictions that apply during the interim occupancy period; and

- to keep the developer/builder informed of any change in purchaser contact information.

Post Closing

Following completion of the purchase transaction it is important that the condominium corporation be promptly informed of the change in ownership and the address for service of the new purchaser. If the lawyer is not going to do this, it should be clearly established that the purchaser will inform the condominium corporation of this change. A purchaser should also inform the condominium corporation of an e-mail address that can be used to communicate with the purchaser. Failing to

inform the condominium corporation of a change in ownership can have significant financial repercussions and could result in a claim against the purchaser's lawyer.

Conclusion

There are many opportunities for a purchaser's lawyer to provide a purchaser with advice and commentary that will serve the purchaser well during the course of ownership of a condominium property. While some of the opportunities set out above may not be included in a "standard" transaction fee, this points to a further opportunity to educate purchasers about additional value-added services. Regardless of the service level selected by a purchaser, a purchaser's lawyer should be sure to clearly communicate, in writing, the extent of the retainer, including, but not limited to, the extent of the searches that will be undertaken by the purchaser's lawyer.

SCHEDULE A

CONDOMINIUM RESALE AGREEMENT OF PURCHASE AND SALE

1. The Seller warrants that:

   (a) the Seller has complied with the *Condominium Act, 1998*, and the declaration, by-laws and rules of the Condominium Corporation in respect of the Property; and

   (b) no improvements, additions or repairs which require the consent of the Condominium Corporation have been carried out by or on behalf of the Seller in the Property or upon the common elements (including exclusive use areas), without the consent of the Condominium Corporation and that the Seller is not otherwise a party to any agreement with the Condominium Corporation, which may affect the Buyer other than as may be disclosed in the Status Certificate obtained by the Buyer in accordance with section 2 of this Schedule A.

   This warranty shall survive the completion of this transaction and not merge on closing.

2. This Agreement is conditional upon the Buyer obtaining a Status Certificate and associated documents as required under the *Condominium Act, 1998,* from the Condominium Corporation and the Buyer being satisfied, in the Buyer's sole and absolute discretion, with the contents of the Status Certificate and associated documents. The Buyer shall have seven (7) calendar days after receipt of such Status Certificate and associated documents to notify the Seller that the Status Certificate is satisfactory to the Buyer, failing which, this Agreement shall be null and void and the deposit shall be returned to the Buyer in full, without penalty. This condition is for the sole benefit of the Buyer. The cost of the Status Certificate and accompanying documents shall be borne by the Seller and adjusted, in favour of the Buyer, on closing.

3. The Seller agrees to notify the Buyer in writing of any notice from the Condominium Corporation related to any actual or contemplated:

   (a) increase in common expenses;

   (b) special assessments;

   (c) additional charges or levies against the Property; and

   (d) updated plan for future funding of the reserve fund,

   delivered to the Seller at any time prior to the Completion Date.

4. The Seller agrees to be responsible for any actual or contemplated increase in common expenses, special assessment, or other charges relating to the Property that are not disclosed in the Status Certificate obtained by the Buyer as contemplated in section 2 of this Schedule A that may be announced or disclosed by the Condominium Corporation prior to the Completion Date. This amount, if any, shall be adjusted, in favour of the Buyer, on closing.

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TAB 16

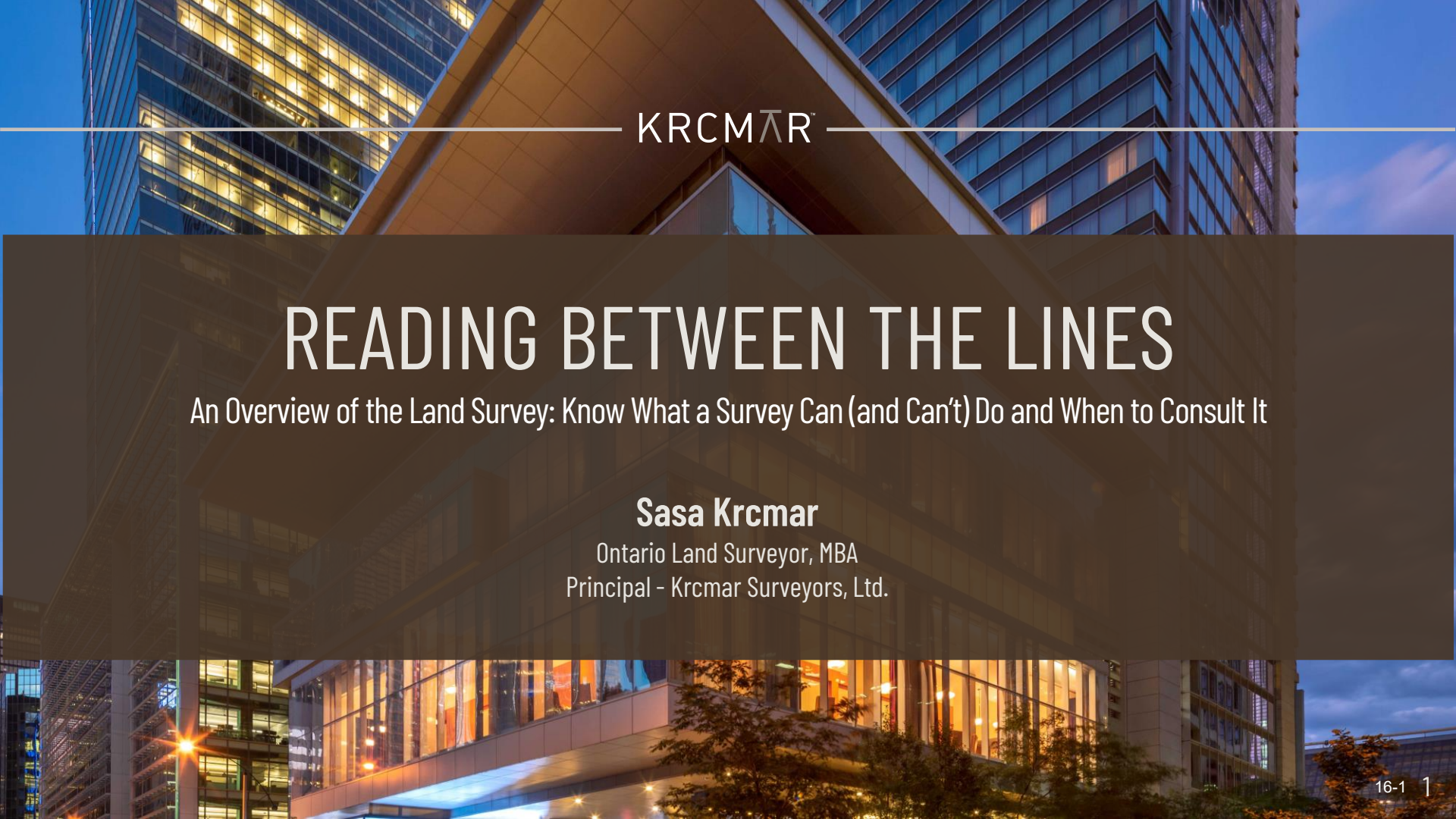
21st Real Estate Law Summit

READING BETWEEN THE LINES
An Overview of the Land Survey: Know What a Survey Can (and Can't) Do and When to Consult It (PPT)

Saša Krcmar, MBA, OLS, OLIP, Principal & Condo Specialist
Krcmar Surveyors Ltd.

