



Law Society
of Ontario

Barreau
de l'Ontario

20th Real Estate Law Summit

CO-CHAIRS

Stephanie Eiley
Torkin Manes LLP

Joel Kadish
Barrister and Solicitor

HONOURARY CHAIR

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

April 19, 2023

April 20, 2023





Law Society
of Ontario

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Law Society of Ontario

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20th Real Estate Law Summit



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

Total CPD Hours = 9 h Substantive + 2 h Professionalism ^P

+ 1 h EDI Professionalism ^E

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

SKU CLE23-00403

Agenda

DAY ONE: April 19





9:00 a.m. – 9:15 a.m.

Welcome

Stephanie Eiley, Torkin Manes LLP

Joel Kadish, Barrister and Solicitor

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

9:15 a.m. – 9:40 a.m.	Back to Basics: A Look Back on 20 Years of the Summit and Lessons Learned Sidney Troister, C.Arb., LSM, <i>Torkin Manes LLP</i>
9:40 a.m. – 10:05 a.m.	Real Estate Frauds: They're Back. The Resurgence of Title Fraud and the Proposed Regulatory Responses Thereto (15 m ) Jeffrey Lem, C.S., Director of Titles, <i>Ministry of Public and Business Service Delivery</i>
10:05 a.m. – 10:20 a.m.	Question and Answer Session
10:20 a.m. – 10:35 a.m.	Break
10:35 a.m. – 11:00 a.m.	Law Society Spot Audits: Five Most Common Issues (20 m ) Andrew Assikopoulos, CPA, CA, CMA, Auditor, Spot Audit, <i>Law Society of Ontario</i> Mandy Chan, BBA (Accounting), DIFA, CA, CPA, Auditor, Spot Audit, <i>Law Society of Ontario</i>
11:00 a.m. – 11:30 a.m.	Client Identification and Verification Requirements: What is Next? (15 m ) Joel Kadish, Barrister and Solicitor
11:30 a.m. – 11:55 a.m.	How not to be the Next Fraud Dupe or Victim! (25 m ) Raymond Leclair, Vice-President, Public Affairs, <i>Lawyers' Professional Indemnity Company (LAWPRO[®])</i>
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. – 2:15 p.m.	Dealing with Workplace Issues in Your Real Estate Practice (1 h )
Moderator:	Joel Kadish, Barrister and Solicitor
Panelist:	Brian Wasyliv, <i>Sherrad Kuzz LLP</i>
2:15 p.m. – 2:40 p.m.	Hot Topics Impacting your Practice
	Tammy Evans, <i>Aird & Berlis LLP</i>
2:40 p.m. – 2:50 p.m.	Question and Answer Session
2:50 p.m. – 3:05 p.m.	Break
3:05 p.m. – 3:30 p.m.	Camps, Cabins, and Cottages: Oh My! Recreational Property Issues in Northern Ontario
	Stephanie Eiley, <i>Torkin Manes LLP</i>
	Kady Stachiw, <i>Larson Lawyers Professional Corporation</i>
3:30 p.m. – 3:55 p.m.	<i>Annapolis Group Inc v. Halifax Regional Municipality</i>- New SCC decision on Municipal Taking of Property?
	Simon Crawford, <i>Bennett Jones LLP</i>
3:55 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

20th Real Estate Law Summit



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Agenda

DAY TWO: April 20

9:00 a.m. – 9:15 a.m.


Welcome

Stephanie Eiley, Torkin Manes LLP

Joel Kadish, Barrister and Solicitor

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

9:15 a.m. – 9:40 a.m.	Condo Management Update: Renos and Reserves Audrey Loeb, LLM, LSM, OOnt, <i>Shibley Righton LLP</i>
9:40 a.m. – 10:05 a.m.	Answers to the Most Frequently Asked Questions about Environmental Issues (5m P) Rosalind Cooper, C.S., <i>Fasken Martineau DuMoulin LLP</i>
10:05 a.m. – 10:20 a.m.	Question and Answer Session
10:20 a.m. – 10:35a.m.	Break
10:35 a.m. – 10:50 a.m.	Common Errors Lawyers Make that Lead to Title Insurance Claims (15 m P) Karen Decker, Senior Vice-President, Chief Underwriting Counsel – International Operations, <i>Stewart Title Guaranty Company</i>
10:50 a.m. – 11:05 a.m.	Title Insurance Claims: Surprising (and unsurprising) Lessons from the Case Law (5m P) Gord McGuire, <i>Adair Goldblatt Bieber LLP</i>
11:05 a.m. – 12:00 p.m.	Closing Deals in a Recession: What to Look Out for up to Closing and Beyond (10 m P) Doug Bourassa, <i>Torkin Manes LLP</i> Merredith MacLennon, <i>Merovitz Potechin LLP</i>
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.	Succession Planning: Thinking about What's Next (10 m ) Melissa McWilliam, Counsel, Practice Management, <i>Law Society of Ontario</i>
1:40 p.m. – 2:10 p.m.	Playing in the Family Law Sandbox: Staying out of the Muck! Roslyn Tsao, <i>Epstein Cole LLP</i> Tannis Waugh, C.S., <i>Waugh & Co Professional Corporation</i>
2:10 p.m. – 2:20 p.m.	Question and Answer Session
2:20 p.m. – 2:35 p.m.	Break
2:35 p.m. – 3:00 p.m.	The Five Most Negotiated Issues in Commercial Leasing Karsten Lee, <i>WeirFoulds LLP</i>
3:00 p.m. – 3:25 p.m.	Teraview Tips & Tricks Jennifer Connell, Registry & Property Solutions (RPS), Senior Product Manager, <i>Teranet® Inc.</i>
3:25 p.m. – 3:55 p.m.	63 Years of Cases That Still Scare Me Reuben Rosenblatt, LLD, KC, LSM, <i>Minden Gross LLP</i>
3:55 p.m. – 4:00 p.m.	Closing Remarks
4:00 p.m.	End of Program



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20th Real Estate Law Summit

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April 20, 2023

SKU CLE23-0040300

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TAB 1

20th Real Estate Law Summit - Day 1

Looking Back on The Last Twenty Years of
Real Estate Law Summits

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

April 19, 2023



LOOKING BACK ON THE LAST TWENTY YEARS OF REAL ESTATE LAW SUMMITS

**Sidney Troister, LSM
Torkin Manes LLP
April 19, 2023**

This is the 20th anniversary of the real estate law summit. The first one was in April 2004 and was conceived as a two day programme after the wildly successful 2002 Special Lectures of the Law Society on real estate law which I co chaired with now Justice Paul Perell.

From an early attendance of 400 lawyers or thereabouts, it has grown to being the best attended annual CLE conference offered by the Law Society, with over 1500 registrants and no doubt many hundreds more lawyers and law clerks watching in boardrooms all over the province.

The summit has had a particular focus and it is simple. And I will explain it in the way I taught law students whenever I lectured. When I teach at the law schools, I like to ask the students what lawyers fear most. I get the usual answer, that they won't be negligent or they won't know the law or that they will make some kind of mistake. I tell them, no, that is not what lawyers fear most and it is something they will never be taught in law school.

What do lawyers fear most? That someone will yell at us. The client, the boss, the judge. Despite all the bravado of being tough lawyers and the stuff that they teach in law school, ultimately we lawyers are just people who prefer to please and who don't want to get yelled at.

And so this summit has always had this focus, to keep people from yelling at you, whether it is your boss, your client or the judge. Every speaker has always been told: Keep it simple. Keep it practical and do what you can to help lawyers keep themselves out of trouble, avoid negligence claims and most of all, avoid getting yelled at. And I like to think that that focus has been what has made the programme so successful.

So what am I going to talk about what looks like my last hurrah as chair at the summit. I am going to look back on 20 years and more and see what has changed and what has not changed at all.

To the younger lawyers, this may sound like your grandfather telling you that he walked up hill both to and from school and that the snow was piled so high, etc. I apologize because I am going to tell you things that you might not even believe.

In reality what has changed is not what we do but how we do it. When I was first called, and that is 49 years ago, there were no computers. Faxes were a novelty and they disappeared in a few months, phones were phones, copies were done with carbon paper, etc. Our assistants, we called

them secretaries or better yet, legal secretaries. Today, they are clerks and paralegals but they were as capable as they are today.

We actually communicated by mail. Couriers were rarely used. It had to be really important for you to spend money on a courier. If the post office went on strike, the bar set up document exchanges to send letters. We used dictaphones. The thought of a lawyer actually typing something? Not a chance.

And cut and paste really did mean cut and paste or more likely cut and scotch tape. Commercial leases looked like a dog's breakfast with taped clauses all over the place and then photocopied into a document.

Back then, and this is no joke, there was a comic strip called Dick Tracy—he was a pointy nosed cop and he had a wrist phone. Talk about science fiction. Fast forward 50 years and we have an Iwatch. We carry a phone and a computer in our pockets. There was no internet. Perish the thought but legal research was done with, wait for it, books.

And title insurance came along and again, the real estate bar was scared to death that they were going to take away our business. Yes, they have tried. Some have done a good job taking away some traditional business and others want to keep lawyers in the loop.

And we have adapted. And we are still here.

When Teranet came along and the government spoke of Polaris, the real estate bar refused to accept it. Some said, I am not learning it. I am a lawyer and will not learn about new fangled technology. And again, we came kicking and screaming into the 21st century. And here we are. Technology is moving faster than we can even comprehend and keep up. Electronic this and electronic that, etc. I don't even want to speculate on what the next 50 or even 20 years is going to look like.

But, you know, there are lots of things that have not changed at all and I am going to tell you a few of them. And in my view, they are far more important than the details of technology, title insurance, etc. to the future of our profession and our role in it.

The solicitor client relationship.

This has not changed at all. I have had many a Lawpro claim where a lawyer acting for a buyer forgot that he or she was actually a lawyer acting for a client. That lawyer is what I call a closer, a paper pusher of the documents required to close the deal but without much regard for the client's particular issues. In the old days, and you will find it in old CLE programmes, we talked about the initial meeting with the client. We kind of expected to have the client come into the office and talk about the deal. We did the intake of the file. Well, I suspect that except in rare cases, that does not happen. These days, you may not see a client until the day before closing, you may never meet the client in the flesh, signing will be virtual, etc.

But that does not change the duty that you have to act competently and to represent the best interests of your client.

So how is it in this email virtual world that you will know what the client wants to do with the property, any special concerns that the client has and how will you tell your client what you will and will not do for the client.

What do you say about the need for a survey; About compliance with zoning and other bylaws; how do you even explain what a survey is and how are you explaining title insurance in a way that the client can even make a decision. And maybe the client wants more assurances than having a claim on a title policy.

I remember hearing Justice Krever talk about a solicitor and client negligence case where credibility was an issue. The lawyer had no notes; neither did the client. But Krever said, lawyers see clients all the time and what they might remember saying from one client to the other may not be clear. A client sees a lawyer one time and what the lawyer said or did not say or impress on the client will be much more likely much clearer in the client's mind than the lawyer's.

I am a paper guy. I have a paper file. But how many now have electronic files, the paperless office. Where are the notes, where are the confirmations, how is your electronic file organized amid emails, text messages, tic tocs and whatever else you use to communicate? You probably send them a form letter, throw a lot of unintelligible information at the client, much of it in legalese and think that you have advised your client.

Here is one of my favourite cases on point. *Harela v. Powell* 20 RPR (3d) 281 — [1998] OJ No 2989 (QL) — 81 ACWS (3d) 393 — 163 DLR (4th) 365

The client's were buying a cottage lot on which they intended to build a cottage. It has a very odd configuration, compared to other lots in the Subdivision, as a result of the intrusion into the rear line of the Lot of the turning basin at the end of the cul-de-sac giving access to the lots in this part of the Subdivision. That peculiar configuration, combined with the very deep setback of 24 metres from the high water mark, results in a very small, oddly-shaped and restricted "building envelope" for the construction of a cottage and the installation of a septic system on the Lot. As it turns out, all of this led to substantially greater costs of construction and worse, the cottage being in what amounted to a less than desirable location. The Buyer sued the lawyer and the agent for damages. The lawyer pleaded that he acted in accordance with the appropriate standard of care.

With regard to the lawyer, the court found that

"5. Fraser at no time discussed with the plaintiffs any of their plans for the Lot as to what they intended to build or where they intended to build it, or have any discussion with them as to setbacks, side yards, or any other zoning matters with respect to the Lot;

6. Fraser at no time examined the plan of subdivision which was available to him at his office or suggested that the plaintiffs obtain a survey of the property, either of which would have brought to his attention the peculiar configuration of the Lot;
7. Fraser relied entirely on Boucher's (the agent's) statement to him that the plaintiffs had walked the Lot and that they had a copy of the plan of subdivision;
8. Fraser at no time made any effort to contact the plaintiffs to meet with them to discuss the purchase, review the agreement of purchase and sale, or discuss their plans for the Lot;
9. In all, the lawyer had a 7 minute conversation by phone with the plaintiff.
10. Fraser at no time pointed out the "entire agreement" provision in the agreement of purchase and sale or advised the plaintiffs of the significance of that provision;
11. Fraser was advised by the building inspector that the building envelope on the Lot was "restricted" but failed to pass this information on to the plaintiffs."

Regarding the lawyer's duty, the court rejected the evidence of the lawyers expert as follows:

"Mr. Fitton's evidence appeared to be to the effect that a lawyer need not make any inquiries of his clients as to their intentions with respect to the property being purchased but must merely ask the clients what they wish the lawyer to do and then carry out the clients' instructions. This appears to me to be a singularly unprofessional approach to the practice of law and places an unreasonable demand upon the clients that they should know exactly what the lawyer ought to do and instruct the lawyer accordingly. In this regard I cite with approval the decision of Zarzeczny J. in *Hickson v. Wilhelm*, [1997] S.J. No. 554 (QL) (Sask. Q.B.) [reported [1997 CanLII 11088 \(SK KB\)](#), 40 C.C.L.T. (2d) 117 *sub nom. Earl v. Wilhelm*], where he referred to an earlier decision of the Saskatchewan Court of Appeal at paragraphs 87 and 88, as follows:

In the case of *Credit Fancier (Canada) v. Grayson et al* (1987), [1987 CanLII 4647 \(SK CA\)](#), 61 Sask. R. 212, Sherstobitoff J.A., speaking for the Saskatchewan Court of Appeal further observed that there is an obligation on the lawyer to explain the nature, effect and significance of a document to a client.

To suggest that it is a sufficient discharge of a solicitor's duty to a testator in circumstances such as these to simply inquire of him what he wishes and then to record and thereafter prepare the will without anything further is to relegate a solicitor and his obligations comparable to that of a parts counterperson or order taker. The public is entitled to expect more from the legal profession."

So, the solicitor client relationship has not changed. The duty to clients has not changed. *Harela v. Powell* is very powerful law. If you intend to limit your retainer to being a paper pusher and a closer, you best make sure the client knows what kind of lawyer you are.

The law of contract.

This has not changed. When I was lecturing at law school, I made this comment. Do not be afraid of real estate law. There is nothing magical about it or esoteric about it. It is nothing more than contract law involving land. It is just contract law.

And so it is that ultimately, what governs is the agreement of purchase and sale and the common law of contract. When I lecture, I asked the students, OK, now that there is an agreement of purchase and sale, what are the next steps that the lawyer has to do. I get all kinds of answers but one I rarely get involves looking at the contract and seeing what the client is entitled to.

The standard form; search title within a period of time, confirm legal use within a particular period of time, search work orders and deficiency notices. What else? Not much other than documents. Are you entitled to warranties, payments of taxes, where do you get those rights from. It is all in the contract.

And when things go sideways, again what are your rights. Termination, damages, the obligation to tender? And what can you disclose to the other side. Are you required to be honest, can you lay in the weeds, wait for them to make a mistake, make crazy requisitions that have little if any merit and then rely on them, declare anticipatory breach, keep the deposit? It is all a matter of contract. And what you do or say can have dire effects on your client.

The case of *Kwon v. Cooper*, 1996 CanLII 1261 (ON CA) contains some good lessons.

Let's start with some basic law. Time of the essence. If a contract says time is of the essence, and no one does anything, the contract is not dead. The contract is alive, but time is no longer of the essence and either party can reinstate time of the essence on reasonable notice.

Here, the buyer said they had no money. The seller's lawyer then responds and says, based on that, I am going to rely on the strict terms of the agreement of purchase and sale. On the day of closing, it turns out that the buyer did not have what was needed to close the deal in accordance with the strict terms of the agreement of purchase and sale. He did not have a discharge of mortgage, a guarantee, or a proper statement of adjustments. The court held that the seller was in breach of the agreement of purchase and sale and declared the agreement of purchase and sale dead.

According to the headnote:

The vendors in a real estate transaction argued that by virtue of the Ontario Court of Appeal's decision in *King v. Urban Country Transport*, "if neither party is ready, willing and able to close on the date set for closing a real estate transaction, the provision in the contract that time is of the essence does not result in an end to the contract, and either party may set a new and reasonable date for closing" - The Ontario Court of Appeal rejected the vendor's argument - The court stated that the vendor was precluded from relying on the *King* case where it took the position prior to closing that it would stand on the strict terms of the contract, and it would sue the purchaser for damages if closing were not accomplished on the required day.

But for sloppy tactics, the seller should have had a slam dunk. When things are going sideways, do not be too smart for your own good. It is basic contract law that prevails. Learn your remedies, understand when to tender, when it is not necessary, how to tender, when to rely on anticipatory breach, what it means to rescind a contract, declare termination, etc., if you are going to be a real estate lawyer because it is still about contract law.

The duty to advise, to investigate, to read.

This is still the same. Back to my paper pusher scenario. We are lawyers and one of the things we have as a skill is the ability to read and understand legal documents. And yet, we may forget that the client requires us to read and understand. And not miss important things.

That will take me to two or three things that some lawyers forget but that has not changed in 20 or 40 or 49 years. You have to read stuff and tell your client what it says. A couple of examples.

Condo declarations: they have all kinds of obligations in them. You have to read them: pets, smoking, prohibited uses, exclusive rights and restrictive covenants in commercial condos for example. You have to read this stuff and look for the stuff of concern. Of course, you should know what is of concern because you already had the discussion with your client like in *Harela v. Powell*.

Leases. We all hate leases but when a client says it's a standard form so tell me if it is OK or is there anything I need to worry about and keep the cost down, that is an invitation to a law suit. What are you even looking at? Is a take out restaurant a sit down restaurant if it has a table, what are the hours of operation, exclusive uses, rights to assign, a right to terminate on sale or remodelling, rights to renew, etc. If you are taking on the retainer, make sure the client knows what you can and cannot do for him. What's included in common expenses. What are the terms of renewal and what if they cannot be agreed upon.

Instruments on title. You never know what lurks in documents on title like restrictive covenants; the title register may just say agreement. What is in the agreement? What is in the subdivision or other agreement, etc. If you are not pulling instruments on title and just relying on a PIN, you have not searched title.

Title searching I am convinced that it is a lost art but it has not changed. A PIN is not a title search. And a PIN is not necessarily the title. A property can be a PIN, more than one PIN or part of a PIN. It may have a metes and bounds description. Do you know how to plot a legal description by metes and bounds. Have you ever done one. And do you search abutting lands for *Planning Act* compliance. And here is a good case.

In *923424 Ontario Limited v. 1695850 Ontario Inc.*, 2015 ONSC 3343, one PIN (parcel A) said that the title was together with an easement over the neighbouring property (parcel B). The title to parcel B did not say that it was subject to the easement over parcel A. The neighbours got into a fight about the easement and parcel B said that they can rely on the parcel register that their title is not subject to the easement.

Justice Perell found that the easement bound parcel B because, a search of abutting lands which was appropriate in this case because it was not a whole lot on a plan of subdivision would have disclosed the inconsistency in title and the matter should have been addressed at the time of purchase. Administrative errors made on conversion did not pre-empt legal rights. You cannot just begin and end with a PIN.

Bad people, defensive practice of law

These have not changed. Two things here: Fraud. There are bad people out there who will take advantage of a lawyer if they can. I always say, a good crook can beat a smart lawyer any day of the week. Be on your guard. We are the last line of defence to the crook. Some will blame the banks for what was easy credit. The buck will always stop with us because we are the last ones to hold on to the money and let it go.

Smell: If it does not smell right, step away. If you are uncertain, get a second opinion. Use good judgment and no fee is worth the grief that will come from being someone's pawn.

The importance of integrity, honesty and your reputation

This has not changed at all. And it is trite to say the only thing you have going for you in this business is your reputation. Are you honest, are you trustworthy, are you careful, do you keep up to date with the law and practice. Do you care about your reputation?

We all know lawyers with whom we have had less than ideal dealings. People who change drafts without telling you, people who do not honour undertakings, people who blame their clients for their own delays, people who don't look at a file until the last minute and create havoc at your end, and on and on. What you need to remember is people remember. I remember. And if you were to ask around, you might find that you are not alone in your assessment of some lawyers. Beyond everything else, your clients may come and go but your reputation will last your entire career.

Nothing more to say other than guard your reputation closely.



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TAB 2

20th Real Estate Law Summit - Day 1

Real Estate Frauds: They're Back. The Resurgence of Title Fraud and the Proposed Regulatory Responses Thereto

Jeffrey Lem, C.S., Director of Titles

Ministry of Public and Business Service Delivery

April 19, 2023



20th Real Estate Law Summit

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Real Estate Frauds: They're Back. The Resurgence of Title Fraud and the Proposed Regulatory Responses Thereto

Jeffrey W. Lem¹

Precis

The popular press has reported recently on a number of high-profile cases of “title theft”. In all of these cases, criminals impersonate the registered owners and sell the registered owners’ properties to otherwise bona fide purchasers for value without notice. The imposters then divert the closing proceeds and abscond. The fraud is typically discovered some time later, as both the original registered owner and the purchaser realize each other’s respective title claims. This article reviews how the Ontario Land Titles Act, R.S.O. 1990, c. L.5, deals with the competing claims of the original registered owners and the purchasers, both of whom are “innocent” (the only bad actor being the imposter vendors against whom there is rarely any recourse).

The Cases

In late 2021, an elderly owner of an East York, Ontario house moved to a long-term care facility. His family, on his behalf, leased the house to a tenant who, soon after taking possession, then listed the house for sale, impersonating the original registered owner. The listing of the property was discovered, and a sale averted, in part because the imposter had used the same real estate brokerage (albeit different agents) that had been retained to lease out the property, but not before several offers had already been received.

In early 2022, the popular press reported the case of a criminal couple impersonating the owners of an Etobicoke, Ontario house and selling the house while the original registered owners were away on business. The couple had access to the house (to permit showings and inspections, etc.) because they were tenants of the property at the time of the sale, a common fact scenario in these types of frauds. The imposters re-directed the proceeds and absconded.

At about the same time, imposters impersonated a foreign student who had purchased and lived in a condominium in downtown Toronto while attending university. The student returned overseas after graduating and rented out the condominium. Like in other cases, the tenants impersonated the owner and sold the condominium (although, in this case, the fraudsters were subsequently arrested when they went

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to the bank to withdraw the sales proceeds in cash).

An article in The Canadian Press in late January, 2023 suggests that there have been thirty-two such recent property fraud cases in both Ontario and British Columbia, six of which have involved “title theft” (i.e., the false sale of the targeted properties), and the balance of which involved “mortgage fraud” (i.e., the false mortgaging of the targeted properties leaving the original owner’s title intact, but now subject to a mortgage that the original owner did not take-out or benefit from).

Who Actually Gets to Keep the Property?

To understand what ultimately happens in these sorts of title frauds, it is important to first understand how title is rectified once these frauds are discovered, and how this title rectification impacts compensation.

Rectification and compensation are intertwined and are both governed by the doctrine of “deferred indefeasibility” in Ontario. There have many attempts to describe the doctrine, but the author’s own take on the definition is as follows:

In a title fraud where an imposter has sold the targeted property to an innocent purchaser, the original registered owner always gets the property back, unless that innocent buyer manages to further transfer that property to a second innocent buyer, at which point, that second innocent buyer gets to keep the targeted property.

In the “title theft” scenario, there are two innocent parties – both the original registered owner and the unsuspecting purchaser are said to be innocent because they did not participate in the fraud – the only bad actor is the imposter vendor, who in almost all cases, has absconded, and against whom recourse is rarely available. Of these two innocent parties, only one will be left with the property, leaving the other as a nominal “victim” – even then, that victim frequently has compensation readily available. The doctrine of deferred indefeasibility favours the original registered owner, always returning the property to that original registered owner (unless the purchaser manages to then sell the property to a second innocent purchaser, at which point it is that second innocent purchaser who gets to keep the property).

Deferred indefeasibility is said to be a form of “static security” since, when forced to choose between two innocent victims, the policy always protects the existing registered owner, and sacrifices the new purchaser (unless, as aforesaid, the purchaser manages to then sell the property to a second innocent purchaser, at which point the title rectification process is reversed to favour that second innocent purchaser, and sacrifices the original registered owner). In this context, “sacrifices” simply means to force that victim to seek compensation in lieu of keeping title.

While the possibility exists that an innocent purchaser will sell to a new, second innocent purchaser before the fraud is discovered, this second sale scenario is, in practice extremely rare, with no known cases of a second innocent purchaser being recorded by the administrators of the Land Title Assurance Fund in at least a decade. As such, at least the tenor of some of these articles is misleading – in almost all of the recent “title theft” cases reported in the popular press, the parties depicted as “victims” (i.e., the original registered owners who had their homes “sold out from under them” while on holiday or working abroad, etc.) are not ultimately as victimized as the press would imply, since their properties will, in almost all instances, eventually be restored to them. Of course, it is always more salacious and shocking to imply that a homeowner could lose his/her home – the same fraud, reported as a caveat emptor warning to purchasers to be wary of impersonated vendors, is more accurate but is simply less sensational and, therefore, less press-worthy.

Ontario's "Modified" Deferred Indefeasibility Regime

Ontario has always been a deferred indefeasibility (static security) jurisdiction, as are most of the other Canadian Torrens jurisdictions, and many other large land registration systems in the world. Scotland has, by far, the most sophisticated deferred indefeasibility regime in the world. Deferred indefeasibility in Ontario is most frequently said to have been affirmed in Ontario by the Court of Appeal in *Lawrence v. Wright*, 2007 CarswellOnt 522 (Ont. C.A.), 2007 ONCA 74, [2007] O.J. No. 381, 154 A.C.W.S. (3d) 1208, 220 O.A.C. 19, 278 D.L.R. (4th) 698, 51 R.P.R. (4th) 1, 84 O.R. (3d) 94 ("*Lawrence*"), although deferred indefeasibility had existed in Ontario long before that case, and has since been codified by statute, at least as it relates to fraud, in *The Ministry of Government Services Consumer Protection and Service Modernization Act*, 2006, S.O. 2006, c. 34 (the "2006 Amendments").

In *Lawrence*, the original homeowner was Lawrence. A fraudster, a fictitious person going under the name of Wright, forged Lawrence's signature and transferred her home to himself. He then mortgaged the home to a financial institution and absconded with the mortgage proceeds. At trial, Lawrence was successful in rectifying the forged transfer (i.e., having it deleted from title) but was unsuccessful in rectifying the mortgage, so, while she got her title back, it was encumbered by a sizeable mortgage, the proceeds of which were stolen by the fraudster. The Court of Appeal overturned the trial decision and deleted the mortgage as well, citing classic deferred indefeasibility doctrine – i.e., the financial institution was "closest to the fraud" and, as between the original owner and the incoming mortgagee, the original owner wins the property, and the incoming purchaser/mortgagee must seek redress elsewhere.

The 2006 Amendments, which were actually in place at the time the Court of Appeal decided *Lawrence* but not retroactively applicable to *Lawrence*, reinforced Ontario's deferred indefeasibility paradigm, but limited the applicability of deferred indefeasance to a narrowly defined type of identity fraud. The 2006 Amendments added Subsections 78(4.1) and 78(4.2) to the *Land Titles Act* and created the following two relevant definitions:

The definition of "fraudulent instrument", in section 1 of the Land Titles Act, includes an instrument:

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land...

A "fraudulent person" is defined in s.1 of the Act as a person who executes or purports to execute an instrument if:

- (a) the person forged the instrument,
- (b) the person is a fictitious person, or
- (c) the person holds themselves out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument.

The operation of Subsections 78(4.1) and 78(4.2), together with the new definitions for "fraudulent person" and "fraudulent instrument" collectively re-affirms deferred indefeasibility but, at the same time, limits the scope of the doctrine to a specifically defined subset of identity-type frauds. By reasonable inference, it means, therefore, that other incidents of title misappropriation (other than identity fraud) would be excluded from the application of deferred indefeasibility, such as, for instance: bunco frauds where a vendor is "tricked" into selling the property; value frauds (where a mortgagee is "tricked" into advancing on an inflated value); non-est factum, duress, and similar bargaining imbalance scenarios; and

even something as simple as a computer glitch or human error.

The best affirmation of the limitation in Ontario's deferred indefeasibility regime ushered in by the 2006 Amendments came, some ten years later, in the other seminal case on point, *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada* (Div. Ct.) 2016 CarswellOnt 18673, 2016 ONSC 7094, 134 O.R. (3d) 702, 273 A.C.W.S. (3d) 426, 79 R.P.R. (5th) 81 ("*Computershare*"). In *Computershare*, somebody (most likely the registered owner, although this was not authoritatively determined by the Court) registered a forged discharge of the original mortgage on title before the registration of the nominally second mortgage, so that, based on the registered title at the time, the subordinate second mortgagee appeared to be lending against a free and clear title. At trial, the original mortgage was reinstated as a prior ranking mortgage, based on the application of classical deferred indefeasibility doctrine – the incoming mortgagee was in a better position to be alert to the fraud, and the then original (or static) mortgage should be reinstated in priority to the incoming mortgagee. On appeal to the Divisional Court, the trial decision was overturned, so that, while the original mortgage was of course reinstated (since the offending discharge was clearly a forgery), but subordinated to the incoming mortgage (*i.e.*, it was reinstated behind the new mortgagee that registered based on an apparent clean title). As set forth by the Divisional Court, deferred indefeasibility analysis only applies to those circumstances where the trailing party acquires its interest pursuant to a "fraudulent instrument" as expressly defined in the 2006 Amendments. In the *Computershare* case, while the discharge was certainly a fraudulent instrument vis-a-vis the original mortgage, the second mortgage was not a fraudulent instrument (it was given by the true owner to the property and not an imposter forging the signature of the true owner). Since the incoming mortgage was not a "fraudulent instrument", concepts of deferred indefeasibility did not apply, and the apparent title governed.

Some pundits posit that the 2006 Amendments, as affirmed in *Computershare*, sounded an end to Ontario as a deferred indefeasibility regime. This author does not agree. To conclude that some amendments to the scope of deferred indefeasibility somehow takes Ontario out of deferred indefeasibility is to overthink the issue and would be the equivalent of saying that Scotland, which has some very sophisticated exceptions and qualifications to its deferred indefeasibility legislation, is also no longer a deferred indefeasibility regime or to suggest, as some have in the past, that Ontario is not a Torrens jurisdiction because our *Land Titles Act* has some exceptions and qualifications not found in the original South Australian model. In this author's opinion, the 2006 Amendments re-affirm that Ontario remains a staunch deferred indefeasibility regime but limited in scope to identity theft frauds (which are, in any event, the overwhelming majority of cases in which titles become compromised under the *Land Titles Act*). While not dispositive, I note that *Lawrence*, decided without the reference to the 2006 Amendments, would have been decided exactly the same even had the 2006 Amendments applied, which this author interprets as support for the proposition that Ontario has statutorily confirmed its adoption of deferred indefeasibility, albeit with a slightly smaller scope than it might otherwise have enjoyed. As such, most of the pre-2006 Amendments case law, decided on more generic deferred indefeasibility concepts, apply just as well to post-2006 Amendments (so long as they arise in the context of identity theft) and Ontario can still consider itself a deferred indefeasibility jurisdiction.

Immediate Indefeasibility Jurisdictions

In contrast, almost all of the Australasian jurisdictions currently (and always) have the opposite paradigm – immediate indefeasibility ("dynamic security") which always favours an incoming purchaser at the expense of the existing registered owner, even if the incoming purchaser acquired by what would be adjudged a "fraudulent instrument" under the Ontario legislation. That is, in these immediate

indefeasibility systems, registration is always paramount. If the purchaser manages to get registered, then that purchaser's title automatically becomes indefeasible and the purchaser gets to keep the property – in an immediate indefeasibility system, it is always the original registered owner who is the “victim” and seeking compensation. Other jurisdictions, like England and Malaysia, have one statutory system, but with cases that seem to run the other way, adding to the confusion that surrounds immediate versus deferred indefeasibility.

If the recent “title theft” cases reported in the popular press had occurred in any of the Australasian (or other immediate defeasance) jurisdictions, then the parties depicted as “victims” (i.e., the original registered owners who had their homes “sold out from under them” while on holiday or working abroad, etc.) would indeed be the victims since their properties will, in all instances, be lost to the newly registered purchasers (presuming, of course, *bona fides* on the part of those purchasers) immediately upon certification of the transfer/deed of land to such purchasers, leaving the original registered owners evicted from their own homes and needing to seek compensation. The sensationalist press should go to Australia for more press-worthy stories!

The choice between immediate and deferred indefeasibility is a pure policy choice. Australasian jurisdictions have historically argued that real estate markets would suffer if purchasers and mortgage lenders could not rely on registration to confer immediate indefeasibility of title. In contrast, policy supporters of deferred indefeasibility have always pointed to the moral hazards of equating registration with indefeasibility. Supporters of deferred indefeasibility posit that, where both parties are innocent, then the burden of the fraud should always fall to the party “closest to the fraud” (a purchaser is said to be “closer to the fraud” since it is in the position to do due diligence, whereas an existing owner is “further away” from the fraud since it is less reasonable to suggest that all existing registered owners should be doing constant diligence on their properties). For a variety of reasons, this author has always preferred deferred indefeasibility and believes that the Ontario government did well to approve the doctrine and to limit its scope only to identity theft types of fraud.

Does the Original Owner Always Get the Property Back?

The most daunting problem in advising your client about title fraud is the inability to be absolute in the advice. For all of the reasons described above, it is almost always the case that the original owner gets title restored to him/her. Alas, “almost always” is not “always.” Even in a deferred indefeasibility jurisdiction like Ontario, an existing owner can, under certain (rare but not entirely unimaginable) fact scenarios, lose the property as a result of title fraud. So, for example, where the property has been fraudulently sold by an imposter to an innocent buyer, and that innocent first buyer then sells the property to an innocent second buyer:

- the title to the property stays with the second buyer (who did not take from the fraudster) because that second buyer is the “second innocent” buyer and thus enjoys deferred indefeasibility;
- the first buyer (i.e., the original buyer from the imposter and the vendor to the second buyer) gets to keep the sales proceeds and therefore suffers no loss; and
- the original registered owner is now in the unfortunate position of actually losing title to the property and is out-of-possession without actually having received any of the sales proceeds – the original owner must seek compensation instead of being able to keep the property.

It is not absurd to imagine circumstances where an innocent first buyer re-sells the property to another innocent buyer within a very short timeframe – perhaps a quick re-sale in a white-hot market, a sudden

change in circumstances for the new owner, or even post-cognitive dissonance on the part of the purchaser after the purchase (i.e., the so-called, “buyer’s remorse syndrome”). That said, as aforesaid, anecdotally, it is rare for a property to be purchased from an imposter and then resold to a second innocent purchaser before the fraud can be detected by the original owner. As aforesaid, this author is not aware of such a situation ever having occurred in Ontario in at least the past decade. Alas, even while the risk of an original owner ultimately losing his/her property is rare, it is not impossible, so the advice always has to be nuanced accordingly.

This has not stopped vested interests from exaggerating the risk of ultimate title loss to their homes, which strikes a very emotional chord in the hearts of homeowners, many of whom have worked an entire lifetime to pay for their respective homes. Given that the family home is typically most individuals’ largest single asset, it is no surprise that the risk of a sudden loss of that home to fraudsters is an alarming headline. In addition to mild examples of this exaggeration (like the case of the popular press in this latest spate of title fraud cases), there are some more extreme examples. In Texas, a company called Home Title Lock, promoting what seems to be a PIN-monitoring type of scheme, is being investigated by the Texas Attorney General for violations of the Texas Deceptive Trade Practices Act for exaggerating the frequency of title theft and understating the fact that, in almost all cases, the original owner can have title restored after the fraud is discovered.

What About the Purchaser’s Mortgage? – The “Glue Rule” Explained

As aforesaid, in almost all cases, the original owner will have title restored to him/her after an imposter sells the owner’s home to an unsuspecting purchaser using a “fraudulent instrument”. However, consider the fact that, in almost all purchases (upwards of 85% of all purchases in a residential context), the acquisition is not in cash, but rather is funded by purchase money financing (now perhaps more than ever, given the soaring cost of housing). What then of that mortgagee who provided the purchase money mortgage?

One might be tempted to conclude that the mortgagee in this case is the “second innocent” in a traditional deferred indefeasibility analysis (since that mortgagee took from the innocent purchaser who initially took from the fraudster). Alternatively, one might conclude that the mortgage in this case is not a “fraudulent instrument” because the mortgage lender took from an innocent purchaser who was not a “fraudulent person” (see the definitions in Section 1 of the *Land Titles Act* set forth above). In both cases, one would conclude that the purchase money mortgagee gets to keep the mortgage, so that, while title would be restored to the original owner, that title would be subject to the purchase money mortgage. That conclusion would be wrong.