April 17, 2024

cpd



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READING BETWEEN THE LINES

An Overview of the Land Survey: Know What a Survey Can (and Can't) Do and When to Consult It

Sasa Krcmar
Ontario Land Surveyor, MBA
Principal - Krcmar Surveyors, Ltd.

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AGENDA

1. Foundations of a Legal Survey Plan
2. Types of Survey Plans and Uses
3. Reading and Interpreting a Survey Plan
4. What Can a Land Survey Do?
5. What Can’t a Land Survey Do?
6. When to Consult a Survey Plan
7. Why it Matters

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THE SURVEY PLAN»

Image source: Adobe Express/Powered by Adobe Stock

TYPES OF SURVEY PLANS & USES – **PUBLIC PLANS**

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- **Reference plans** (R-Plans) simplify legal descriptions for public use.
- **Strata Plans** just complex 3-D Reference Plans.
- **Absolute Title Conversion Reference Plans** for title conversion.
- **Registered Plans** under "Registry" Act.
- **M-Plan** (Master/Subdivision Plan) under Land Titles Act.
- **Condominium Plans** creating "three-dimensional" subdivisions.
- **BA (Boundaries Act) Plans** usually confirm street legal limits.

TYPES OF SURVEY PLANS & USES - **PRIVATE PLANS**

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- **Surveyors Real Property Report** (SRPR) for real estate transactions.
- **Plan of Survey** provides legal boundary with/without buildings.
- **Boundary and Topography Survey** for redesign/development, shows real boundary and topographic features.
- **Topography Surveys** not always legal surveys.

READING AND **INTERPRETING** A SURVEY PLAN

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- **Limits** that have been surveyed.
- **Comparison** information for distances, directions.
- **"Ties"** showing relationship to surveyed boundary.
- **Legal monuments** include iron bars (IB), cut crosses(CC), concrete pins (CP).
- **Surveyor Number** stamped on bars and concrete pins.
- **"Witness" monuments** not set at corners.