As a necessary adjunct to deferred indefeasibility, the courts have long since recognized that a mortgagee who takes its interest concurrent with the innocent purchaser (i.e., any purchase money mortgagee), is deemed to be analogously “attached to” the innocent first purchaser and shares the same fate as that innocent first purchaser. This rule is colloquially referred to as the “Glue Rule” by some commentators because, for the purposes of any deferred indefeasibility/fraudulent instrument analysis, the purchase money mortgage is to be treated as if it were “glued to” the immediately antecedent transfer/deed. The conceptual rationale for the Glue Rule is that the purchase money mortgage lender is almost always represented by the same lawyer as the purchaser (it is extremely rare in residential transactions in Ontario for the purchase money mortgage lender to be independently represented), the purchase money mortgage transactions close simultaneously with the purchase (and indeed are a precondition of the registration of the transfer/deed), and, for all intents and purposes, there is only one due diligence exercise in a typical residential transaction.

The operation of the Glue Rule prevents a purchase mortgage money lender from claiming to be the “second innocent” and instead, puts the lender in the same position as the purchaser. As discussed above, in the overwhelming majority of cases, the fraud is discovered before the innocent purchaser re-sells the property to a second purchaser (the true “second innocent” in a deferred indefeasibility regime) – the original owner gets title restored to him/her, and the purchaser (and, by operation of the Glue Rule, his/her mortgagee) are both left to seek compensation elsewhere.

The Glue Rule is an obvious implied construction rule. Without the Glue Rule, an innocent original owner, the favoured innocent in a deferred indefeasibility regime, will almost never get the title back (well, at least not free and clear of the mortgage) since, as aforesaid, almost 85% of the typical residential real estate transactions are mortgage financed on acquisition. Alternatively put, whether the original owner can have his/her title restored free and clear would become dependent on how the innocent purchaser decided to finance the acquisition, which is an absurd criterion for determining whether the original owner should have his/her title restored to its original state. Finally, the Glue Rule affirms the general principles of deferred indefeasibility, which seeks to ascribe the risk of title loss back to the original owner only in circumstances where the original homeowner waits so long to detect the fraud that the bona fide first purchaser has had time to sell to a second bona fide purchaser. From a practical perspective, it would be absurd to allow the purchase money mortgage lender to claim that role as the second bona fide purchaser – purchase money mortgages are always registered immediately behind the transfer/deed (indeed, for those readers old enough to remember Registry, sometimes, quite deliberately, the purchase money mortgage was registered immediately ahead of the transfer/deed!). This means that the original owner is afforded one nanosecond to discover the fraud before losing it to the purchaser’s purchase money lender. Any paradigm that allows a purchase money mortgage lender to claim “second innocent” status ensures that deferred indefeasibility will be limited to a mere 15% of all typical residential purchases (those that pay in cash). This simply could not be the intent of either the common law or the legislation.

Although the “Glue Rule” is a modern appellation used by only a few pundits, the doctrine of ascribing the same fate to both the innocent purchaser and to his/her purchase money mortgage lender (i.e., the practice of “gluing” them together) is well accepted by the courts as a necessary rule of construction when applying deferred indefeasibility/fraudulent instrument analysis. Although the Glue Rule is adopted in a number of cases, the most articulate expression of the Glue Rule can be found in *Rabi v Rosu* 2006 CarswellOnt 6685, [2006] O.J. No. 4348, 152 A.C.W.S. (3d) 922, 277 D.L.R. (4th) 544, 48 R.P.R. (4th) 1, 83 O.R. (3d) 37 where, discussing the fate of a purchase money mortgage lender, R.S. Echlin J, concludes (at paras 47 and 48):

Accordingly, while I am persuaded that the doctrine of deferred indefeasibility applies to the Land Titles Act in the circumstances of this case, the mortgagee cannot rely on it. In this instance, as the fraudsters transferred the property and obtained the mortgage from the bank in one transaction, it was incumbent upon the bank to exercise due diligence which might be able to prevent the fraud. Clearly, it did not...I read the Act as requiring some evidence of due diligence as an element of deferred indefeasibility. The principle of deferred indefeasibility cannot be relied upon where there is or ought to be notice of a problem. While this approach may introduce some uncertainty about when deferred indefeasibility applies, the right to rely on the Register is not automatic for deferred indefeasibility. Indefeasibility occurs in certain limited circumstances. The bank cannot be heard to say that it was entitled to rely upon a registration of a fraudulent title in this instance. If subsequent innocent parties were to come along later and rely upon the abstract of title and the accuracy of the registrations, they might be found to be entitled to rely upon the Register. [emphasis added]

As the quote from *Rabi v. Rosu* quite rightly explains, “subsequent innocent parties [may] come along later and rely upon the abstract...”, but purchase money mortgage lenders cannot assume that role – they are always “glued to” their borrowers in such circumstances and cannot keep their mortgages when the title gets restored to the original owner.

What About Frauds in Registry?

While deferred indefeasibility applies to lands registered under the *Land Titles Act*, the question arises as to who, of the two innocent parties, gets to keep the title to the property (and, the corollary, who must turn to compensation) in the case of a forged transfer/deed of a property still registered under the *Registry Act*. As a preliminary response, the question is very nearly moot, for a couple of reasons. Currently, over 99.5% of the properties registered in Ontario’s are in some variation of Land Titles (LTCQ, LT Absolute, or LT Absolute Plus), leaving only about 30,000 non-convert PINs left in Registry. The comparatively *de minimus* number of Registry PINs remaining alone makes any discussion of fraud in Registry almost moot. Furthermore, while there is no obligation at all to convert a Registry PIN to LTCQ before a sale thereof, most agreements of purchase and sale for Registry PINs are, in fact, conditional upon the conversion of the Registry PIN to LTCQ on or before closing. These “title theft” frauds are typically time sensitive, there being an urgency to closing the deal before the true owner discovers the imposter’s attempts to sell the true owner’s property – and it would surely be rare for an imposter to go through the work and time of upgrading the PIN from Registry to LTCQ before closing the deal. As such, Registry PINs are, perhaps counterintuitively, proportionately less likely to be subject to “title theft” frauds than their Land Titles counterparts. That said, it is, of course, entirely possible for “title theft” frauds to occur on a Registry PIN.

The *Registry Act* and other marketability-of-title regimes do not act on a defeasibility basis in the same way that Torrens statutes do, and it would be incorrect to apply such constructs when discussing Registry. That said, similar frauds perpetrated on Registry PINs have a practical result very similar to like frauds perpetrated in Land Titles -- in almost all cases, the original Registry owner will have the title to the property restored to him/her, leaving the purchaser to seek compensation for the loss of the land – exactly the same result as one would have expected in a deferred indefeasibility regime. What is decidedly different, however, is that, under the *Registry Act*, the original owner’s claim to the title is not then jeopardized if the innocent purchaser sells to a second innocent purchaser. This is because the *Registry Act* operates on a modified *nemo dat* system of title. Even as against a second (or third or fourth, etc.) innocent purchaser, the original owner could always have his/her title restored (to the detriment of the last innocent purchaser holding title). The only exception to this rule arises if that latest innocent purchaser acquires outside of the forty-year search period. So, the first purchaser to acquire forty years after the deed under which the true owner acquired will take free and clear of the original owner’s claim to title. It has always been the case that the operation of the forty-year rule will cut out all claims outside of that forty-year search period, even it is ultimately proven that the chain of title evidenced by a proper forty-year search traces back to a forged deed.

If the impersonation/forgery takes place with respect to a Registry PIN, the title restoration process also takes on a markedly different look. Unlike for Land Titles PINs:

- the OnLand portal through which impersonations and forgeries are reported for Land Titles properties (see below), will not entertain any like allegations for Registry lands;
- the original owner of a Registry PIN that has been sold by an imposter/through forgery does not have recourse to a Section 57(16) hearing (see below) or any title rectification by the Director of Titles (Registry does not guarantee ownership); and

- an innocent purchaser who buys from an imposter/forgery does not have any access to the Land Titles Assurance Fund for the losses when the original owner discovers the fraud and has title rectified.

In other words, the original owner's only recourse in Registry is to the Superior Court. Presumably, a certificate of pending litigation issued by the Superior Court will serve as interim interlocutory relief to protect the property from further trading while the claim for title reinstatement is established (although, as aforesaid, interim interlocutory relief is, in theory, less necessary under the *Registry Act* because, absent the application of the forty-year rule, the true original owner always gets his/her property back, regardless of the number of subsequent innocent purchasers there are).

What about Corporate Fraud?

Corporate fraud poses an interesting test of deferred indefeasibility. In a typical corporate fraud, a bad actor will amend the records in the Ontario Business Registry to show himself/herself as an authorized signing authority for the corporation when he/she does not have that right to do so. Thereafter, the newly appointed signing officer will typically sell or mortgage the corporation's land, then divert the purchase or mortgage proceeds from the corporate coffers to the fraudulent officer's account, which is then drained. Recent changes at the Ontario Business Registry (e.g., the "company key") have been implemented to make this kind of fraud more difficult to orchestrate, but this type of corporate misappropriation fraud can still occur, and the application of the "fraudulent instrument" definition under the *Land Titles Act* to corporate filing frauds has proved challenging.

There have been competing decisions on the issue, but the most recent and now authoritative leading case on point, *Froom v. LaFontaine*, 2022 CarswellOnt 6961 (Ont. S.C.J.) 2022 CarswellOnt 6961, 2022 ONSC 2930, 2022 A.C.W.S. 3141, 43 R.P.R. (6th) 307 ("*Froom*"), has settled (presumably once and for all) any debate that had previously existed about corporate fraud. In *Froom*, a wife allegedly misappropriated the signing authority of a corporation, the shares of which were owned by her husband. She then caused the corporation to mortgage the property to a lender who allegedly was unaware that she was not a proper signing officer. The husband and his wholly owned corporation argued that corporations can only be represented by their officers and directors, so any fraudulent misappropriation of the identity of the any officers and directors would, by definition, make that fake officer a "fraudulent person" under the *Land Titles Act*. The mortgage lender and the wife countered with the proposition that an otherwise innocent lender was entitled to rely on indoor management as a defense against any impropriety in the authorized signing parties. Furthermore, the wife did everything using her own name and was not herself a fictitious person -- she did not impersonate anyone else or forge any other persons' signatures on the mortgage. Even if she held that office fraudulently, the relevant test of "fraudulent person" only asks if the person was fictitious (she was not) or had impersonated another person (she had not).

In *Froom*, the Ontario Superior Court sided with the wife and the mortgage lender, affirming the court's very strict interpretation of the fraud definitions under the *Land Titles Act*, consistent with the approach of the Divisional Court in *Computershare* discussed above. According to the Superior Court in *Froom*, a conveyance of corporate real estate executed by an officer with ostensible authority, who is himself/herself neither a fictitious person nor an imposter, is not a "fraudulent instrument" within the meaning of the *Land Titles Act* (even if that signing officer appropriated his/her office through fraudulent filings in the relevant business registry). While corporate filing frauds are clearly a form of fraud, the Ontario Superior Court confirmed the general principle that the *Land Titles Act* only operates within a strict and relatively narrow subset of events (i.e., frauds involving direct impersonations and forgeries of the signing person), and, for greater certainty, not to cases where a bad actor (who is not otherwise a "fraudulent person") manipulates corporate records and then signs for the corporation -- while this too is no doubt some sort of fraud, it is

not a fraud under the *Land Titles Act*.

To this author's knowledge, the fraudulent instrument issue from *Froom* is currently under appeal at the Court of Appeal. If the lower court holding at trial is overturned on appeal, the matter will go back to trial for determination of the facts. For the time being, however, corporate identity appropriation frauds, for all intents and purposes, are not frauds under the *Land Titles Act*.

What About Unauthorized Transfers and Mortgages Registered by Rogue Lawyers?

Another sort of fraud that ultimately is not a fraud under the *Land Titles Act* are transfers and charges registered by rogue Teraview registrants, without any authorization from the registered owner. We have seen a number of spectacular lawyer misappropriation cases where lawyers have mortgaged their clients' properties without the authorization of those clients and have since misappropriated the mortgage proceeds.

This scenario mirrors the corporate authority misappropriation situation faced by the Superior Court in *Froom*, and the DOT takes the same position on unauthorized lawyers as did the Superior Court in *Froom* on unauthorized signing officers – unless the signing officer is a fictitious person or an imposter, the mere fact that the authorization to register is deficient or even altogether absent will not make the resulting transfer or charge a “fraudulent instrument.”

Although such a conveyance without authority is not technically a “fraudulent instrument” under the *Land Titles Act*, it would be naïve to think that the DOT would suffer this type of unauthorized document remaining on title. As soon as it is determined to the satisfaction of the DOT that a document has been registered without the express and explicit authorization of the appropriate party, that unauthorized document can and routinely is deleted from title by the DOT through Land Registrar's Orders.

This is recourse against the offending Teraview registrant. The entire electronic land registration system is premised on the integrity and good judgement of the professionals who are entitled to register therein. If the registering person is an existing Teraview registrant, then there are remedies available under the *Land Registration Reform Act* ranging from reprimand to suspension and termination of the offending Teraview registration's ability to register documents in Teraview (in addition to civil and criminal remedial responses to the fraud).

True, a lawyer orchestrating deliberate fraud in this sort of context will generally consider the loss of his/her Teraview registration rights to be the least of his/her concerns, but all other lawyers should carefully ensure that they have express and explicit authorization from the appropriate party to register whatever they are registering on title. Recently, it has come to the attention of the DOT that some lawyers are registering charges on title based on acknowledgement and directions signed by the chargee! It should be patently obvious to practitioners that charges are registered only with express and explicit authorization of the registered owner, and, for greater certainty, not because a lender decides that it would like to secure its debt against the debtor's property and is willing to authorize its lawyer to go ahead and mortgage the property. Likewise, we have recently seen charges registered by lawyers and other Teraview registrants based on arguments that their lender clients deserved to have a mortgage or were somehow equitably entitled to have a mortgage over the property. While such facts may, if true, possibly give rise to a notice under Section 71 of the *Land Titles Act* or, more likely, a caution under Section 128 of the *Land Titles Act*, the fact that the lender somehow deserves or wants a mortgage from the debtor is not authorization for a lawyer to then register a charge on the debtor's property. While the relevant authorization required under the *Land Registration Reform Act* does not always need to be the standard acknowledgement and

direction document, it must be very express and very explicit – the fact that the lender could have, would have or should have had a mortgage does not authorize the Teraview registrant to then go ahead and register a charge over the debtor’s property.

What is the Process by Which the Original Owner Can Rectify Title?

For most title frauds, the original owner, the purchaser, counsel for either party, or the police, once they become aware of the impersonation or forgery, will notify the Land Registry Office of their allegations through the OnLand portal (including, the relevant PIN(s), a copy of the exact instrument(s) alleged to be fraudulent instruments, evidence that a police investigation has been commenced, all other relevant facts). These allegations are always escalated for review by senior staff on an expedited basis. If the senior staff determine that there is a *pima facie* case of impersonation or forgery, then the file is escalated to the Office of the Director of Titles, where the staff will “freeze” the PIN by registering thereon a Land Registrar’s Investigation (an “LRI”). The original owner is then put to the option of pursuing the matter before the Superior Court, at which time the LRI will be lifted, or through a hearing before the Director of Titles or one of his Deputy Directors of Titles (collectively, the “DOT”), at which time the LRI will be replaced with a DOT caution.

Either the Superior Court or the DOT can order that the title be restored to the original owner upon satisfaction that the impugned transfer was forged or otherwise signed by a fictitious person. There are pros and cons to each remedial venue. The Deputy Directors of Title, in particular, are quite expert at the determination of impersonation and forgery and their hearings under Section 57(16) of the *Land Titles Act* are held under *Statutory Powers Proceedings Act* rules (with supplemental rules issued from time to time by the appointed hearing officer). All recent Section 57(16) hearings have been exclusively Teams video hearings (with no in-person hearings available except by specific motion, which motions are not granted except in extremely extraordinary circumstances). As a result of these factors, Section 57(16) hearings are usually faster than the equivalent court proceedings (in the scheduling, in the hearing, and in the rendering of the judgment) and far less costly than equivalent court proceedings.

On the flip side, while the DOT may order the award of costs in Section 57(16) hearings, costs are typically moot in an impersonation/forgery case since the costs would be awarded against the imposter who, in most cases, has absconded or is otherwise impecunious. The DOT cannot, however, order damages (which, in the case of impersonation or forgery are usually about as ineffective as a cost award) or other equitable relief that the Superior Court can do. In some cases where the alleged impersonation or forgery is part of a broader familial or business dispute, the original owner will elect to proceed by way of the Superior Court for the additional remedial relief available through the courts. It should be noted that orders of the DOT under Section 57(16) can be appealed as of right by way of a trial *de novo* through the Superior Court (and not an appeal on grounds of palpable error through the Divisional Court as is the case in most *Statutory Powers Proceedings Act* tribunal decisions). Some lawyers feel that the ease with which Section 57(16) orders can be appealed militates in favour of proceeding at the Superior Court *ab initio*.

If the original owner proceeds to have title restored at the Superior Court as a result of an impersonation/forgery, then the DOT must be made a party to the proceedings pursuant to Section 57(14) of the *Land Titles Act*, which then allows the DOT to make submissions to the Court as to the definition of “fraudulent instrument” and gives the DOT standing to appeal the Superior Court decision, even if the Superior Court decision is a trial *de novo* appeal of an original decision of the DOT in a Section 57(16) hearing. Note that this rule requiring the naming of the DOT as a party to title litigation is an exception to the general rule that the DOT is never named as a party in a dispute over title or a slander of title.

In Section 57(16) hearings, the DOT looks for the requisite evidence of impersonation or forgery, such as, without limitation:

- evidence regarding signature and identification inconsistencies;
- evidence of the whereabouts of the original owner at the time of the impugned transfer; and
- documentary errors or inconsistencies (e.g. typos, wrong contact details, etc.) that indicate the likelihood that an imposter was selling the property, etc.).

Furthermore, the DOT will also be looking for evidence of collusion on the part of the original owner (with the purchaser, the imposter, or in some cases, both) – readers might be astonished at the number of claims where it turns out that the original owner was “in on the scam,” either by being the alleged imposter (i.e., alleging an impersonation forgery when he/she was the actual vendor) or collaborating with a “straw man” accomplice, and then, in either case, having the title re-instated by pleading innocent non-involvement and victimization.

Elsewhere in this article, this author posits that, because the original owner almost always gets his/her title restored, and it is the innocent purchaser that needs to seek compensation elsewhere, ergo, the original owner is not really the “victim” that they have been made out to be in the recent press. In fairness, this is a qualified statement -- Section 57(16) hearings are not without their own particular stresses. Homeowners who have their titles sold “out from under them” by imposters must still go through a significant process to have their title restored (presumably proceedings at the Superior Court are also as inconvenient and stressful). So, in that respect, the original owners are also “victims” – just not quite the victims that the popular press makes them out to be.

Private Compensation – Title Insurance

As aforesaid, where a property has been fraudulently sold by an imposter, the original owner almost always gets the title restored to him/her. This means that it is the purchaser that is at risk if he/she innocently buys from an imposter. While the purchaser almost always loses the property, the same defrauded purchaser can almost always avail himself/herself of compensation for the loss. In Ontario, the burden of compensating defrauded purchasers (and, far more commonly, compensating defrauded banks in mortgage frauds) is overwhelmingly shouldered by the title insurance industry. This is because title insurance is now ubiquitous in the Ontario residential real estate market and, at least anecdotally, Ontario’s title insurers seem to respond readily to such fraud claims. Of course, these are private contracts and, ultimately, contract construction rules apply, but there have not been a lot of anecdotal cases of title insurers unreasonably denying coverage to defrauded purchasers.

As discussed above, an original landowner can also lose title to his/her land in the rare instances where an innocent purchaser from an imposter manages to sell the lands to a “second innocent” before the fraud can be detected by the original landowner. Title insurance payouts are far rarer to original owners who lose their properties as a result of this double transfer of the property, for several reasons:

- frauds are almost always detected before the first purchaser can transfer the property to a “second innocent” and, in part because title insurance was not nearly as ubiquitous decades ago when many current owners acquired their properties;
- while almost all new home purchases are now title insured, this is a relatively new phenomenon – a majority of the properties in the 1980s and 1990s are not title insured; and
- even for properties that are title insured, not all such policies carry “post-policy coverage” (i.e., insurance coverage for the loss of title after the date of the insurance policy).

It came as a bit of a surprise to this author that not all title insurance policies will cover the owner for post-policy fraud. Unlike the case with defrauded purchasers (which all title insurers insure as a matter of course), as a general principle, title insurance does not respond to post-policy events (a fraudulent sale, followed by another sale to a “second innocent” would definitely qualify as post-policy events). While post-policy coverage seems ubiquitous in residential policies of any vintage and in more modern commercial policies, post-policy fraud coverage might not be available in older (and not that much older) commercial policies (this author recently discovered that a commercial owners’ policy underwritten in 2013 did not have post-policy fraud coverage). In most cases, where post-policy fraud coverage is not available as of right under an already issued standard owner's policy, coverage can still be obtained after closing with an additional policy or policy addendum (for an added premium). Title insurance policies are private contracts, and the policy coverage varies from insurer to insurer and, even by the same insurer, from time to time. In all cases, practitioners are urged to review their clients' owner's policies carefully before casually assuring them that title insurance responds to post-policy fraud loss.

As of the date of this article, there are three private title insurers operating in Ontario (Stewart Title, First Canadian Title, and Chicago Title), each of which is the Canadian subsidiary of their respective homonymous U.S. title insurers, and all of which together account for almost the entire market of title insurance in Ontario. There is also a quasi-public title insurer, TitlePlus, operated by LawPro, a subsidiary of the Law Society of Ontario (the “LSO”).

Public Compensation – The Land Title Assurance Fund

In addition to the near-universal availability of private title insurance compensation for victims of title fraud discussed above, there is also compensation for the same victims under the Land Titles Assurance Fund (the “LTAF”) established under Section 54 of the *Land Titles Act*, but there are special rules applicable to compensation from the Land Titles Assurance Fund.

The LTAF is a special fund administered by the Province of Ontario (in particular, the Office of the DOT) that, somewhat paraphrased, pays compensation to persons who suffer a loss of an interest in land as a result of: (i) a “fraudulent instrument” (see discussion above); or (ii) an error on the part of the Land Registry Office staff.

Applied to the current spate of “title theft” fraud cases, the out-of-pocket purchaser generally does not have recourse to the LTAF. If, as is almost always the case, the original registered owner has title restored to him/her, then it is the purchaser who is out-of-pocket and seeking compensation. As aforesaid, residential purchasers are almost universally privately title insured nowadays, so there is no need for most purchasers to turn to the LTAF and, in fact, purchasers must turn first to their private title insurance before approaching the LTAF. Furthermore, in the rare instances where the purchaser does not have private title insurance for a residential purchase, then the issue will be whether the purchaser has exercised “requisite due diligence” as contemplated by section 57(4.1) of the *Land Titles Act* – which then becomes somewhat circular since, *inter alia*, it is arguable that purchasing title insurance for a typical residential purchase might in fact be a part of the “requisite due diligence” required in most residential transaction. The LTAF might only respond to the claims of a defrauded purchaser in those extraordinarily rare cases where private title insurance would not be considered common practice (e.g., it might be argued that it is not common to take out an owner’s policy for a condominium unit from an established builder, etc.). This means that the defrauded purchaser has to turn to private title insurance in almost all cases, failing which that purchaser might be out-of-pocket with no compensation whatsoever.

The situation is peculiar for the original registered owners in the same circumstances and may depend upon whether the original registered owner has private title insurance. As aforesaid, the original registered owners almost always get their properties back, so compensation is rarely an issue for the original registered owners. In the (very rare) instances where an original registered owner has their property “sold out from under them” and cannot get the title restored (because the property has been subsequently sold to a second innocent purchaser), then if the original registered owner:

- does not have (and would not have been expected to have) private title insurance with post-policy coverage, then the LTAF is likely to provide compensation to the original owner after a title theft;
- does not have (but probably should have had) private title insurance with post-policy coverage, then the LTAF might not provide compensation to the original registered owner after a title theft (because the owner should have purchased private title insurance as part of their required due diligence on the purchase); and
- does have private title insurance with post-policy coverage, then the LTAF would most likely not provide compensation to the out-of-pocket original registered owner after a title theft (because the owner did in fact purchase private title insurance and therefore must first look to that title insurance).

The LTAF distinguishes between residential and commercial and between buyers and mortgage lenders. So, residential purchasers and owners are a prescribed class of persons who may access the LTAF as a “fund of first resort.” Mortgage lenders and commercial parties must come to the LTAF as a “fund of last resort” (i.e., after having exhausted all other possible avenues of recourse before seeking compensation from the LTAF).

As aforesaid, all applicants to the LTAF, even if they may do so as a “fund of first resort,” must establish that they have exercised the “requisite due diligence” as contemplated by Section 57(4.1) of the *Land Titles Act*. The Director of Titles issues an order pursuant to section 57(4.1) of the *Land Titles Act* (the “DOT Order”) setting forth a list of some of the due diligence that is expected of prospective applicants before applying to the LTAF. For the current DOT Order, see:

<https://www.ontario.ca/land-registration/order-director-titles-due-diligence>

The DOT Order is not exhaustive and, therefore, does not operate as a “safe harbour” (i.e., applicants to the LTAF are not deemed to have exercised “requisite due diligence” just because they complied with the DOT Order). Besides, the Office of the Director of Titles has already publicly announced that the DOT Order, last issued in 2007, is expected to be updated in 2023 (see discussion below on Regulatory Responses).

As aforesaid, putative victims who have private title insurance are required to recover first from that private title insurance before looking to the LTAF, even if they are a prescribed class of persons who can nominally look to the LTAF as a “fund of first resort”. It should be noted, however, that, while private title insurers who pay compensation are generally subrogated to the rights of their insureds at common law, they are statutorily barred from accessing the LTAF. Accordingly, the subrogation available to private title insurers seems limited to a subrogated claim against the imposter which subrogation right is, for all intents and purposes, without any practicable value.

Mortgage Fraud

The “title theft” frauds referred to in the public press stories of late (and which are the principal subject of this article) arise as a result of an imposter selling the fee simple in the target property. More frequently,

however, the imposter merely mortgages the property and then absconds with the mortgage proceeds. The original registered owner remains the registered owner, but encumbered with a mortgage that he/she did not ask for and did not benefit from. While the sale proceeds from a sale of a targeted property are always materially more lucrative than the proceeds from a mortgage of the same property, mortgage frauds are far easier to execute because there is no need to list the property for sale (which could attract the attention of neighbours who know the registered owner being impersonated) or to stage or show the property to prospective buyers or do any of the other chores typically involved in a sale.

Speaking only to title theft frauds (and not mortgage frauds), an article in the North Shore News quotes a representative British Columbia Land Registrar as saying that, barring unknown frauds, these types of title thefts are a “one-in-a-million thing” and “we haven’t seen a huge proliferation in fraud claims.” Only the private title insurers have knowledge of the true rates of title theft and mortgage fraud, but even if the recent spate of “title theft” articles exaggerates the title theft problem, every indication is that mortgage frauds have been increasing at an alarming rate.

The Regulatory Response

The digitization of land registration through much of Canada has gone a long way in combatting title fraud by allowing a clear and immutable digital trail leading to the lawyer that registered the relevant deed from the imposter. That said, the true “front line” of the battle against fraud rests with the real estate brokers, real estate lawyers, and mortgage lenders, all of whom have face-to-face contact with imposters and who already have know-your-client and anti-money-laundering identity verification obligations.

Even if the incidents of true “title theft” as described in this paper are not quite as common and not quite as devastating as has been recently depicted in the popular press, it does seem, at least anecdotally, that mortgage fraud is definitely on the rise and has alarmed many industry observers. The status quo is unsatisfactory and calls for a regulatory response – but what response and from whom?

The LSO was first out of the box to announce a regulatory response to title theft and mortgage fraud. On September 29, 2022, the LSO had announced, somewhat suddenly, that, commencing January 1, 2023, virtual client identification would be amped up to include software-assisted client identification technologies, including a sampling of some of the software options on the market. Then, just as suddenly, on or about November 22, 2022, the LSO changed course and deferred the implementation of the new client identification rules until January 1, 2024, effectively maintaining the status quo throughout 2023. This author has no line of sight into what is happening on this issue at the LSO. For an excellent article on the proposed LSO response, see M. Romanin, “Virtual Verification of Client Identity: A Discussion of the New Law Society Requirements for Verifying Client Identity”, *The Six-Minute Real Estate Lawyer* 2022, LSO which was published after the LSO announced its proposed response but before the ensuing flip-flop.

The Ministry of Public and Business Services Delivery also weighed-in with its proposed response to the recent spate of title frauds. An article on title fraud published in the *Globe & Mail* quoted the Ministry response as follows:

The Ontario Ministry of Public and Business Service Delivery said changes are coming to legislation that governs real estate workers to better protect consumers and add provisions specifically related to fraud.

These “changes are coming to legislation that governs real estate workers” appear to have been a reference

to revised wording to the Code of Ethics applicable to real estate agents pursuant to O. Reg. 365/22 promulgated under the *Real Estate and Business Brokers Act, 2002*. This author is unaware of the current status of these anticipated anti-fraud enhancements to the Code of Ethics.

More recently, on March 28, 2023, the Financial Services Regulatory Authority of Ontario (“FSRA”) announced that it had revised its “Proposed Guidance: Detecting and Preventing Mortgage Fraud”. The FSRA guidance, greatly paraphrased, will require: verification of client identification through multiple reliable sources; a minimum of at least one piece of government-issued photo identification; the verification of driver’s licenses (by far and away the most common form of identification proffered by clients) against the Ontario Driver’s Licence Check; and greater scrutiny of the pieces of identification proffered by clients for inconsistencies. While this FSRA guidance is not binding on lawyers, it will be binding on their mortgage lending clients and is most definitely a harbinger of things to come for lawyers.

Finally, as aforesaid, the Office of the DOT has already publicly announced that the DOT Order, last issued in 2007, is expected to be updated and re-issued in 2023. The task of updating the DOT Order was well under way at the end of 2022, but the unexpected announcement of the LSO’s proposed (and now postponed) response, interrupted the completion of that revision. To be clear, the DOT Order will not be mandatory, but the failure to meet the requirements set out therein will disentitle the client from claiming compensation under the LTAF. For transactions that are title insured (and that is probably almost all residential real estate transactions nowadays), the DOT Order will be all but moot, since the clients of title insured transactions will not be accessing the LTAF in any event. That said, there is every possibility that the DOT Order will inform the standard of care expected of real estate lawyers to protect against title theft and mortgage fraud. It is premature to announce the forthcoming details of the revised DOT Order and there will be no “spoilers” in this article.

Stay tuned.



Law Society
of Ontario

Barreau
de l'Ontario

TAB 3

20th Real Estate Law Summit - Day 1

Law Society Spot Audits
Five most common issues (PowerPoint)

Mandy Chan, CPA, CA, DIFA, Spot Auditor
Law Society of Ontario

Andrew Assikopoulos, CPA, CA, CMA, Spot Auditor
Law Society of Ontario

April 19, 2023



Law Society Spot Audits

Five most common issues

Mandy Chan, CPA, CA, DIFA

Andrew Assikopoulos, CPA, CA, CMA

Spot Auditors

Law Society of Ontario

Spot Audit Process

Authority:

- *Section 49.2 of the Law Society Act* authorizes the spot audit process.

Selection criteria for Spot Audit:

- Random, Newly Formed, Referral, Annual Filing Report indicator, Re-audit.

Audit Process:

- Audit authorized by LSO, firm notified, audit date scheduled, pre-audit letter sent to the firm.
- Auditor attends the firm's office to complete the audit. Audit Report presented to the firm.

What happens after the audit?

File closed, Monitoring, Re-audit, Undertaking, Investigations.

Five most common issues

1. **Electronic Trust Disbursements** – *Section 18(11) of By-Law 9*
2. **Duplicate Cash Receipt Book** – *Section 19(1) of By-Law 9*
3. **Pre Taking of Legal Fees** – *Subsection 9(1)3 of By-Law 9*
4. **Monthly Trust Bank Reconciliations and Comparison** – *Section 18(8) of By-Law 9*
5. **Client Identification & Verification** – *Part III of By-Law 7.1*

Five Common Audit Issues

1. **Electronic Trust Disbursements** – *Section 18(11) of By-Law 9*

- Form 9A – signed electronic trust transfer requisitions not prepared or not fully completed.
- Signed printed bank confirmations (from bank's website) of electronic transfers of trust funds are not maintained or not fully completed.
 - The client name and file number should be added to the confirmation
 - The bank confirmation should be: signed/dated by the lawyer
- All Form 9As and confirmations should be kept centrally in one file folder.

Reminder: Electronic trust disbursements to the general account or special trust account, for land transfer tax and registration fees, require a Form 9A

Resources:

For Form 9A: www.iso.ca > Lawyers > Practice Supports and Resources > Topics > Managing Money > Recordkeeping requirements > Form 9A

R/E Accounting: www.iso.ca > Lawyers > Practice Supports and Resources > Topics > Managing Money > Bookkeeping Guide >
For Lawyers: Real Estate Accounting

Form 9A
Electronic Trust Transfer Requisition
Requisition (*number*)

Amount of funds to be transferred: (*Specify amount.*)

Re: (*Specify name of client.*) (*Specify file reference number.*)

Reason for payment: (*Give reason for payment.*)

Trust account to be debited:

Name of financial institution: (*Specify name.*)

Account number: (*Specify number.*)

Name of recipient: (*Specify name.*)

Account to be credited:

Name of financial institution: (*Specify name.*)

Branch name and address: (*Specify name and address.*)

Account number: (*Specify number.*)

Person requisitioning electronic trust transfer: (*Print the person's name.*)

(*Date*)

(*Signature of lawyer*)

Form 9A must be signed by a
lawyer with signing authority
on the trust account

Additional transaction particulars:

(*This section should be completed by the person entering the details of the transfer, after he or she has entered the details of the transfer, and by the person authorizing the transfer at the computer terminal, after he or she has authorized the transfer.*)

Person entering details of transfer:

Name: (*Print person's name.*)

(*Signature of person entering details of transfer.*)

Person authorizing transfer at computer terminal:

Name: (*Print person's name.*)

(*Signature of person authorizing transfer at computer terminal.*)

Five Common Audit Issues

2. Duplicate Cash Receipt Book – *Section 19(1) of By-Law 9*

- Cash receipts do not contain all of the details required by the *By-Law*, specifically:
 - The signature of the lawyer (or the person authorized by the lawyer to receive cash)
 - The signature of the person from whom cash is received
(If the person refuses to sign, document your efforts to obtain the signature)
 - The date on which cash is received; name of the person from whom cash is received; the amount of cash received; the client for whom cash is received; any file number in respect of which cash is received.
- Cash receipts not kept together in date order and therefore do not constitute a duplicate cash receipt book.

Five Common Audit Issues

3. Pre Taking of Legal Fees – *Subsection 9(1)3 of By-Law 9*

Legal fees can only be transferred from trust account to general account for fees earned after all of the following are complete:

- Detailed fee billings are prepared;
- Billings are rendered to the clients via mail, email, courier, hand deliver or client's pick up;
- Billings posted to the financial records (accounting journals etc.)

Five Common Audit Issues

4. Monthly Trust Bank Reconciliations and Comparison – *S18(8) of By-Law 9*

Proper procedure is to compare:

- A. Firm's reconciled trust bank balance at the previous month end to
- B. Firm's Client Trust Listing (CTL) balance at previous month end – the CTL identifies each client for whom monies are held in trust and shows the trust ledger account balance for each client at month end

Any difference between A and B must be explained and corrected. Any trust shortages should be corrected immediately.

Trust Bank Reconciliation
For Month Ended: February 28, 2023

Prepared: March 30, 2023 <Issue 1>

Ending Balance per Bank statement	\$ 3,044.00
Reconciling Items	
Less: Outstanding Cheques (per attached)	(\$ 2,000.00)
Plus: Outstanding Deposits (per attached)	\$ 500.00
Plus or Minus: Bank Errors (per attached)	<u>(\$ 19.00)</u>
Reconciled Trust Bank Balance	<u>\$ 1,525.00</u> A

Client Trust Listing
For Month Ended: February 28, 2023

<u>File Name</u>	<u>Last Activity Date</u>	<u>Amount</u>
Peter Piper	Dec 5/21	\$ 400.00 <Issue 5>
Jane Doe	Feb 28/23	\$ 1,650.00
Mary Lamb	Jan 12/23	<u>(\$ 525.00)</u> <Issue 4>
Total Trust Liabilities		<u>1,525.00</u> B

Trust Comparison:

Total Reconciled Trust Bank Balance (see Trust Reconciliation above)	A \$1,525.00
Total of unexpended balances per Client Trust Listing (above)	B <u>\$1,525.00</u>
Difference (should be zero)	<u>\$ -</u>

Trust Bank Reconciliation For Month Ended: February 28, 2023

Outstanding Cheques:

<u>Cheque#</u>	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	
084	May 14/22	Terry Taylor	\$ 25.00	<Issue 3>
178	Feb 27/23	Treasurer of Anytown	\$ 1,200.00	
179	Feb 28/23	Niko Georgie	\$ 775.00	
Total Outstanding Cheques			<u>\$ 2,000.00</u>	

Outstanding Deposits

<u>Date</u>	<u>Received From</u>	<u>Amount</u>	<u>Date Bank Processed</u>
Feb 28/23	Jane Doe (Cash)	<u>\$ 525.00</u>	Mar 1/23
Total Outstanding Deposits		<u>\$ 525.00</u>	

Bank Errors

<u>Date</u>	<u>Explanation for Error</u>	<u>Amount</u>	<u>Date Corrected</u>
Dec 23/22	Chq#67 cleared as \$687 s/b \$678	\$ 9.00	<Issue 2>
Jan 31/23	Bank service charge	\$ 5.00	
Feb 28/23	Bank service charge	<u>\$ 5.00</u>	
Total Bank Errors		<u>\$ 19.00</u>	

Five Common Audit Issues

4. Monthly Trust Bank Reconciliation and Comparison (cont'd) – S18(8) of By-Law 9

Audit Issues:

1. Reconciliation and Comparison not completed by the 25th day of the next month.
2. Bank and/or posting errors from the previous month(s) remain uncorrected.
3. Stale-date cheques [i.e. issued more than 6 months prior] not dealt with.
4. Overdrawn client trust ledgers remain uncorrected for more than one month.
5. Inactive trust ledger accounts. Firms should review the list of inactive accounts monthly to see whether accounts can be closed.
 - If unable to locate the person(s) entitled to the trust funds, consider applying the trust funds to the Law Society's Unclaimed Trust Fund (see Resource below).