VALIDATING A LEGAL SURVEY PLAN

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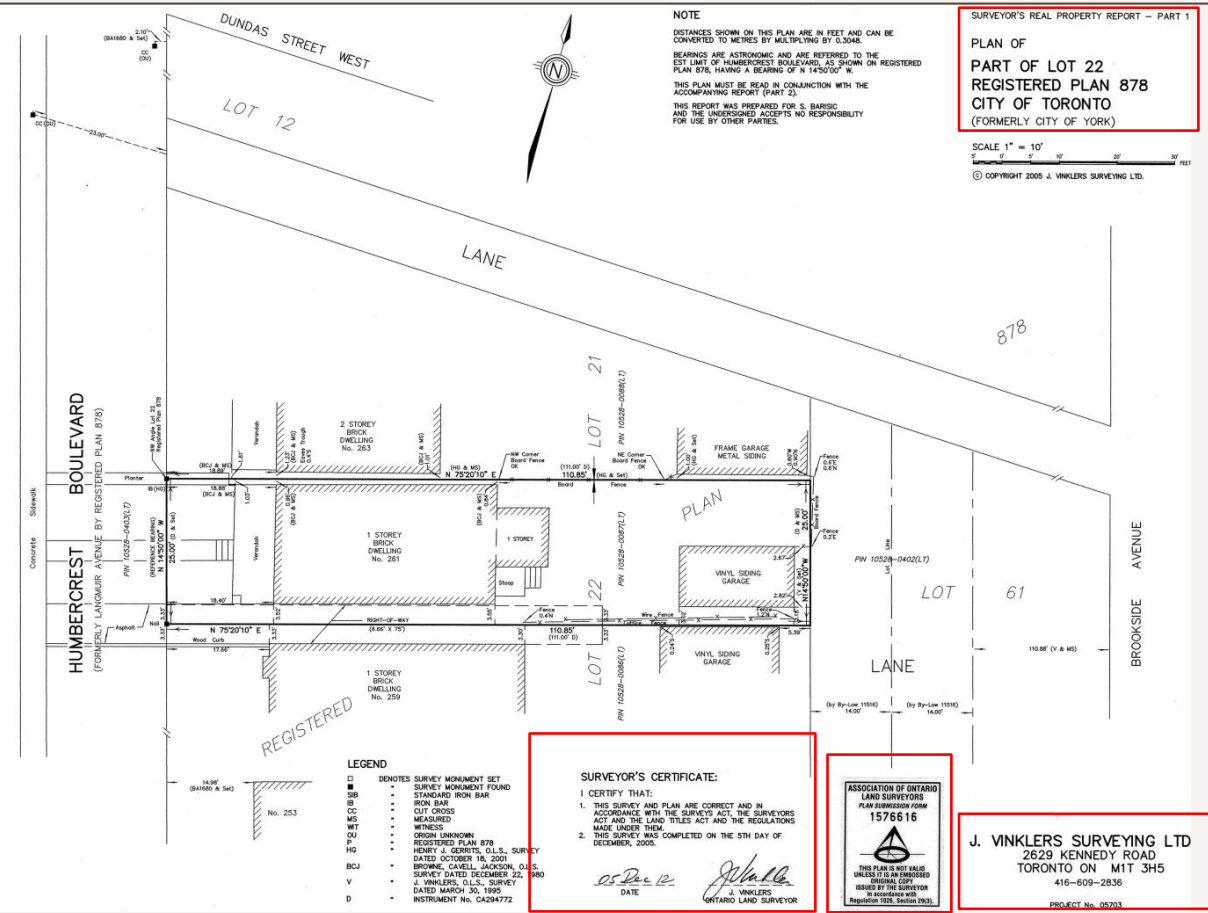
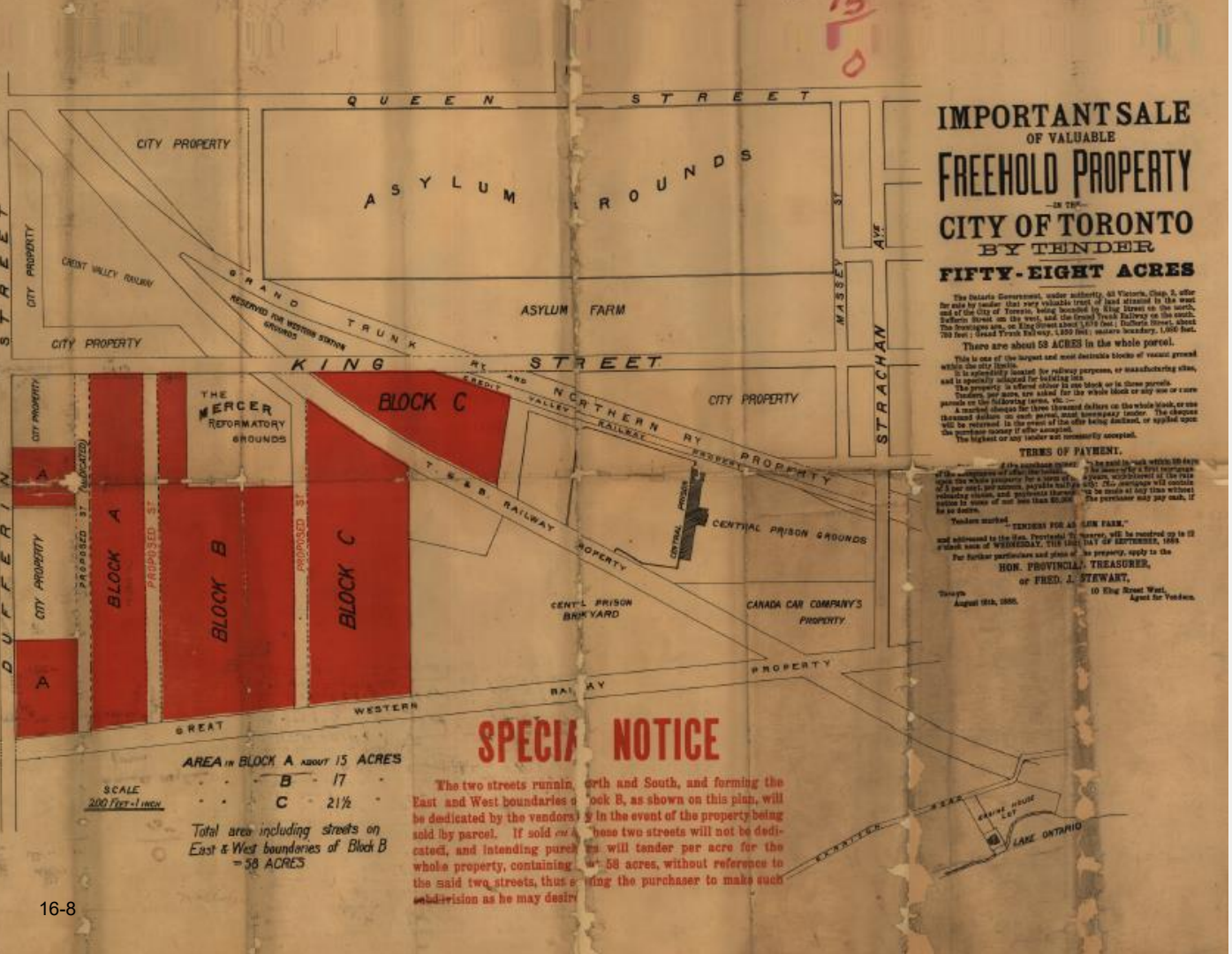


CHECKLIST

- ☑ Title.
- ☑ Surveyor's Certificate.
- ☑ Signature and Date.
- ☑ Land Survey Firm.
- ☑ AOLS Sticker (now a statement).



WHAT **CAN** A LAND SURVEY DO?

WHAT **CAN** A LAND SURVEY DO?

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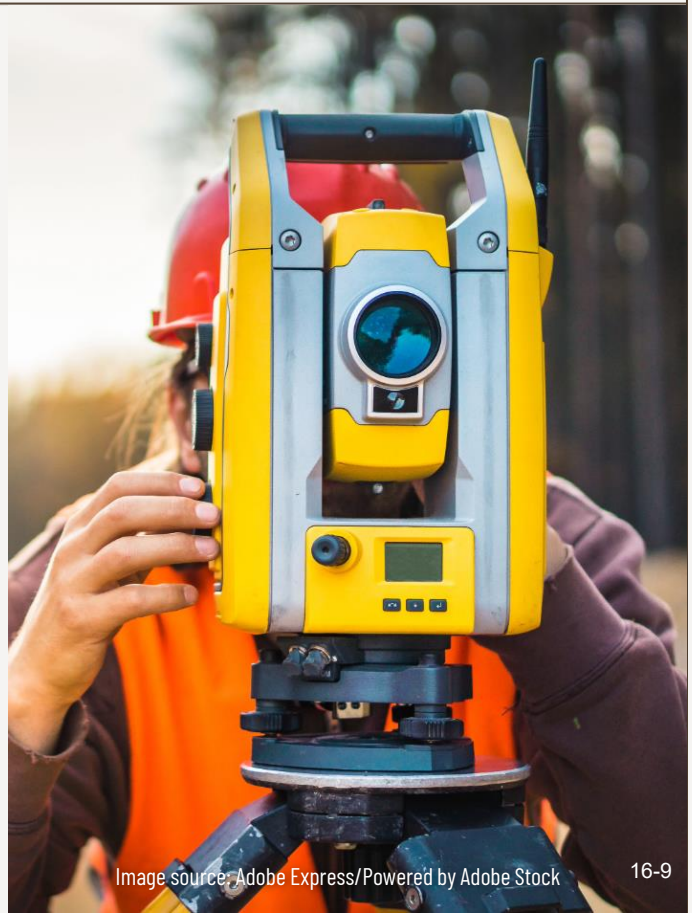
1. PROVIDE SURVEYOR'S OPINION OF THE BOUNDARY

- Surveyor provides an **impartial opinion** of the boundary using **"best available evidence".**
- Relies on **hierarchy of evidence** to prioritize evidence based on reliability.
    - Natural Boundaries -> Original Monuments in their Original Positions -> Occupation -> Dimensions
- Survey plan **tells a story of the research.**



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WHAT **CAN** A LAND SURVEY DO?