Five Common Audit Issues

5. **Client Identification and Verification** - Effective January 1, 2022, Part III of By-Law 7.1 was amended. The client identification and verification requirements now include six main elements:

1. Identification	Obtaining basic identification information about the client and any third party that the client is acting for or representing.
2. Verification	Verifying the identity of the client or third party where the lawyer or paralegal is engaged in or giving instructions in respect of the receipt, payment, or transfer of funds (a “financial transaction”). Additional steps are required when verifying the identity of minors and organizational clients.
3. Source of Funds	Obtaining source of funds information from the client where there is a financial transaction.
4. Monitoring	Periodically monitoring the professional business relationship with the client when retained in respect of a financial transaction that is ongoing.
5. Record Keeping	Recording and retaining all information acquired during the identification and verification process.
6. Withdrawal	If at any point while retained, including while obtaining identification and verification information, withdrawing from representation if the lawyer or paralegal knows or ought to know that they would be assisting in fraud or other illegal conduct.

Above list taken from LSO website: <https://www.lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/identification-and-verification>

Five Common Audit Issues

5. Client Identification and Verification - *Part III of By-Law 7.1*

Audit Issues:

Client Identification - *subsection 23(1) of By-Law 7.1*

- Where the client is an individual, firms not obtaining/recording the client's work address and/or work telephone number, and occupation.

Source of Funds Inquiry – *subsection 23(2) of By-Law 7.1*

- New requirement, effective January 1, 2022
- Firms not obtaining and *recording* information from clients about the Source of Funds for their transaction, including the economic activity that generated the funds (e.g. salary from employment)

Broad Overview re Source of Funds Inquiry

- Required when firm is retained to engage in, or give instructions in respect of the receipt, payment or transfer of funds
- If client's answer is reasonable (nothing suspicious, unusual), the inquiry is complete
- If explanation is unusual or inconsistent, further inquiry needed (see LSO FAQs)
- See Resources list below

Five Common Audit Issues

5. Client Identification and Verification (cont'd) - *Part III of By-Law 7.1*

Tips:

- Use an intake sheet (or update the firm's existing one) to ensure that all of the required client contact information is obtained and recorded; add the Source of Funds Inquiry.
- Consider using the LSO's templates (see Resources below).
- The intake sheets produced by some accounting software are incomplete.

Note: The elements of the Client Identification and Verification requirements are not covered in detail in this presentation.

Resources:

www.lso.ca: Lawyers>Practice Supports and Resources>Topics>The Lawyer Client Relationship> Identification and Verification

- Overview of Requirements (see Flowchart)
- FAQs (excellent)
- File Forms (templates) – Client ID Form; Client Verification Forms
- Red Flags Worksheet
- CPD Program
- And more!

Accounting Software for lawyers

Tips to select software suitable to your practice:

1. area of practice;
2. volume of accounting transactions;
3. knowledge of the software;
4. extent of help from support staff;
5. how well you understand bookkeeping;
6. cost considerations.

Resource: Financial Management Software

www.iso.ca: Lawyers > Technology Resource Centre > Financial Management Software

The Law Society does not endorse, approve, or recommend any products, software, applications, service providers or other such tools for use by lawyers or paralegals in their professional business.

Helpful Resources:

- *The Bookkeeping Guide for lawyers – for common bookkeeping issues*
www.iso.ca: Lawyers > Practice Supports and Resources > Topics > Managing Money > Bookkeeping Guide
- *Practice Management Helpline*
416-947-3315 or 1-800-668-7380

Questions?



Law Society
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TAB 4

20th Real Estate Law Summit - Day 1

Client Identification and Verification Requirements:
What is Next?

Joel Kadish, Barrister and Solicitor

April 19, 2023



Client Identification and Verification Requirements:

What is Next?

Joel Kadish, Barrister and Solicitor

RESOURCE LINK:

Client Identification and Verification Requirements

<https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/identification-and-verification>



Law Society
of Ontario

Barreau
de l'Ontario

TAB 5

20th Real Estate Law Summit - Day 1

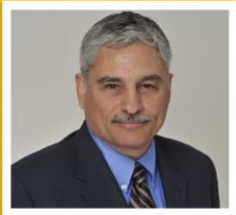
How to NOT be the Next Fraud Dupe or Victim
(PowerPoint)

Raymond Leclair, Vice-President, Public Affairs


Lawyers' Professional Indemnity Company (LAWPRO ®)

April 19, 2023






Raymond G. Leclair
Vice President, Public Affairs




LAWPRO
Lawyers' Professional Indemnity Company

HOW TO NOT BE THE NEXT FRAUD DUPE OR VICTIM

REAL ESTATE SUMMIT 2023




Law Society of Ontario



Barreau de l'Ontario


1

KEY STATISTICS




Frauds affecting Canadians

- In 2020, Canadian reported several types of fraud:
 - Identity fraud** ranking second (16,970 reports),
 - personal information fraud** ranking third (6,649 reports) and
 - phishing fraud** ranking fourth (3,672 reports) among the top 10 types of fraud.




Mortgage fraud

- Equifax Canada October report warned that financial pressures in the country could lead to increase in mortgage and credit fraud. As of 2022, the number of reported **mortgage fraud causes** has increased by **29.5%** compared to pre-pandemic levels.



LAWPRO

- Real estate No. 1** reason for claims against lawyers.



Fraud

- Fraud impacts the individual (client or lawyer) substantially in losses, costs, time, etc.

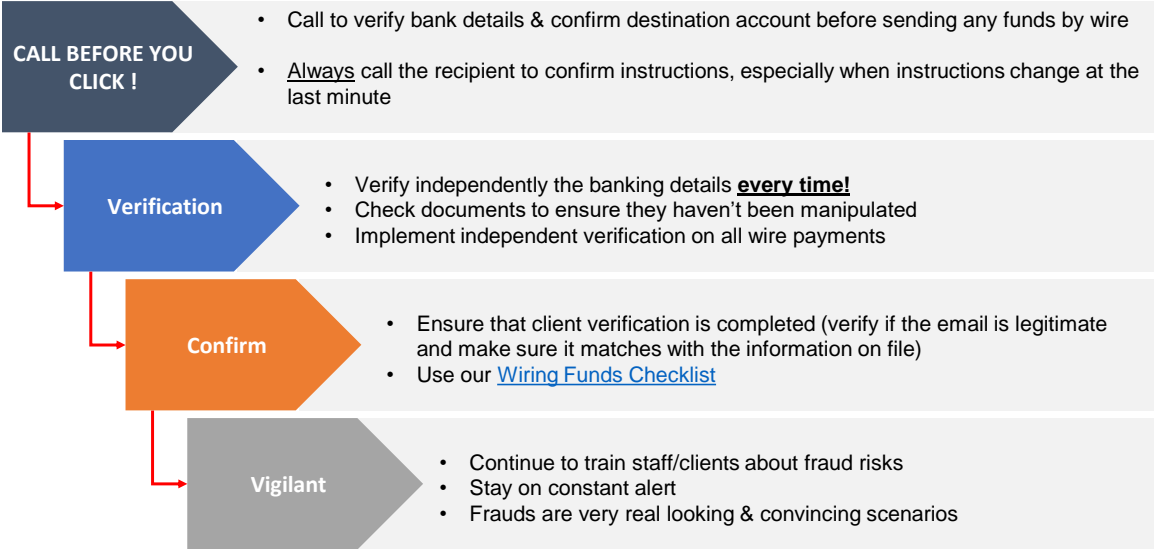
Source: LawPRO Annual Report, Canadian Anti-Fraud Centre Report and Equifax Canada Report.

1.

Wire
Diversion
Fraud

- **Wire Diversion Fraud:**
 - Fraudster deceives lawyer and/or clients
 - into transferring funds to a fraudulent account
 - through direction, redirection, or fake payment documents
 - Wire transactions - inherent risk
 - given speed & sums that are typically disbursed

3



4

2. Identity (ID) Fraud

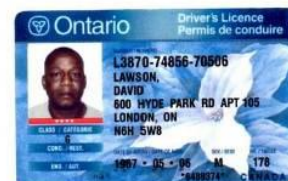
• Identity Fraud:

- Fraudster use another person's identifying information to commit fraud
- Title fraud usually starts with identity theft.
 - Using fake documents to
 - transfer ownership of a property
 - register a mortgage
 - discharge a mortgage
- Verifying ID is NOT a copy & file exercise

5

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
- 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

6

5-3

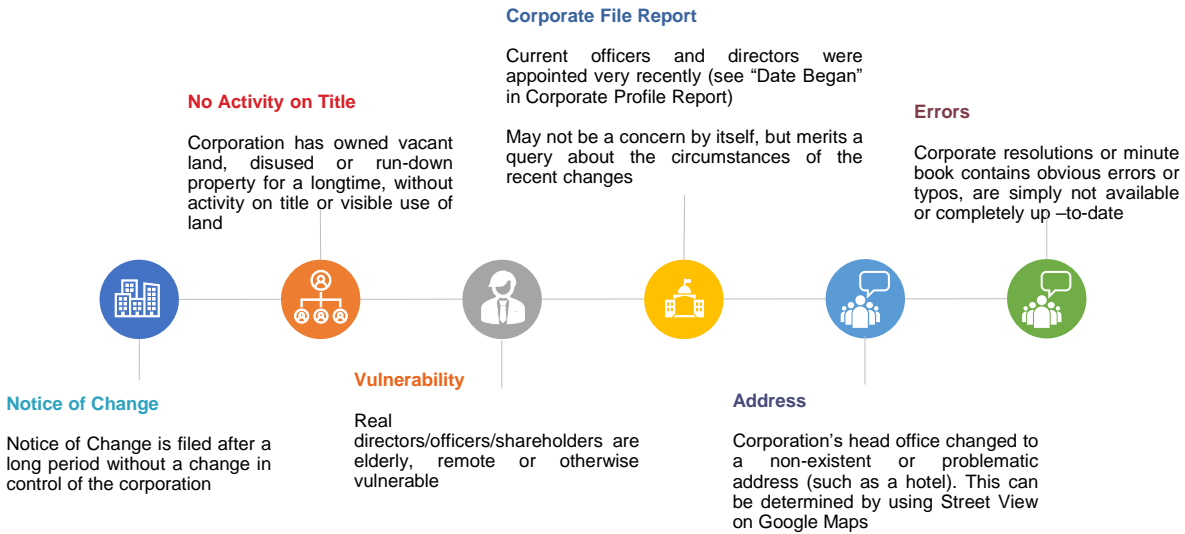
3. Corporate Fraud

• Corporate Fraud (Form 1)

- Fraudsters change or steal the identity of corporate property owners
- Most commonly accomplished with filing of **Form 1 Notice of Change** naming new directors and officers
- Fraudsters may retain a lawyer to prepare and file the **Form 1**; in other cases, they prepare and file it themselves
- [Recognizing the red flags of real estate scams involving corporate theft](#)

7

The Red Flags...



8

4.

“Bad” Cheque Fraud

• **Bad Cheque Fraud:**

- Fraudster retains firm on a contrived legal matter so that they can run a counterfeit cheque or bank draft through the firm trust account and walk away with real money
- These contrived matters will look real, and fraudster will provide extensive and very real looking ID and documents
- When the bad cheque bounces, there will be a short fall in the trust account
 - May be coverage, see Endorsement 7 – Limited Trust Account Overdraft Liability Coverage

9

WARNING:

cheque in & wire out

unless you can confirm they are good funds

• On Oct 7, 2016, at 10:53 AM, Ratna, Nazmun <Nazmun.Ratna@lincoln.ac.nz> wrote:

- Hello,
-
- My name is Al-Abel Usman. We want to invest in North America
-
- Thank you for your consideration,
- Al-Abel Usman

Oct 11, 2016, at 2:37 PM, Al-Abel Usman al-bel@abelconsultantoffice.com wrote:

Good Afternoon,

Thank you for your reply. I fully expect that this will be a lucrative business partnership for parties involved. I base this expectation on our successful Canadian investments made in 2015.


As financial representative for the Saudi Royal family in this arrangement, I will be the acting financial representative for all communications...

What I need to know is your level of confidence in helping with the plan to begin investing a total amount of \$1b U.S. We want to ...

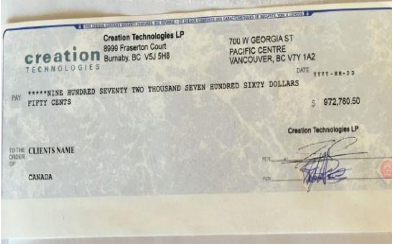
Investor is willing to invest 1 Million - 10 Billion USD into good and profitable companies, subject or business, if you are interested

Let me know if you contact from linkedin search.

Sincerely,
Al-Abel Usman



The maximum we can pay for the retainer/consultation fee and travel cost/ hotel reservation is \$40,000.00 all this will be paid upfront...



10

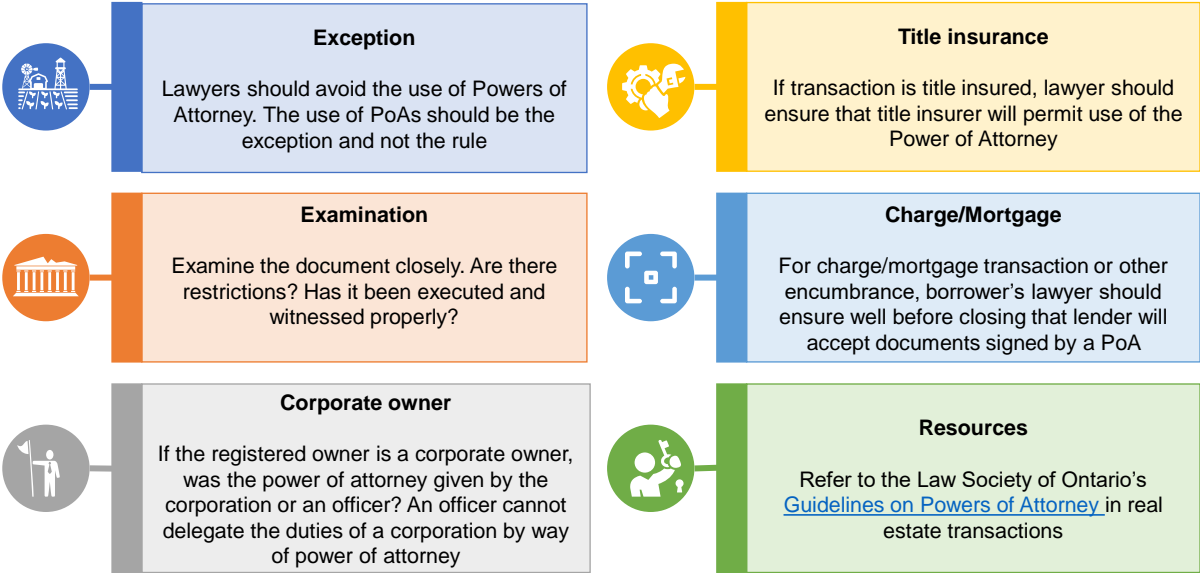
5.
Power of
Attorney Fraud

• Power of Attorney Fraud

- Forged powers of attorney have emerged as a common tool for committing real estate fraud
- Improperly used legitimate powers of attorney are just as problematic
- Power of attorney used to fraudulently mortgage properties or transfer title

11

Factors to consider....



12

6. Cyber Fraud

- **Cyber fraud:**
 - Use of email (**phishing**), text message (**smishing**) or phone call (**vishing**) that appears to come from a trusted source or institution, vendor or company, but is from an imposter
 - Personal information and identity theft and/or payment scams are motives behind most phishing scams
 - Seek information or get you to do something

13

Link is different from company s usual website URL
place your mouse over link and look at the task bar

Sender s email address is not the same as company s usual email address

Spelling, grammar or phrasing mistakes

Promise of receiving money, big prize or much more work

Anyone asking for money even if you know them

Possible
signs
of fraud

14

To : dan.pinnington@lawpro.ca
From : Appleapp@apple.ca
(michal@host.fullenglish.net)
Subject : Update your account details on iTunes.

Actions for current recipient :

Our security check detected multiple unwanted login attempts on your account.

You need to update your iTunes account details for better security.

Click the link below to update your account details:

Click Here to Update

Hover mouse over words – DO NOT CLICK!

http://www.coffeevietland.com/images/stories/ca.php

To: Undisclosed recipients
From: BMO <xcze@bmocm.com>
Subject: New Security Measures

To protect your account, Bank of Montreal has implemented security questions and answers for you to create and use whenever you log in from a different location.

Please create security questions and answers for your BMO online account by <<clicking here >>

We strongly advise you to enroll now. The new login method will be effective within the next 24 hours.

Thank you for using BMO.

Regards,
BMO Support Dept.

Hover mouse over words – DO NOT CLICK!

http://www.onb.it/wp-admin/css/on/bmo/

- New technique to avoid fraud

15

Best practices of password hygiene

- Regularly change passwords on key accounts
- Change compromised passwords immediately
- Use different passwords for different accounts
- Use a two-step authentication (2FA)
- Use a password manager

2022 most common passwords

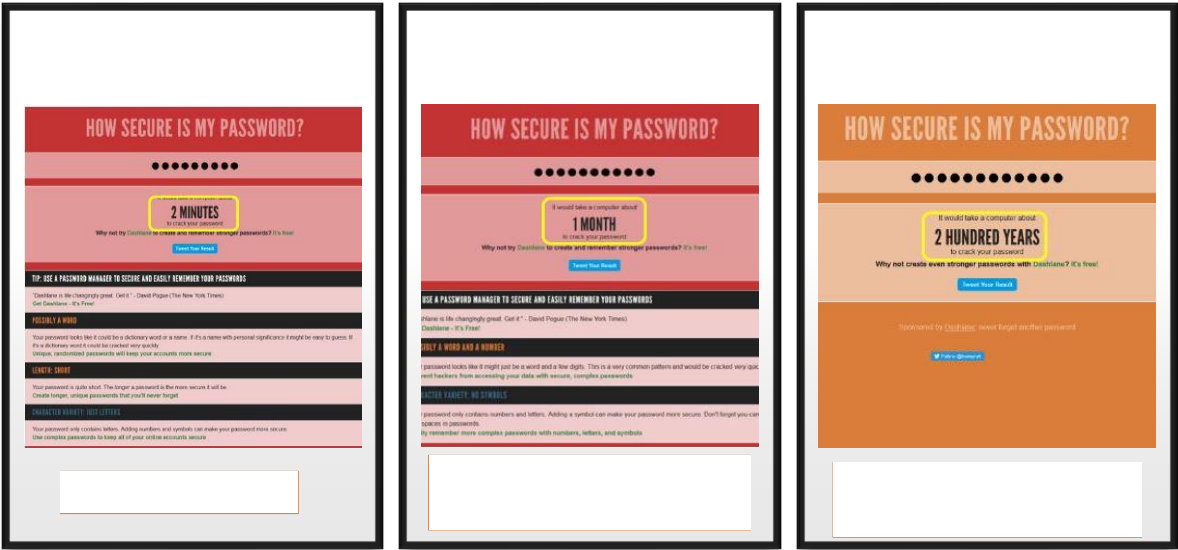
1. password (114)	13. 1234567890 (114)
2. 123456 (114)	14. 000000 (114)
3. 123456789 (114)	15. 555555 (114)
4. guest (104)	16. 666666 (114)
5. qwerty (114)	17. 123321 (114)
6. 12345678 (114)	18. 654321 (114)
7. 111111 (114)	19. 777777 (114)
8. 12345 (114)	20. 123 (114)
9. coll123456 (114)	21. D1lakiss (24)
10. 123123 (114)	22. 777777 (114)
11. 1234567 (114)	23. 110110jp (24)
12. 1234 (114)	24. 1111 (114)
	25. 987654321 (114)

*[xx] is time to crack the above passwords. Majority of top 200 only take 1 second to crack

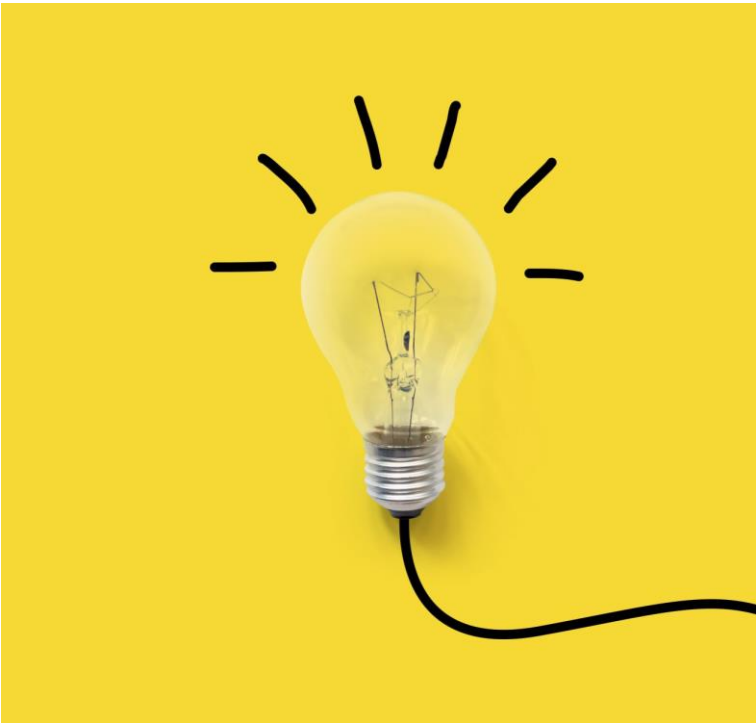
Where are they kept? – Sticky on the monitor? Under the keyboard?
Consider using a password manager



16



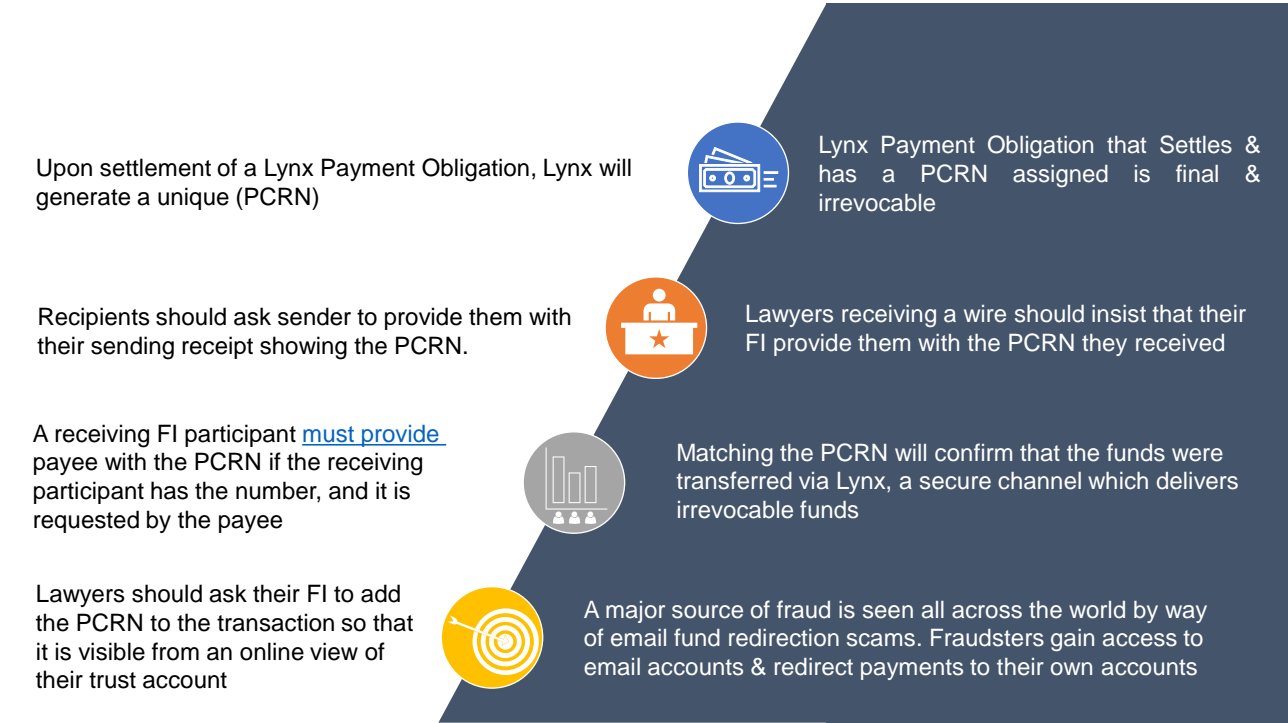
17



How to
Identify Good
Irrevocable
Funds

The PCRN
(LVTS+9digits)
Payment Confirmation Reference
Number

18



19



20

Consequences of being involved in a fraudulent transaction

Public trust

Reputational damage

- Can have damaging effects on your firm's reputation and an impact on the client's experience

Professional liability

- Cases of fraud are not covered by LAWPRO

Time to deal with an LSO complaint or LAWPRO claim

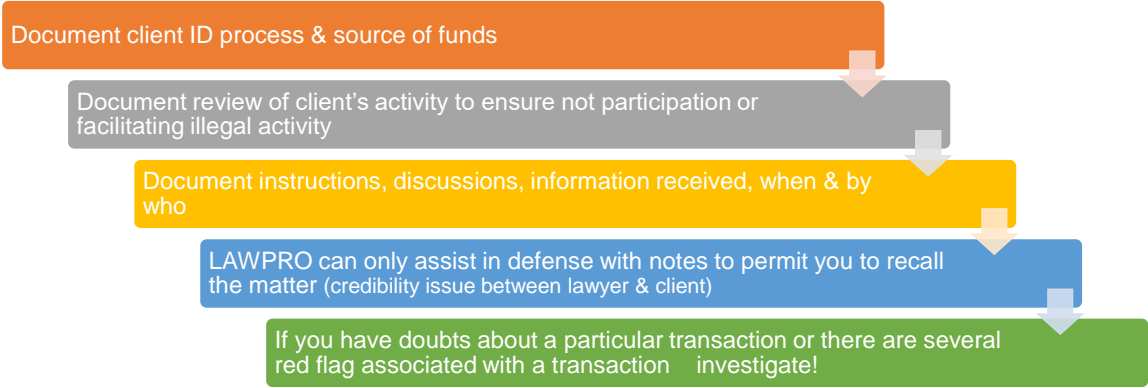
Statistics of mortgage fraud investigation by the Law Society

Since 2001, there were 123 mortgage fraud prosecutions

- 45 lawyers' licenses were revoked
- 20 permitted to surrender licence
- 56 licenses suspended + 2 with lesser penalties

21

LAWPRO's GOLDEN RULE : DOCUMENT, DOCUMENT, DOCUMENT!



22

Contact Information & Resources

Raymond G Leclair, LL.B.

Vice President, Public Affairs, LAWPRO

(416)-598-5890 or 1-800-410-1013

ray.leclair@lawpro.ca



Resources:

PracticePro: <https://www.practicepro.ca/>

Working group on Lawyers and Real Estate: <https://www.lawyersworkinggroup.com/> |

Avoid a claim: <https://avoidclaim.com/>

CBA Mortgage Instructions Toolkit: <https://www.cba.org/Publications-Resources/Practice-Tools/Mortgage-Instructions-Toolkit>

What to do if money is diverted to a fraudster's account? - <https://avoidclaim.com/2021/what-to-do-if-money-is-diverted-to-a-fraudsters-account/>

Update about funds transfers - <https://avoidclaim.com/2022/update-about-fund-transfers/>



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TAB 6

20th Real Estate Law Summit - Day 1

Dealing with Workplace Issues in Your Real Estate Practice
(PowerPoint)

Workplace Harassment Investigations:
An Overview of the Process

Brian Wasyliv
Sherrad Kuzz LLP

April 19, 2023



Dealing with Workplace Issues in Your Real Estate Practice

Sherrard Kuzz LLP |

Brian Wasyliw

April 19, 2023



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www.sherrardkuzz.com

Agenda

- Termination entitlements

- Employment Contract

- Occupational Health & Safety / Discrimination

- Policies

- Investigations

- Applied - Scenarios

Termination of Employment

Notice

- When employment is terminated “without just cause”, there is an implied obligation of employer to provide employee with reasonable prior notice of termination, or pay in *lieu* of notice

ESA Notice

- Bare minimum notice is set out in ESA
- ESA requires notice based on length of service
- Notice can be working notice or pay in *lieu*
- No notice required for employee unless continuous employment for at least three months

ESA Severance

- ESA also requires severance pay
- Severance is only applicable if employer has a payroll of at least \$2.5M annually and only applies after an employee reaches five years of service
- Unlike notice, severance has to be pay (cannot be satisfied with working notice)

Common Law Notice

- As a default, an employee is entitled to Common Law notice
 - Not in addition to ESA notice and severance
- Common Law Notice rationale: To provide employee with reasonable amount of time to search for other employment

Common Law Notice

■ How much notice?

□ *Bardal v. Globe and Mail*, (1960), 24 DLR (2d) 140 (Ont. H CJ)

■ Length of service

■ Character of employment

■ Age of employee

■ Availability of similar alternate employment, having regard to experience, training and qualifications of worker

Employment Contract

- Can limit notice/severance to ESA minimum (or something more)
- Requirement of contract:
 - ☐ Entered into without duress
 - ☐ Good and valid consideration
 - Fresh consideration needed if enter into contract after employment relationship commenced (with some exception) or terms already agreed upon

Employment Contract

- Must provide for at least statutory minimum to have any effect (*Machtinger v. HOJ*, [1992] 1 SCR 986)
- Language must be clear to rebut presumption of obligation to provide reasonable notice (*Ceccol v. Ontario Gymnastics Federation* (2001), 55 OR (3d) 614 (CA))

Employment Contract

- Fixed-term employment agreement
 - Early termination clause
 - Presumption of payment to the end of the fixed-term

Occupational Health & Safety Discrimination

Legislative Landscape

■ *Occupational Health and Safety Act*

- requires an employer implement workplace policies and programs to address workplace violence and harassment

■ *Human Rights Code*

- requires an employer to take steps prevent/address workplace harassment if harassment is related to one of the protected grounds under the *Code*

Legislative Background

- Legislative obligations reflect heightened awareness of risks of violence and harassment in the workplace
 - Triggered by
 - High profile incidents
 - Change in societal perceptions of workplace interactions

Policy Overview

■ Purpose

- Help create a safe workplace where everyone is treated with respect and dignity
- Comply with legal obligations
 - *Occupational Health and Safety Act* – both employers and workers have obligations
- Communicate workplace objectives, responsibilities, standards of behaviour and procedures

Application

- **Who:** all of the firm's "workers"
- **Where:** wherever business is conducted – on-site (including parking lots) but also off-site locations where employees engaged in firm-related activities or at firm-sponsored events
- **When:** both during and outside of business hours

Definitions

- **Workplace Violence:** the use, or attempted use, of physical force by a *person* against a worker in a *workplace* that *could* cause physical injury.
- This includes a statement or behaviour a worker could *reasonably* interpret as a **threat** to use physical force that could cause physical injury

Definitions

- **Threat:** the implication or expression of intent to inflict physical harm or actions that a reasonable person would interpret as a threat to physical safety

Definitions

■ **Workplace Harassment:** a course of vexatious comment or conduct that is known or ought to be known to be unwelcome, including **workplace sexual harassment**

□ This definition **does not** include a reasonable action taken by an employer related to the supervision or direction of a worker or the workplace

What is Workplace Harassment?

Harassment

- Calling someone unwanted and derogatory names
- Making negative comments about someone unrelated to work performance
- Teasing or cruel remarks about an individual and their personal characteristics
- Bullying

Not Harassment

- Reasonable imposition of discipline
- Negative performance evaluation
- Policy implementation
- A question from a co-worker about a work-related issue
- Consider: if serve a legitimate work-related purpose?

Definitions

- **Workplace Sexual Harassment:** harassment based on sex, sexual orientation, gender identity or gender expression; includes a **sexual solicitation or advance** from a person in a position to confer, grant or deny a benefit or advancement to the worker where the person knows, or ought reasonably to know, the solicitation or advance is unwelcome

Responsibilities

■ **Human Resources and Management:**

- ❑ Implement Workplace Violence and Harassment Policy
- ❑ Intake complaints of a potential violation
- ❑ Work with Joint Health and Safety Committee to address any risks of workplace violence identified in the risk assessment

Responsibilities

■ **Human Resources and Management:**

□ Determine and manage:

- Complaint and investigation process
- Police involvement (where not already contacted)
- Remedies and corrective action related to a violation of the Policy

Responsibilities

■ **Joint Health and Safety Committee:**

- ❑ Conduct a risk assessment to identify any risks of workplace violence in the workplace
- ❑ Work with Management and Human Resources to determine and implement appropriate measures to address any risk

Responsibilities

■ **Workers:**

- ❑ Understand the Policy
- ❑ Refrain from acts of workplace violence or workplace harassment
- ❑ Immediately report:
 - Incidents of workplace violence/harassment
 - Potential risks of violence in the workplace, including **domestic violence** where it may result in a risk of violence in the workplace

Reporting and Investigating

■ Reporting:

- ☐ Report should be made to a member of Management (In writing if time permits)
- ☐ A complaint made against a member of Management or a supervisor, can be made to Human Resources

■ These reporting procedures do not preclude a worker from contacting law enforcement or emergency services, as needed

Reporting and Investigating

■ **Investigation:**

- ❑ All incidents and complaints will be investigated promptly and impartially and in a manner appropriate in the circumstances
- ❑ Investigation may be completed internally or externally (where appropriate)
- ❑ Complainant and/or respondent may be temporarily reassigned or placed on a paid leave during the investigation where required

Reporting and Investigating

■ Investigation Process:

- ☐ Review the allegations
- ☐ Conduct interviews of the complainant, witnesses, respondent, and anyone with relevant information
- ☐ Collect and review relevant documents including workplace policies
- ☐ Review the workplace or site(s) of the incident (if relevant)

Reporting and Investigating

■ Investigation:

☐ Investigator to determine

- Relevant facts as to what happened
- Whether violation has occurred

☐ Management to

- Decide appropriate corrective action, if any
- Communicate outcome of investigation and any corrective action taken to complainant and respondent in writing (if they are a worker)

Reporting and Investigating

■ **Sanctions/Discipline:**

- If employee is found to have acted in violation of policy, disciplinary action up to and including termination of employment for cause may result

Reporting and Investigating

■ Reprisals:

- ☐ There shall be no reprisals

- Against workers who make complaints/reports in good faith, regardless of outcome

- For participating in an investigation

- ☐ Acts of reprisal are subject to investigation and discipline

Scenario 1 – What should you do?

- Bernard (assistant) and Tina (young lawyer), get along very well and text and email pictures and jokes to each other outside of work
- Lately the content of the jokes and pictures have become sexually explicit
- After Bernard declines a request from Tina to go out on the weekend Tina refuses to approve Bernard's vacation request – she needs his help on a closing
- Tina keeps texting Bernard and asking to go out

Scenario 2 – What should you do?

- Sal and Peter are co-workers
- Peter is shy and sometimes stutters when required to speak to people he doesn't know. Sal mimics Peter's speech and says "I'm just joking"
- When Sal introduces clients he always chooses to ask Peter questions about his work which he knows makes Peter uncomfortable (and stutter)
- ***What should you do when you notice this behaviour?***



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416.603.6035 Fax
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LEXPERTRANKED



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WORKPLACE HARASSMENT INVESTIGATIONS: AN OVERVIEW OF THE PROCESS

OVERVIEW

While the case law does not set out hard-and-fast rules regarding the do's and don'ts of a workplace harassment investigation, it does suggest that in order to rely on the investigative process and outcome, the investigation must be conducted properly, in keeping with the fundamental principles of procedural fairness. Where an investigation is conducted improperly, this can leave an organization vulnerable to liability.

WHY INVESTIGATE?

When conflict or misconduct occurs in the workplace, there may be a temptation to bring matters to an immediate conclusion in the hope that by acting quickly and decisively strife will be minimized and any interference with the conduct of business will be avoided.

While swift and decisive action is a worthwhile goal, this can cause long-term harm to other business objectives. Reasons to investigate include:

- **Making a fact-based decision** – Making a decision about how to respond to wrongdoing requires knowledge of the facts. While sometimes all the facts will be available, more often some facts are not known. If the facts cannot be readily amassed, it may be necessary to interview people, analyze data, or consult with experts. An orderly and systemic collection of facts (*i.e.*, an investigation) is preferable to a disorderly, “fly-by-the-seat-of-your-pants” process.
- **Fairness** – Whatever decision is made, if it appears the decision was made hastily, without process or reflection, the decision will be regarded by others as arbitrary, unfair, or even wrong. If that is the perception, the outcome may foster cynicism, low morale, resentment and loss of good employees.
- **Consistency of message** – Your business may have a mission statement, business philosophy, and/or a public reputation for honest dealing. If a hasty decision creates an outcome inconsistent with this message, this may damage your internal and external brand.
- **Legal obligation** – An employer may also have a legal obligation to conduct an investigation. The *Occupational Health and Safety Act* requires an employer investigate

a complaint of workplace violence or workplace harassment. The *Human Rights Code* (the “*Code*”) has been interpreted to require an employer investigate a complaint of harassment based on a *Code*-protected ground. A failure to meet these obligations and responsibilities can result in liability.

- **Risk** – Even where no positive legal obligation exists, neglecting to conduct an investigation may still result in increased liability for an employer. For instance, although there is no obligation to conduct an investigation before terminating employment for dishonesty or misconduct, if it turns out that the terminated employee was falsely accused and no investigation was conducted, an employer may face an aggravated or punitive damage award. Conducting a fair and thorough investigation in such a circumstance will help to mitigate this risk.