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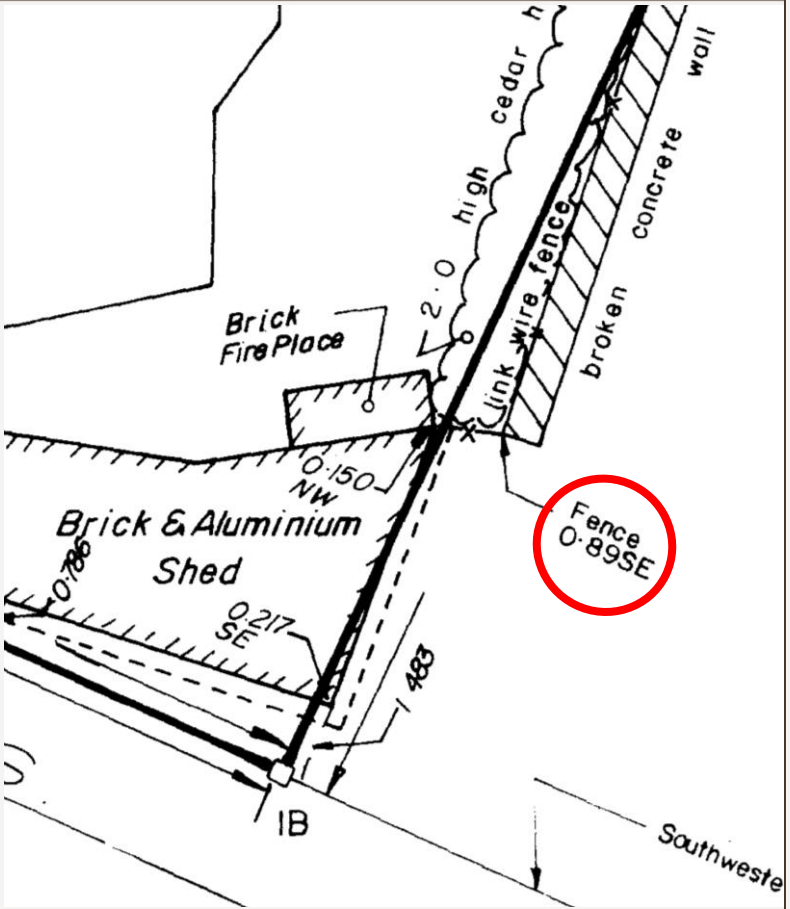
2. SHOWS RELATIONSHIP OF PHYSICAL FEATURES

- Illustrates **the relationship of features** to the boundary (c/l fences; structures; easements; encroachments; survey monuments; retaining walls; buildings).
- Short form distance-direction "from the boundary/corner" (x N/S, y E/W).



WHAT **CAN** A LAND SURVEY DO?

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3. CREATE A BASELINE FOR THE FUTURE

- Serves as **a chronological and legal record** for understanding land history and occupation.
- Support future claims such as adverse possession.
- Confirms legal non-conforming history.
- Buildings are monuments (they do not move).
- Due diligence.

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WHAT **CAN** A LAND SURVEY DO?

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4. DISAGREE WITH GEOWAREHOUSE INDEX MAP

- Geowarehouse is **not a land survey**, but an index map.
- A land survey **can reveal discrepancies** with deeds, identify misdescriptions, and affirm parcel boundaries.

GEOWAREHOUSE PARCEL MAPPING

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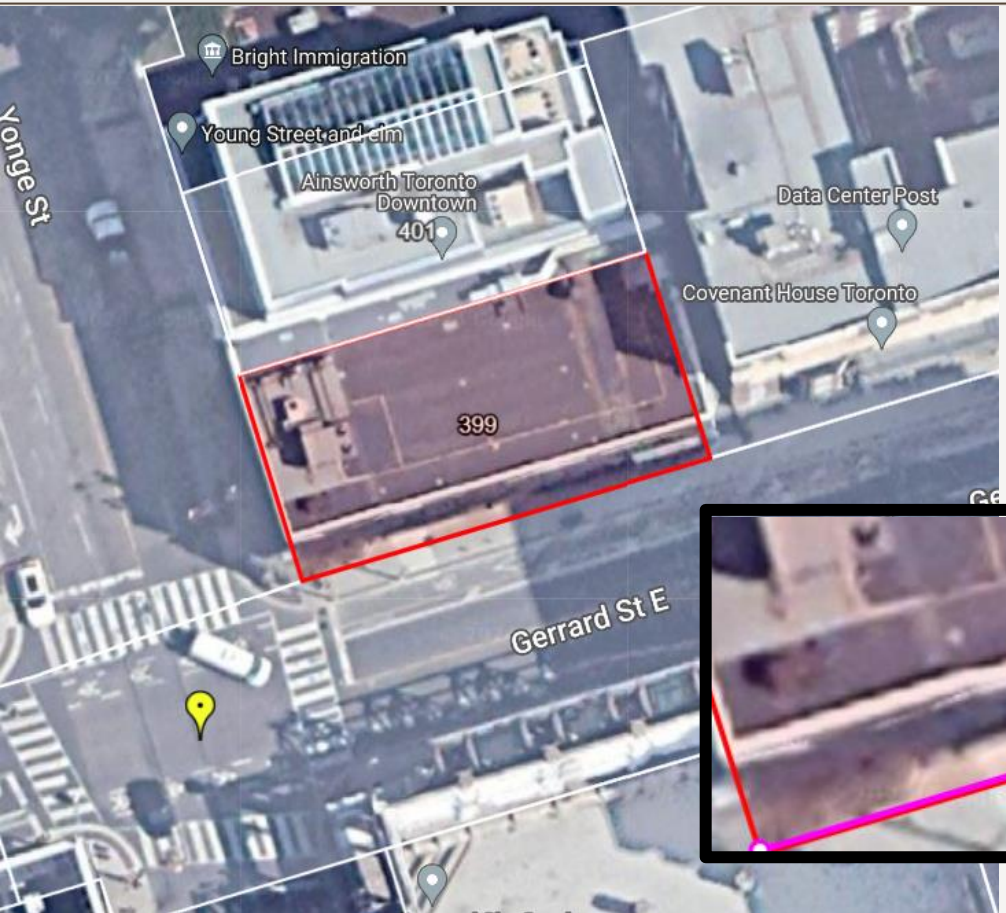

Parcel mapping shows 100 ft lot depth (matching Registered Plan).