CONSIDERATIONS BEFORE THE INVESTIGATION BEGINS

Administrative Leave for the Respondent – Yes or No?

Sometimes, it will be desirable to remove the respondent from the workplace while the investigation is ongoing. For example, if serious sexual harassment is alleged to have occurred, it may be disruptive or even dangerous to permit the respondent to remain in the workplace while the investigation is being conducted. However, there are a number of factors to keep in mind when considering an administrative leave:

- Leave without pay has the potential to be deemed a constructive dismissal. In addition, a leave without pay can also give the impression of pre-judgment as it may be seen as a punitive action. As such, a leave without pay should only be used in the most extreme and exceptional cases where there is clear and compelling evidence of misconduct even before the investigation is launched.
- Placing an employee on leave with pay pending the outcome of an investigation, although an added expense, avoids the potential impact on an investigation where the respondent remains present in the workplace, and also avoids any allegations of constructive dismissal or preconceived bias.
- It is usually desirable to avoid use of the term “suspension” as it connotes discipline or wrongdoing. Instead, the respondent may be said to have gone on an “administrative leave”.
- Where removing the respondent from the workplace is unnecessary or undesirable, an employer should take steps to ensure the presence of the respondent does not affect the credibility of the investigation and does not put the complainant or other affected employees in an awkward or uncomfortable position. For example, this may require altering a reporting relationship, or moving the respondent to another location within the facility while the investigation is ongoing.

Selecting the Investigation Team – Internal or External; and How Many Investigators?

- Should the investigation be conducted by an in-house team, an external investigator, or a combination of both? Considerations include:
 - is objectivity a potential issue?
 - are potential investigators experienced or inexperienced?
 - cost
 - timing
 - internal perception of other workers
 - the employer's workplace culture
 - whether a member of the investigation team has the authority and experience required to make factual findings that might negatively influence the career of the individual(s) being investigated
 - whether the proposed investigator would be a 'good' witness should he or she be called as a witness (*i.e.*, is he/she responsive, thoughtful, intelligent, well spoken, unbiased, *etc.*). (Note of Caution: Anyone who attends during an interview may be called as a witness in court or before an adjudicator and may be subject to cross-examination on matters beyond the scope of the interview(s)).
- In most cases it will be desirable to appoint an investigation team comprised of two individuals: one to conduct the interview and another to take detailed notes.
- Limiting the number of investigators to two will help avoid an allegation of intimidation.
- The investigation team should remain consistent for each employee being interviewed to avoid an allegation of inconsistent information or approaches.
- Ensure the investigation team has knowledge of the applicable policies, practices or codes of conduct that are alleged to have been breached, as well as a working knowledge of the law as it relates to workplace investigations.

USUAL ORDER OF PROCEEDINGS

There is no one "right" way to conduct an investigation. That said, investigations usually proceed in the following manner:

1. Obtain complaint from complainant (written or verbal)
2. Interview complainant
3. Interview respondent
4. Interview any other individuals identified by the complainant or respondent who may have relevant information (witnesses, *etc.*)
5. Source and review any documents that may be relevant
6. Follow-up with additional interviews, as required

7. Review evidence, make findings of fact, determine whether the conduct at issue violates any legislative or policy obligation, and consider and implement any actions that may be necessary based on your findings.

CONDUCTING INTERVIEWS

- Once you identify those you want to interview, quietly and discretely call each one of them to attend an interview in a private location. Employees should be interviewed individually and not as a collective to ensure a more truthful and accurate recount of events is told.
- To the extent reasonably possible, all interviews should be conducted shortly after one another to reduce the possibility of witnesses being able to coordinate stories.
- Interviews should be conducted in a private area where other employees will not be able to overhear what is occurring. Maintaining privacy and confidentiality, to the extent possible, is key to a proper investigation.
- An employer cannot hold an individual being interviewed against his/her will if the individual wants to leave. However, if an individual wants to leave, make it clear you consider them to have refused to participate in an investigation. In some cases, it may be appropriate or necessary to impose discipline on an employee who refuses to participate in an interview. This may especially be the case where the individual is withholding information which he or she is required to provide as a term of employment or under a company policy.
- Every interview should be consistent. It is important for the employer to show each interview was thoughtfully planned out and to demonstrate due diligence in the investigation process.
- In terms of 'where to start', it largely depends on the nature of the investigation itself. It is often useful to gather information from other sources before meeting with the respondent. On the other hand you may already have enough information to start the interview process with the respondent. Regardless, it is common to meet with individuals more than once. This is not a sign of a flawed investigation. To the contrary, a follow-up interview may be prudent and appropriate as more and more information comes to light in the course of meeting with various individuals.

How— Introduction

- Certain information should be communicated to each interviewee at the outset of the interview, including:
 - that the investigator has been asked by the employer to conduct an investigation.
 - that the investigation process is private and will not to be discussed with others, to the extent that it is possible to maintain confidentiality. However, employees should be advised that some information will need to be disclosed in order to conduct an effective investigation. Therefore, while privacy will be respected, there can be no guarantee of confidentiality.
 - that to discuss the fact of the investigation or the content of the interview with any other employee or person who may be involved in the investigation will be considered cause for discipline up to and including discharge.
 - that each employee is protected against reprisal for filing a complaint or participating in an investigation and any employee who engages in reprisal against another employee related to this investigation will be subject to discipline up to and including discharge.
 - a description of the allegation(s), providing sufficient details necessary to make the interview meaningful.
 - the respective roles of the investigator and the note-taker.

How – Questioning

- It is important to engage in active listening (*i.e.*, listen more than you talk).
- Do not suggest an answer or start a question with extra lead in; just ask the question and stop. Let the interviewee answer.
- The purpose of any interview is to get the interviewee’s “story”. As a general point, you will want to focus on using open-ended questions, such as “tell me what happened on” as opposed to questions which direct the interviewee towards a particular conclusion. You want to have the interviewee discussing their side of things in their own words, with you taking the role of listener more than speaker.
- In preparing for an interview, you may want to have a list of topics you want to cover, but the questions will often be determined by what is being said and so pre-scripting the questions you want to ask may only be a starting point. It is useful to start with general questions and narrow your focus depending on the answers provided.

- With the respondent, you may want to provide him or her with a copy of the complaint in advance so that he or she is able to review it and is prepared to respond. The most important part of interviewing the respondent is to ensure he or she (1) understands the allegations and (2) has an opportunity to respond to the allegations. This means the respondent will need to be questioned with some specificity if necessary. For example, if the allegation is that Joe pushed Frank in the lunchroom on September 30, 2017 you will want to specifically ask Joe if he pushed Frank in the lunchroom on September 30, 2017 to see what he says. He may deny it, he may admit it, or he may admit it and provide an explanation (*e.g.*, because Frank spit on him). It would then become necessary to go back to Frank and any other witnesses to determine whether this occurred.
- Should an employee being interviewed refuse to answer a question, the investigator should clearly advise that he or she is being provided an opportunity to co-operate and (if the interviewee is the respondent) to provide information which may assist him or her. If the interviewee is the respondent, he or she should also be advised if he or she refuses the opportunity to provide information to the investigator, the investigation will proceed and findings of fact drawn based on the information collected and the respondent will not be provided a further opportunity to provide information to assist in his or her own defense.
- In the course of the interview, the investigator may wish to ask each interviewee if there is anyone else with whom the investigator should speak to who may be able to verify the witness' account. Those individuals should be interviewed if you believe they may be able to provide information necessary to assist you in reaching a conclusion.
- Always remember that you don't have to get everything in the first interview. If you think of other information you need, you can always meet with the party again to get that information.
- Some interviewees may request they be permitted to have a representative present during the investigation. Absent a specific provision in a collective agreement that speaks to the issue of representation in such circumstances, interviewees are not entitled to representation. That said, there may be sound reasons to agree to such a request. Consider the pros and cons before dismissing such a request out of hand.

How – Taking Notes – Just the Facts!

- The investigator whose role it is to take thorough notes of the investigation should make note of the following:
 - Who was interviewed and who was present
 - Where and when the meeting occurred
 - What was discussed (in as much detail as possible)

- It is very important notes contain no editorials or opinions. Notes must be as close as possible to a verbatim record of questions asked and answered at the meeting. Should the investigation culminate in litigation, the notes will likely be produced in the course of that litigation. Notes containing editorial commentary could significantly undermine the credibility of the investigation and any subsequent disciplinary action.

Signing Off

- At the end of the interview, the investigation team may wish to ask the interviewee to review the notes taken to ensure they are complete and correct; and to sign them. If an interviewee is requested to sign off on the notes and refuses, the note-taker should add the following to the notes: “The interviewee was given the opportunity to review the notes and to amend any portion of the notes he or she believed to be inaccurate or incomplete. The interviewee reviewed the notes and declined to sign”.

Concluding the Interview

- Not surprisingly, not everyone can recall every detail of an event during an interview. For this reason, the interviewee should be advised to contact the investigator if he or she subsequently remembers or learns of any additional information, correction or clarification.

Post Interview

- Any information collected following the interview of the respondent (that was not originally put to respondent, likely because it was not known at the time of the first investigation meeting), should be put to him or her. To do this, another meeting should be held to allow the person under investigation to respond to the new information.

CONCLUDING THE INVESTIGATION: MAKING FINDINGS

- At the conclusion of the evidence collection phase of the process, a determination will have to be made (*i.e.*, has the complaint been substantiated?).
- Review all of the material and determine if there is anyone you think you may need to re-interview. You will want to make sure you feel comfortable you have all of the information that you need before making a determination.
- When trying to draw a conclusion as to what you think occurred, you need to be focused on what type of objective evidence you have to support one version of events over another. For example, this may be assisted by documentary evidence, corroborating stories from witnesses, *etc.*

- You will want to ensure any conclusion drawn is based on a critical evaluation of the evidence and not just on an impression or a “feeling” that one party should be believed over another. This is particularly true in a situation where the impact of a finding a party engaged in improper workplace conduct has the potential to impact negatively on that person’s work and/or personal life.
- That said, the standard of proof to be applied in the context of a workplace investigation is not the same as that which is applied in a criminal investigation. In other words, you do not require proof beyond a reasonable doubt. Rather, your decision should be based on a determination of the balance of probabilities (*i.e.*, is it more likely than not the transgression complained of occurred?)
- If it is a complaint of workplace harassment, once you have made a determination as to whether the complaint is substantiated, you will need to advise the complainant and the respondent (if he or she is a worker) in writing of the conclusions reached in the investigation and any discipline imposed.

CONCLUSION

Conducting a credible workplace investigation is all about process. There are many steps to consider, starting with the receipt of the complaint, through to the final decision-making. The need for a workplace investigation therefore presents both **a challenge** and an **opportunity**.

The challenge is maintaining impartiality and the appearance of impartiality throughout the investigation. Every aspect of an investigation can affect the appearance of impartiality; even small details like the location where the interviews are conducted. For this reason, we recommend developing a detailed investigation plan in consultation with your legal counsel.

The opportunity presented is one of effective and proactive management of workplace issues. Conducting a thorough, fair, and effective workplace investigation is key to a successful management strategy. A proper investigation is also a great framework from which to present a case to an adjudicator and may serve as a helpful tool in limiting your organization’s potential liability.

We hope this overview of workplace investigations is a helpful introduction to the process. For further information or for assistance please contact a member of our team.

*The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This article is current as of **January 2022** and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the article is prepared, but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP.*

CHECKLIST FOR EMPLOYERS IN ONTARIO

MANDATORY

Occupational Health and Safety Act		
Requirement	Completed	Not Applicable
1. If the workplace has more than five workers, prepare and review (at least annually) a written Occupational Health and Safety Policy. Must also develop and maintain a program for implementing the Policy.		
2. Prepare and review (at least annually) a written Workplace Violence Policy and Workplace Harassment Policy (these two policies can be incorporated into one policy). Must also develop and maintain a program for implementing each Policy. If there are five or fewer workers regularly employed in the workplace, the Policies do not need to be in writing (unless a Ministry of Labour inspector so orders).		
3. Provide information and instruction that is appropriate for each worker on the Workplace Violence and Harassment Policies and programs.		
4. Conduct basic occupational health and safety awareness training for every worker and supervisor.		
5. Ensure there is a Health and Safety Representative appointed or a Joint Health and Safety Committee established as follows:		
(i) If six workers but less than 20, need a Health and Safety Representative selected by the workers.		
(ii) If 20 workers but less than 50, need to establish a Joint Health and Safety Committee with at least two members (one of whom must not exercise managerial functions) both of whom must be certified.		
(iii) If 50 workers or more, need to establish a Joint Health and Safety Committee with at least four members (two of whom must not exercise managerial functions), with one management and one non-management member certified.		
6. Post in the workplace:		

(i) A copy of the Occupational Health and Safety Act		
(ii) A copy of the “Health and Safety at Work: Prevention Starts Here” poster (https://www.labour.gov.on.ca/english/hs/pdf/poster_prevention.pdf).		
(iii) The organization’s Occupational Health and Safety Policy (discussed above).		
(iv) The organization’s Workplace Harassment and Workplace Violence Policy (discussed above).		
Employment Standards Act, 2000		
Requirement	Completed	Not Applicable
1. Ensure each employee is provided with a copy of the Ministry of Labour’s most recent “Employment Standards in Ontario” poster (https://files.ontario.ca/employment-standards-in-ontario.pdf) with 30 days of commencing employment.		
2. If the employer has 25 employees or more as of January 1 of each year, prepare a written policy on disconnecting from work. Each employee must be provided a copy of the policy within 30 calendar days of the policy’s development, amendment, or the employee commencing employment (as applicable).		
3. If the employer has 25 employees or more as of January 1 of each year, prepare a written policy on electronic monitoring of employees. Each employee must be provided a copy of the policy within 30 calendar days of the policy’s development, amendment, or the employee commencing employment (as applicable).		
Workplace Safety and Insurance Act, 1997		
Requirement	Completed	Not Applicable
1. Register for coverage with the Workplace Safety and Insurance Board (WSIB) unless coverage is optional for the employer’s industry or business.		
2. If covered, post prominently in the workplace a copy of the WSIB’s “In Case of Injury” poster (http://www.wsib.on.ca).		
Pay Equity Act		
Requirement	Completed	Not Applicable

1. If the employer has 10 employees or more, establish and maintain compensation practices that provide for pay equity in every establishment of the employer, by:		
(i) determining job classes, including the gender and job rate of each job class		
(ii) determining the value of job classes based on factors of skill, effort, responsibility and working conditions.		
(iii) conducting comparisons for all female job classes using the job-to-job or proportional value method of comparison.		
(iv) adjusting the wages of underpaid female job classes so they are paid as much as an equal or comparable male job class or classes.		
Accessibility for Ontarians with Disabilities Act		
Requirement	Completed	Not Applicable
1. Develop and implement a policy (or policies) on how the organization will achieve accessibility as required by the Regulation. The policy should be prepared in written form (i.e., documented) and made available to the public (in accessible format) on request. An organization with less than 50 employees does not need to have the policy (or policies) in written form.		
2. If the organization employs 50 or more employees, establish a multi-year accessibility plan, document the plan and post it on the organization's website. The multi-year accessibility plan must be reviewed and updated every five years.		
3. Provide training on the Regulation and <i>Human Rights Code's</i> disability-related requirements to:		
(i) employees and volunteers of the organization		
(ii) persons involved in the development of the organization's policies		
(iii) persons who provide goods, services or facilities on behalf of the organization.		
4. If the organization employs 50 or more employees, maintain records of the training noted above.		
5. If the organization employs 20 or more employees, prepare and file an accessibility report as of December 2020 and every three years thereafter. An employer with 20-49 employees needs to only report with respect to the Customer Service Standard.		

6. Develop a policy (or policies), practices and procedures for providing goods, services or facilities to a person with a disability.		
7. If the organization employs 50 or more employees, prepare document(s) describing organization's policies, practices and procedures with respect to a service animal and support person and, on request, give a copy of the document(s) to any person, in accessible format where applicable.		
8. Provide training on providing goods, services or facilities to a person with a disability to:		
(i) employees and volunteers of the organization		
(ii) persons involved in the development of the organization's policies		
(iii) persons who provide goods, services or facilities on behalf of the organization.		
9. If the organization employs 50 or more employees, maintain records of the training noted above.		
10. If the organization employs 50 or more employees, prepare a document describing the organization's training on accessible customer service and, on request, provide a copy of the document to any person. Notify a person to whom the organization provides, goods, services or facilities of the availability of this document, upon request.		
11. Establish a process for receiving and responding to feedback about the manner in which the organization provides goods, services or facilities to persons with disabilities.		
12. If the organization employs 50 or more employees, ensure new internet websites and web content on those sites conforms with WCAG 2.0 Level A.		
13. Notify employees, the public and any job applicant about the availability of accommodation during the recruitment process.		
14. Inform a successful job applicant about the organization's policy on accommodation of disability in employment.		
15. Advise each employee of the organization's policies on how it will support an employee with a disability.		
16. If the organization employs 50 or more employees, establish a written process for:		
(i) The development of a documented individual accommodation plan for an employee with a disability.		

(ii) Returning an employee to work after a disability-related leave of absence.		
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OPTIONAL

Recommended Policies/Agreements	Completed	Not Applicable
1. Written employment agreements containing an enforceable termination clause and any necessary restrictive covenants (where applicable).		
2. Written independent contractor agreements (where applicable).		
3. Job descriptions which include the occupational requirements of the position (physical, cognitive, behavioural).		
4. Excess hours of work and/or overtime averaging agreements (where applicable)		
5. Employee handbook, containing policies on:		
(a) Anti-discrimination		
(b) Recruitment and Hiring		
(c) Dress Code and Grooming		
(d) Smoking		
(e) Scent Free Workplace		
(f) Benefits		
(g) Solicitation		
(h) Personal Property		
(i) Public Holidays		
(j) Leaves of Absence		
(k) Sick Days		
(l) Jury Duty		
(m) Bereavement Leave		
(n) Vacation		
(o) Drug and Alcohol		
(p) Progressive Discipline		
(q) Attendance and Absenteeism		
(r) Confidentiality		
(s) Conflict of Interest		
(t) Consensual Relationship		
(u) Employment of Relatives		
(v) Information Technology		
(w) Social Media Use		

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Law Society
of Ontario

Barreau
de l'Ontario

TAB 7

20th Real Estate Law Summit - Day 1

**LATEST CONDOMINIUM ISSUES:
New Taxes & Restrictions re: Residential Property**

Tammy Evans
Aird & Berlis LLP

April 19, 2023



20TH REAL ESTATE LAW SUMMIT
April 19 & 20, 2023

LATEST CONDOMINIUM ISSUES: New Taxes & Restrictions re: Residential Property

My presentation will cover 3 primary items that should be of interest to lawyers who act for purchasers of residential real estate and are all related to recent changes or impacts on the housing industry due to the current economic climate and state of housing availability in Canada. While I act only for vendors, developers and builders, I am very much aware of the impact of these new legislative provisions on our clients' purchasers and the extra attention that is now required by purchasers' counsel.