GEOWAREHOUSE PARCEL MAPPING

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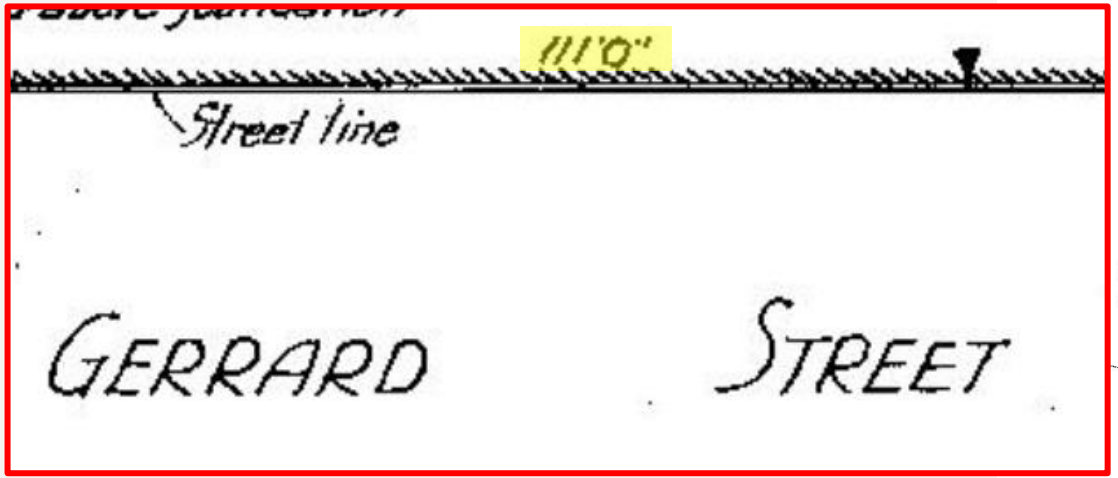
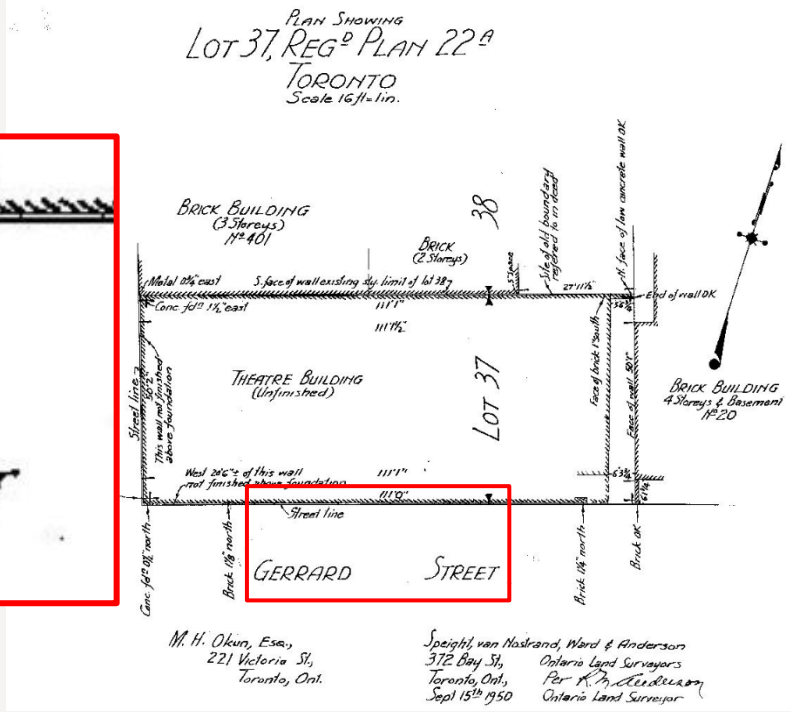
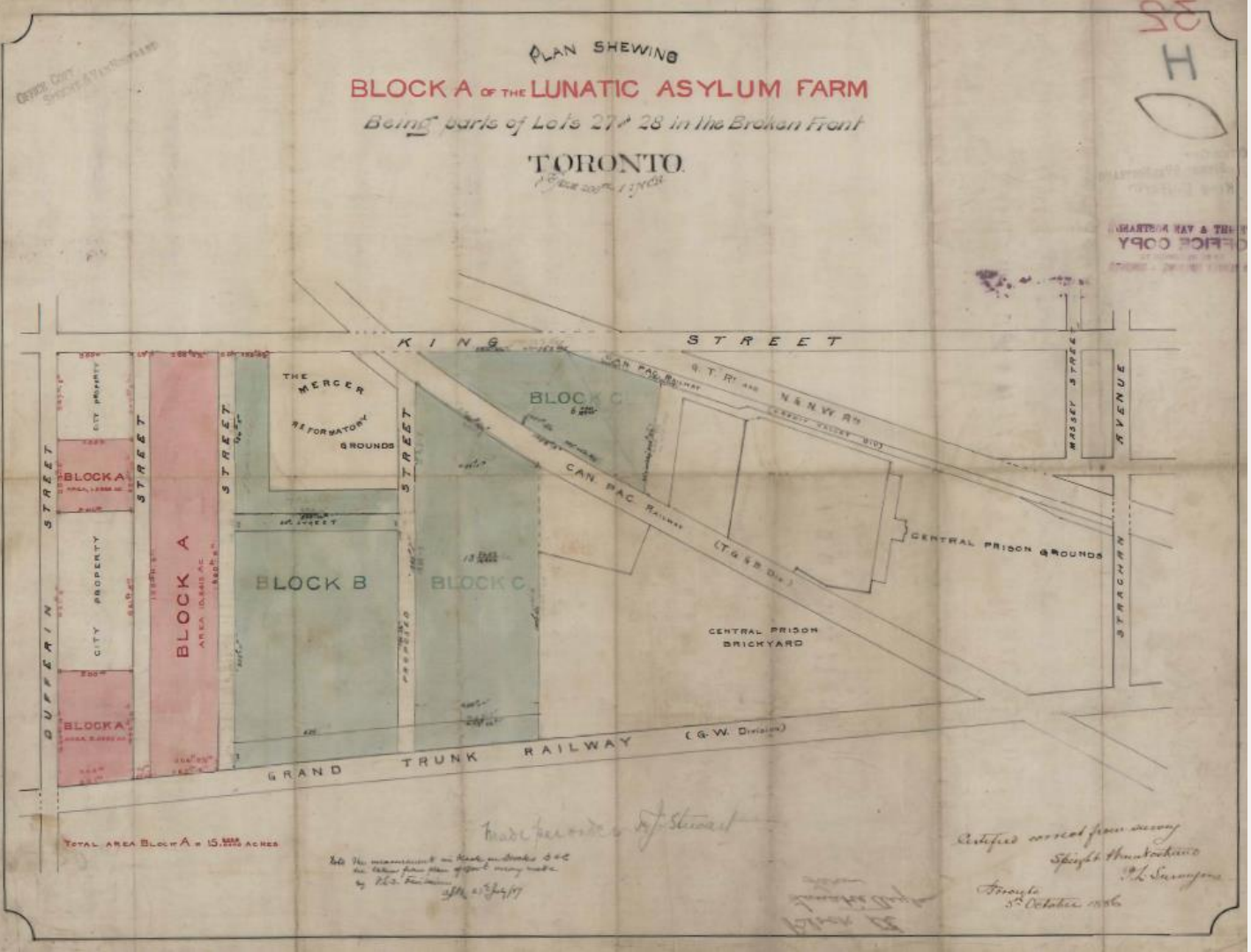




Legal survey plan from 1950 shows surveyed lot depth of 111 ft (11 feet longer than Registered Plan).



WHAT **CAN'T** A LAND SURVEY DO?

WHAT **CAN'T** A LAND SURVEY DO?

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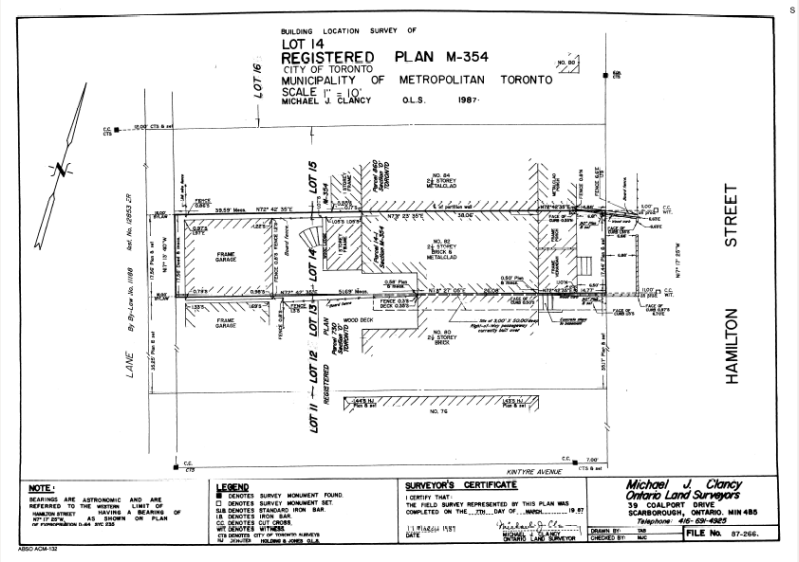
1. CERTIFY A BOUNDARY

- Only a judge can certify boundaries (Boundaries Act); **a surveyor's opinion remains subject to change** based on new evidence.

2. MOVE A BOUNDARY

- A typical re-survey **does not create boundaries**. Non-riparian parcels **cannot gain land** through a typical re-survey.
- **Lot lines cannot bend**, but property lines can bend.



WHAT **CAN'T** A LAND SURVEY DO?

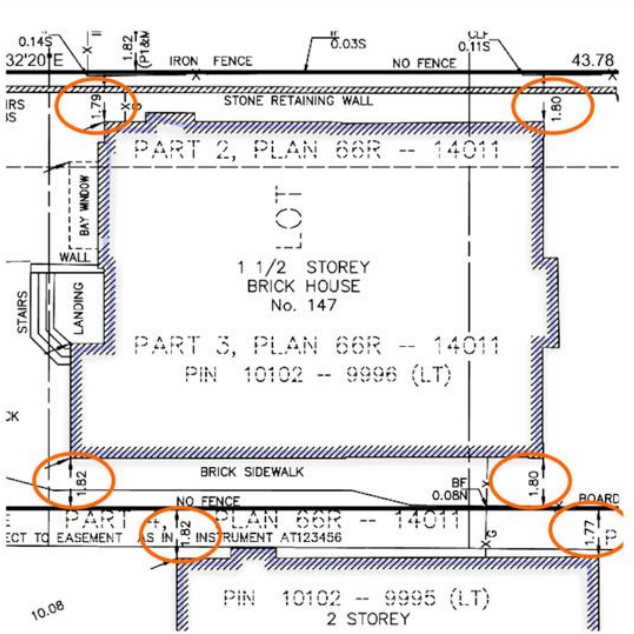
KRCMAR

3. IGNORE EVIDENCE

- Surveyors cannot disregard evidence; the plan must **address all conflicting information impartially**.
- **Surveyors are not advocates, lawyers are.**

4. SHOW NON-VISIBLE STRUCTURES

- **Hidden structures** such as boundary walls, underground utility services or underground garages may be omitted.



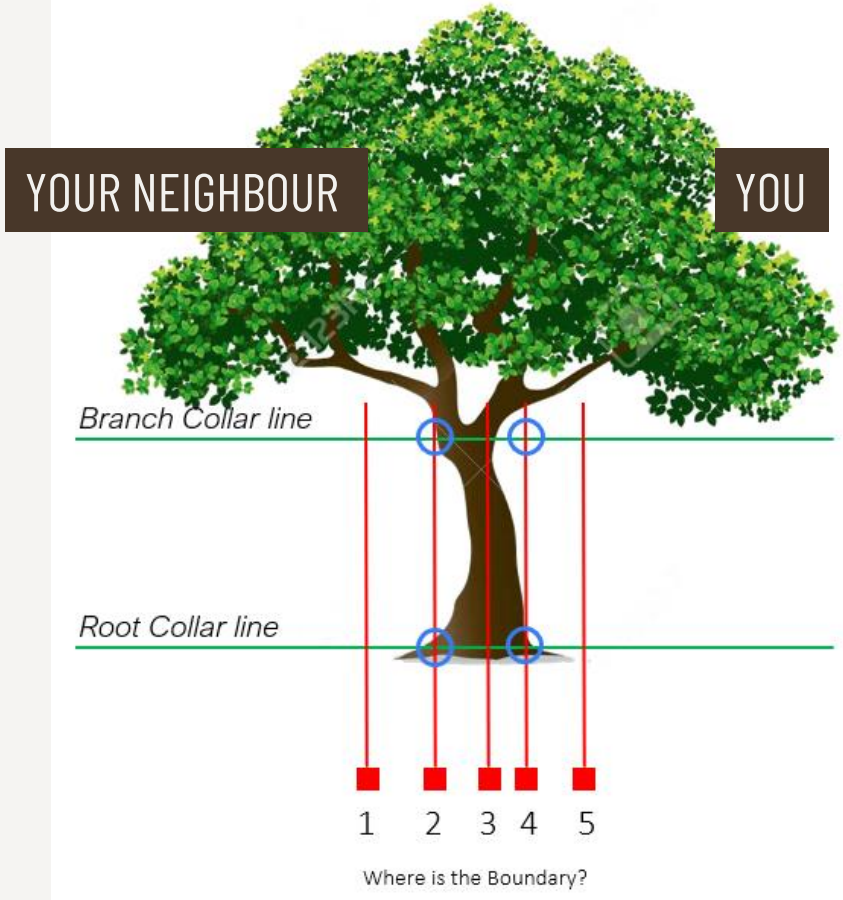
WHAT **CAN'T** A LAND SURVEY DO?

KRCMAR

5. DEFINE OWNERSHIP OF A TREE

Survey **shows location, not ownership** or shared rights.

1. Your Tree
2. Shared Tree
3. Shared Tree
4. Shared Tree
5. Their Tree



WHAT **CAN'T** A LAND SURVEY DO?

KRCMAR

6. SOLVE ISSUES AND DISPUTES

- **Easement Issues –** Encroachments, prescriptive rights, usage, blocking.
- **Boundary Disputes –** Two different surveyor's opinions, ultimate resolution by a judge.
- **Unregistered Rights –** Quality of title.

Image source: Adobe Express/Powered by Adobe Stock

WHEN TO CONSULT A LAND SURVEY

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1. **Any dealings in land** - transaction, construction, improvement, development.

2. **Legal descriptions** which include metes and bounds, easements, “save and except”, or registry PIN.

3. Uncertainty about important **features** relative to boundary, or potential claims for **adverse possession.**

4. Adjoining lands undergoing change.

5. Property situated **along the water** (there may be a hidden shore reserve).

WHY IT MATTERS

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Source: Microsoft 360 Images

16-21

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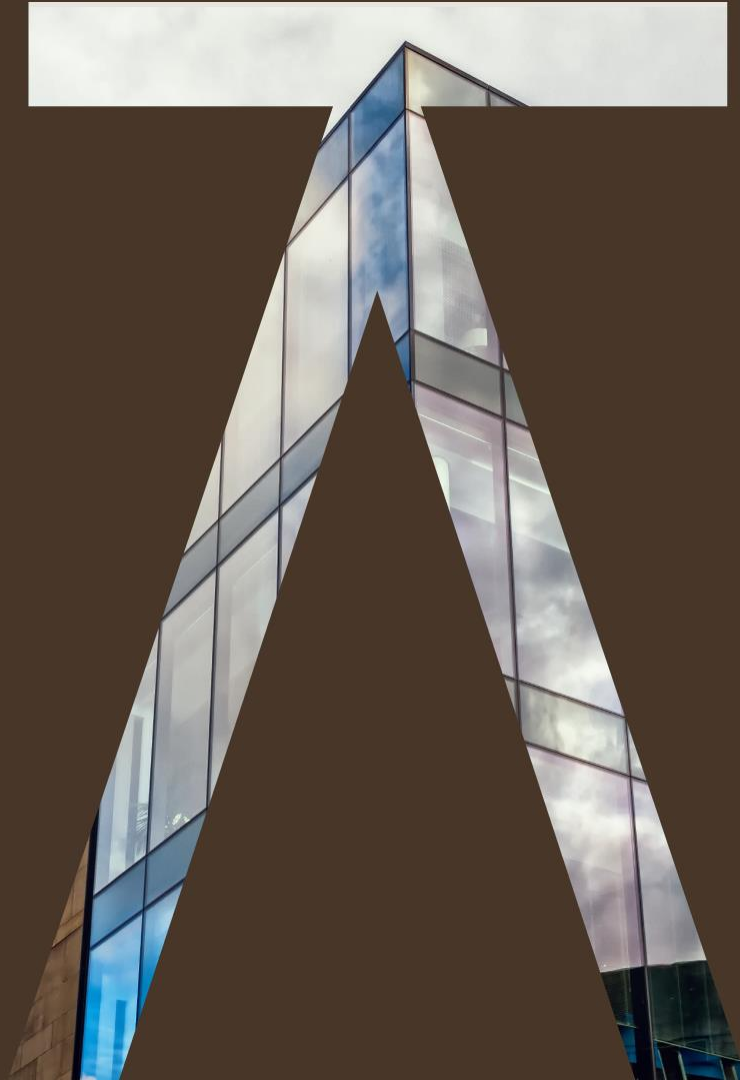
THANK YOU

Sasa Krcmar, OLS, MBA.



16-22

Law Society of Ontario | Barreau de l'Ontario

TAB 17

21st Real Estate Law Summit

Coaching and Training for The Dedicated Legal Professional (PPT)

Lana Saleh
Emotional Intelligence Training for Lawyers

April 17, 2024

Lana Saleh

COACHING AND TRAINING FOR THE DEDICATED LEGAL PROFESSIONAL

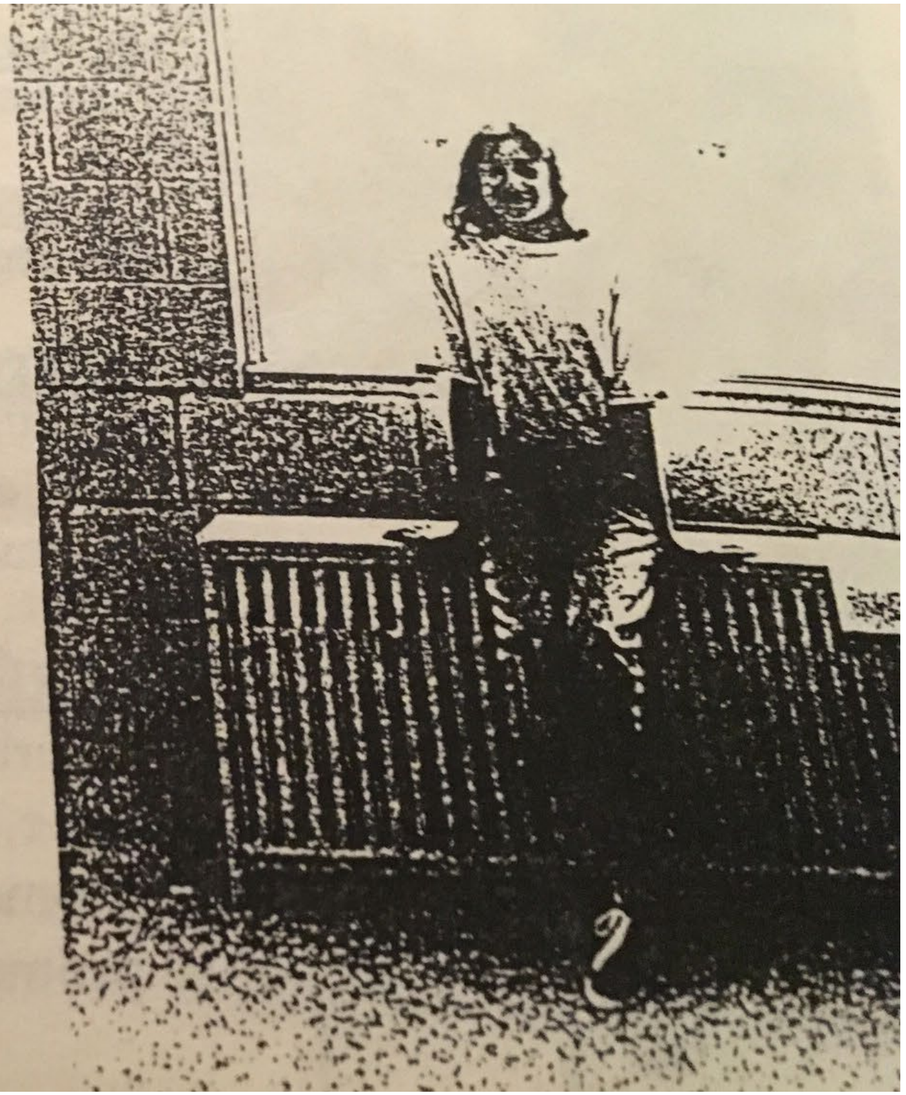
THE BEGINNING...

DATE DE NAISSANCE:
16 octobre 1982

ÉCOLE SECONDAIRE:
Mgr. de Charbonnel

AMBITIONS:
Actrice, avocate, dessinatrice de mode, maquilleuse, mannequin, décoratrice d'intérieur.

INTÉRÊTS:
Gynastique, l'art visuel, l'art dramatique.



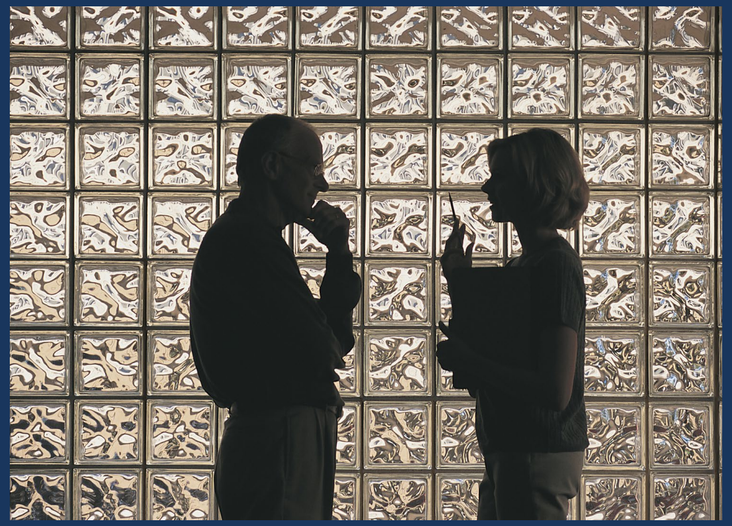
EMOTIONAL INTELLIGENCE

"Is a set of emotional and social skills that influence the way we perceive and express ourselves, develop and maintain relationships, cope with challenges and use emotional information in a effective and meaningful way."

MULTI HEALTH SYSTEMS, EMOTIONAL QUOTIENT INVENTORY - MANUAL 2011


EMOTIONAL & SOCIAL FUNCTIONING
SELF-PERCEPTION
Self-Regard
Self-Actualization
Emotional Self-Awareness
SELF-EXPRESSION
Emotional Expression
Assertiveness
Independence
INTERPERSONAL
Interpersonal Relationships
Empathy
Social Responsibility
DECISION MAKING
Problem Solving
Reality Testing
Impulse Control
STRESS MANAGEMENT
Flexibility
Stress Tolerance
Optimism
Emotional Intelligence
WELL-BEING
PERFORMANCE
EMOTIONAL & SOCIAL FUNCTIONING

DIFFICULT CONVERSATIONS



WRITE DOWN...

A difficult conversation you need to have right now.

WHY HAVE THEM?

01 What you want is on the other side of the difficult conversation.

02 The longer you wait the worse it gets

03 Practice makes perfect

04 Builds trust and connection

05 Sets clear expectations

06 Retention of value in the face of technological developments (AI)

07 Meets your professional obligations

08 Avoids LawPro claims

“Breakdown in lawyer/client communication is the most common cause of real estate claims”

These types of real estate claims result in an average total cost $22.7 million per year. Figure based on claims from 2012 to 2022.

DIFFICULT CONVERSATIONS: A FRAMEWORK

"The single biggest problem in communication is the illusion it has taken place"

George Bernard Shaw

1. Check in with yourself

- Why do I think this conversation will be difficult?
- Why am I having this conversation?
- What feelings am I experiencing?
- Can I approach this conversation from a different perspective?
- What can I do to prepare and support myself?

2. Communicate Clearly and Directly

- What are the points I need to communicate?
- How can I prepare for this conversation?
- What are some complicated terms I need to be mindful of?
- Is there a better way to explain this concept? What concepts require more accessible and plain language?

3. Be Curious

- What is important for this person?
- How might this impact them?
- What are some questions they might have?
- What are some things I have noticed in prior interactions?
- What have I personally experienced that can help me relate?

3. Be Curious ctnd...

- I can see I may have lost you, would you like me to go over this section again?
- What are your expectations for today's meeting?
- Is there anything I've missed that you think might be important?
- What is the best outcome for you?
- Is there anything you were hoping to discuss that I missed?

4. Listen: to what is being said

- I heard...
- is that right?
- do you have anything to add?

4. Listen: and what is not being said

BEHAVIOR = FEELING = NEED

I see you've gotten quiet, is that because you're feeling lost and need some clarification?

BE KIND TO YOURSELF

EMOTIONAL INTELLIGENCE TESTING AND TRAINING FOR LAWYERS

www.lanasaleh.com ~ info@lanasaleh.com