Ontario Vacant Home Tax

The vacant home tax or VHT applies to residential properties in Ontario that are vacant for more than six months of the previous tax year. It is calculated annually on the assessed value as determined by the municipality under the Assessment Act. Under Part 9.1 of the Municipal Act, 2001, the Minister of Finance may designate municipalities to which the VHT applies. Once designated, the municipality then passes a by-law setting out the vacant home tax rate and the conditions of vacancy that trigger the imposition of the annual tax, as well as any exemptions, rebates and objections that would go to dispute resolution.

The City of Toronto passed its bylaw to implement the VHT on February 3, 2022 setting the tax rate at 1% of the assessed value.

The calculation of tax is determined by the City on the basis of occupation for the previous calendar year and the mandatory declaration (copy in the materials) that must be submitted by each residential homeowner by February 3 of each year commencing with 2023. Submission of the declaration is mandatory. If it is not submitted by the deadline required, that property will be deemed to be vacant and the VHT will be assessed against the property.

The exemptions to imposition of the VHT currently include a vacancy that would otherwise be taxable (ie. vacant for more than 6 months in the previous tax year) but where that vacancy is due to:

- death of a homeowner
- principal resident is in a hospital or other long-term care facility
- there is a court order preventing occupancy
- the owner lives outside the municipality, but requires the home for occupational residency for at least 6 months of the particular year
- the home is under repair or renovation (that does not allow for occupancy and is active)
- subject to a transfer of title that has not yet closed*

the property is exempted.

Purchasers and their counsel should be mindful of closing dates that straddled the end of 2022 year, as the VHT must be addressed for the 2022 calendar year. The seller had an obligation to complete the declaration to be submitted to the City if the transaction closed between January 1 and February 28 of 2023 for the 2022 calendar year. The purchaser must submit a declaration for a closing date from and after March 1 until December 31, commencing 2023.

A VHT imposed on a home forms a lien against the property. Accordingly, any unpaid VHT becomes the subsequent purchaser's responsibility. I recommend the VHT be addressed at closing in the statement of adjustments if a purchaser's counsel does not have confirmation from the City that the declaration has been submitted and no payment is required.

Of note, there is a penalty for not submitting the declaration, and there are also considerable fines for false statements, up to \$10,000. Any disputes of the VHT assessed can be commenced by way of filing a Notice of Complaint found on the City's website.

The City of Toronto's website page www.toronto.ca is comprehensive on the VHT, so I would direct you there for any more detailed questions, or you can give me a call.

Other municipalities that have taken up the VHT are Ottawa and Hamilton and the Region of Peel seems to be moving through the implementation process.

Federal Foreign Investor Tax

Under the federal Underused Housing Tax Act, that took effect January 1, 2022, the federal government imposed a 1% tax on the ownership of vacant or underused housing in Canada generally by non-resident, non-Canadian owners, or those who do not fit within an exemption category.

There are basic exclusions for Canadian citizens and permanent residents, and then further exclusion categories for Canadian public corporations, registered charities, cooperative housing corporations, trustees of REITs, MFTs or SIFT and Indigenous governing bodies or their corporations. If the owner fits within one of these exclusions, this legislation does not apply. If the ownership does not fit within one of these exclusion categories, the owner is an "affected owner" under the legislation, and may be subject to the 1% tax based on the assessed value (or the FMV, if owner elects to use an appraisal to determine the value).

Once it is determined that the owner is an affected owner, there are exemption categories to being taxed based on the type of owner or resident; the availability for use of the residential property; and the location and use of the residential property.

Exempted owners or residents means:

a) where the residential property is the primary place of residence of owner, spouse or common law partner or child, who is a Canadian citizen or permanent resident, or owner, spouse or common law partner with a Canadian work permit; or

b) where an individual occupies under a written contract with the owner, spouse or common law partner or child (and is arm's length), or where the non-arm's length individual occupies under a written contract and pays fair market rent; and

c) where the residence is occupied for at least 180 days of the calendar year (can be multiple different occupancies to make up the 180 days, but to qualify as an occupancy period it must be at least one month in a calendar year) by a qualified occupant.

Affected owners must file an Underused Housing Tax Return for each calendar year commencing 2022 as an owner of residential property in Canada regardless of whether you fit into an exemption category or not. The return is due by April 30th 2023 for the previous tax year (2022) and any tax owing is required to be paid by April 30 using a social insurance number (or individual tax number (ITN) for non-residents) or business number (BN) for corporations. A corporate owner is required to apply for and register for the Underused Housing Tax (RU) Program account number first.

Each property requires its own RU tax return, and each owner who shares ownership with other co-owners must file his or her respective separate RU tax return. There are penalties for not filing the RU return, and considerably higher penalties for filing false information. For more detailed information, refer to the Government of Canada website Underused Housing Tax - Canada.ca.

Non-Canadian Buyer Restriction

In your materials you should have 3 bulletins that my firm has issued out on this new piece of federal legislation that effectively prohibits non-Canadians (or those who do not fit within an exemption category) from purchasing, either directly or indirectly, residential property in Canada for 2 years from January 1, 2023.

Under the Prohibition on the Purchase of Residential Property by Non-Canadians Act (for simplicity, the Foreign Buyer Ban) every non-Canadian that contravenes the Act, and every person who counsels, induces, aids or abets in the contravention, is guilty of an offence and subject to a maximum fine of \$10,000. The liability under this Foreign Buyer Ban is drafted very broadly, potentially reaching to any individual involved in the offending transaction – for example mortgage brokers, salespersons, directors, officers, senior officials, lawyers and/or other advisors. It is not limited to the contracting parties (ie. named vendor/purchaser).

Note that the effect of a contravention is not to deem the transaction itself invalid, so the parties are still obligated under the contract. Section 7(1) of the Act states that if a non-Canadian is convicted of contravening the Act, the superior court in which the property is situated may order the property to be sold, with the proceeds of sale distributed by the court as it deems appropriate, including payment of any unpaid fines and repayment to the non-Canadian of no more than the amount paid for the property, with any balance remaining (or profit) going to the Receiver General for Canada.

In this statute there are a few terms that require specific attention.

Firstly, the Regulations made under the statute set out the definition of a “non-Canadian” - Generally, a non-Canadian is:

- an individual who is neither a Canadian citizen or permanent resident or a person registered under the Indian Act;
- a corporation or other entity incorporated or otherwise organized federally or provincially or even if incorporated or organized federally or provincially if it does not fit within the control requirements described below
- an entity (eg. partnership/trust) formed under Canadian or provincial laws that are controlled by entities not formed under Canadian laws.

The term control is also defined in the Regulations, as:

- direct or indirect foreign ownership of shares or ownership interests of the corporation or entity representing 10% (recently increased from the original 3%) or carrying 10% of more voting rights; or
- foreign control in fact of the corporation or entity, whether directly or indirectly, through ownership, agreement or otherwise.

Residential property includes single family homes, condo units duplexes and triplexes but is also clarified in the Regulations in that it must be within a certain geographical area based on definitions of a census agglomeration or a census metropolitan area which have certain population criteria as outlined by Statistics Canada. Generally, these areas include many smaller cities, towns and villages across Canada in addition to the major urban centres.

Certain transactions are not caught by this legislation. For example, the Regulations exempt acquisitions of property resulting from death, divorce, separation or gift, or rentals to occupying tenants.

It also by way of more recent amendment does not apply to land “for development” – so in general terms, vacant land or commercial land is not subject to the legislation, however one should refer to the CMHC guideline with respect to what “for development” means (Prohibition on the Purchase of Residential Property by Non-Canadians Act – Frequently asked questions | CMHC (cmhc-schl.gc.ca)).

Certain individuals/entities are also not caught by this legislation. For example, the Foreign Buyer Ban does not apply to temporary residents, or those who meet certain conditions related to studies or work permits or foreign nationals with temporary resident visa status or refugee claimants (as defined in the Immigration and Refugee Protection Act), and, where the statute is incompatible with Indigenous rights, Indigenous rights prevail.

For lawyers who act for purchasers of residential property, it has now become a more in depth part of the transaction closing to “know your client”. While there are no specific compliance requirements in the legislation relating to collection of information or reporting when dealing with non-Canadian purchaser clients, it is important to keep in mind that any person who assists

in a contravening purchase can be held liable under the statute. Further, under the Regulatory Impact Analysis Statement that was issued with (but not part of) the Regulations, it is expected that Canadian professionals will establish “prudent business practices” with respect to identifying and advising the client on how the client may be impacted by this legislation (Canada Gazette, Part 2, Volume 156, Number 26: Prohibition on the Purchase of Residential Property by Non-Canadians Regulations).

I am aware that many of you act for non-Canadian buyers, particularly foreign investors, and in my role as counsel to developers acting on bulk closings, we see many foreign buyers, so this is not an insignificant piece of legislation for the real estate industry, and adds more work to the solicitor’s due diligence.

For our developer clients, we have prepared some additional provisions to go into our agreements of purchase and sale and assignment documentation and other forms of confirmation that any new buyer from January 2023 will have to sign. Expect to see these provisions in your purchaser’s documentation.

I recommend, when acting for a purchaser and completing the “know your client” due diligence required, that the solicitor start with the two basic questions – 1) is this residential property with a dwelling on it? 2) (if an individual), are you a Canadian citizen or permanent resident, have a work visa, study permit or a temporary resident or refugee authorized under the Immigration and Refugee Protection Act? OR 2) (if a corporation), trustee, partnership or other exempted entity, what is the shareholding/control as against the definition of control in the Regulations?

Feel free to call me or any other partner in my real estate group and to make use of the reference materials and links provided to the relevant government websites.

Thank you.

All owners of properties that are classified within the **Residential Property** tax class must complete and submit a Declaration of Occupancy Status to determine whether the residential property is subject to the Vacant Home Tax. Declarations must be submitted by February 2, 2023 to identify the occupancy status of the property for the 2022 calendar year. Declarations may also be submitted online by visiting: www.toronto.ca/VacantHomeTax.

A declaration is not required if the residential property does not contain a residential unit. (For example, vacant land, parking space or condominium locker). A residential unit is comprised of one or more self-contained dwelling units that include a dedicated washroom and kitchen.

I am making this declaration (check one box only):

- ☐ **As the registered owner.** You are declaring the property status as the registered legal owner of the residential property.
- ☐ **On behalf of the registered owner(s).** You are declaring the property status as a personal representative of a registered owner.

Section 1. Property and Owner Information (required)

Assessment Roll Number (21 digits)	
1 9 - - - - - - -	
Property Address (Street Number, Street Name, Suite/Unit Number)	
Property Owner Name (First, Last or *Single) or Owner Name Business/Organization (if property is owned by a business or organization)	
Email Address (optional)	Telephone Number

*If first name and last name do not apply because you have either a registered birth certificate or change of name certificate bearing a single name you may use single name.

Section 2. Representative Information (for declarations made on behalf of owner)

☐ I, the owner, authorize the below listed representative, to act on my behalf in respect to this declaration.

Name (First, Last or * Single, if applicable)	
Email Address (optional)	Telephone Number
Organization/Business Name (if applicable)	Job Position Title (if applicable)
Business Email Address (optional)	Business Telephone Number

Section 3. Principal Residence and Occupants (required)

Principal Residence - A residential unit in which a person ordinarily resides and conducts daily affairs, receives mail, pays bills etc. This applies even if you leave for extended periods of time due to travel or work (for example, snowbirds that spend more than six months away from their principal residence). A person may only have one principal residence, however a residential unit may be the principal residence of more than one person. The property must be your principal residence for at least six months during the taxation year to claim this occupancy status. Please read all options (A through D) and complete the below:

- ☐ **A. The property was the principal residence of the owner for at least six months.**

☐ Yes (Go to Section 5, Declaration and Certification of Information)

☐ No (Continue to B)
- ☐ **B. The property was the principal residence of a permitted occupant(s) or occupied by tenants for at least six months in 2022.**
The property was occupied by (select one):

☐ **Permitted occupant** - A person(s) who is authorized by the registered owner to occupy a residential unit as their principal residence (see definition above). This may include but is not limited to a family member or friend of the registered owner.

☐ **Tenant** - A person(s) who has a written lease or sublease to occupy the residential unit for at least 30 consecutive days in a year. The property must be occupied by one or more tenants for at least six months during the year.

☐ **Combination of occupancy**

☐ **None of the above** (Continue to C or D)

If selected for audit, you may be asked to provide supporting documentation for verifying the principal residence of any permitted occupants or occupancy of any tenants.

Vacant Home Tax - Property Status Declaration

- ☐ **The property was vacant but an exemption from the tax applies.**
Go to Section 4, Exemptions.
- ☐ **The property was vacant and no exemptions apply. The Vacant Home Tax applies.**
Go to Section 5, Declaration and Certification of Information.

Section 4. Exemptions (if applicable, supporting documents must be submitted with this declaration)

Check the box that applies and provide the effective date in 2022.

Effective Date

<input type="checkbox"/> Death of registered owner - This exemption may be claimed for up to two consecutive years if the registered owner has died in the taxation year or in the previous taxation year. Acceptable types of evidence include (but are not limited to): death certificate of registered owner.	(yyyy-mm-dd)
<input type="checkbox"/> Property is undergoing renovations or repairs - This exemption may be claimed if the vacant unit is undergoing repairs or renovations, and all the following conditions have been met: <ul style="list-style-type: none">• occupation and normal use of the vacant unit is prevented by the repairs and renovations for at least six months of the taxation year;• all requisite permits have been issued for the repairs and renovations;• the City is of the opinion that the repairs or renovations are being actively carried out without unnecessary delay.• Provide copy of building permit(s) and a short description of the project.	(yyyy-mm-dd)
<input type="checkbox"/> Principal resident is in care - This exemption may be claimed for up to two consecutive taxation years, if the principal resident of the vacant unit is in a hospital, long term or supportive care facility for a period of an aggregate of at least six months during the taxation year. <ul style="list-style-type: none">• Provide signed letter from health care facility on letterhead.	(yyyy-mm-dd)
<input type="checkbox"/> Transfer of Property (sale of property) - This exemption may be claimed if the legal ownership of the vacant unit has been transferred to a transferee in the taxation year. <ul style="list-style-type: none">• Provide a copy of land transfer deed.	(yyyy-mm-dd)
<input type="checkbox"/> Occupancy for full-time employment - This exemption may be claimed if the vacant unit is required for occupation/employment purposes for an aggregate of at least six months in the year, by its owner who has a principal residence outside of the Greater Toronto Area. <ul style="list-style-type: none">• Provide proof of residency outside of the Greater Toronto Area and a signed letter from your employer on company letterhead, or employment contract that confirms requirement of physical presence in Toronto for the purpose of work.	(yyyy-mm-dd)
<input type="checkbox"/> Court Order - This exemption may be claimed if there is a court order which prohibits occupancy of the vacant unit for at least six months of the taxation year. <ul style="list-style-type: none">• Provide copy of court order or court record.	(yyyy-mm-dd)

Section 5. Information Collection and Vacant Home Tax Agreement Statement (required)

Vacant Home Tax Agreement Statement
By signing this form, I have read and agree with the below statements:

- I declare that the property status identified and all information provided are true and accurate.
- I understand that I may be asked to provide further information and evidence to support my declaration at a later date and that failing to do so, providing false declaration or false information can result in fines.
- I understand the City of Toronto's use of the personal information provided for the purposes of administering the Vacant Home Tax are in accordance with City of Toronto Municipal Code Chapter 778, Taxation, Vacant Home Tax.
- I agree not to submit any personal information relating to any other individual (personal information relating to any other individuals could include but is not limited to: Government-issued personal identification, income tax returns and notices of assessments, lease agreements, employment documents, financial statements, insurance certificates; and any medical information concerning an individual's residency in a medical facility) without obtaining the individual(s) prior consent to submit such personal information to the City, and ensuring that the individual has seen and understood the Notice of Collection outlined below.

Owner Name (First and Last or *Single)	Owner Signature	Date (yyyy-mm-dd)
Representative Name (First and Last or *Single) (if applicable)	Representative Signature (if applicable)	Date (yyyy-mm-dd)

Submit your completed and signed declaration along with the supporting documentation (if applicable) by:
Mail: City of Toronto, Revenue Services, Vacant Home Tax, 5100 Yonge St., Toronto, ON M2N 5V7
In person: At City Hall and Civic Centres Inquiry and Payment Counters, for location information visit: toronto.ca/inquirypaymentcounters

Revenue Services collects personal information on this form under the legal authority of the City of Toronto Act, 2006, section 8 and Part XII.1, and the City of Toronto Municipal Code, Chapter 778, Taxation, Vacant Home Tax, Article 4, Declaration and Deemed Vacancy, Article 5, Assessment and Collection and Article 11, Offences and Fines. The information will be used for the purposes of administering and enforcing the Vacant Home Tax, specifically for the purposes of receiving and reviewing Declarations received pursuant to § 778-4.1, assess the Vacant Home Tax payable in respect of each taxable Vacant Unit, issuing a Notice of Tax to the Owner setting out the amount of Tax assessed and the Payment Date; as well as contacting the Owner and other parties concerning the administration and enforcement of the Vacant Home Tax. Questions about this collection can be directed to the Manager, Operational Support, Revenue Services, 5100 Yonge Street, Toronto, Ontario M2N 5V7 or by telephone at 416-395-0125.

Canada Gazette, Part II, Volume 156, Number 26

Registration

SOR/2022-250 December 2, 2022

PROHIBITION ON THE PURCHASE OF RESIDENTIAL PROPERTY BY NON-CANADIANS ACT

P.C. 2022-1259 December 2, 2022

<https://canadagazette.gc.ca/rp-pr/p2/2022/2022-12-21/html/sor-dors250-eng.html>

CITY OF TORONTO

BY-LAW 97-2022

To enact a new City of Toronto Municipal Code Chapter 778, Taxation, Vacant Home Tax and amend City of Toronto Municipal Code Chapter 169, Officials, City.

<https://www.toronto.ca/legdocs/bylaws/2022/law0097.pdf>

Amendments to Regulation Banning Canadian Foreign Home Buyers Released

By: Norman I. Kahn, Kristian N. Arciaga, Jennifer Glied-Goldstein, Peter A. Dalglish and Jasraj Shergill

On March 27, 2023, the Minister of Housing and Diversity and Inclusion introduced amendments (the “**Amendments**”)¹ to the regulation (the “**Regulation**”)² enabled under the federal *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the “**Act**”) which attempt to provide further clarity on this new prohibition.³ The Amendments came into force the very same day they were introduced. The Act prohibits the purchase of residential real estate by non-Canadians, either directly or indirectly, for a two-year period that began on January 1, 2023. The Amendments to the Regulation have since narrowed the scope of the Act to lessen the impact on commercial transactions and property development.

This bulletin supplements our previous bulletins circulated on November 3, 2022, and December 28, 2022, and must be read in conjunction with them, as some of the information contained in these previous bulletins is no longer applicable.

Zoning No Longer a Criteria

Section 3(2) of the Regulation originally prohibited “non-Canadians” (as defined under the Act) from purchasing property within most metropolitan areas that was zoned for either residential or mixed use.⁴ This provision prevented non-Canadians from purchasing commercial real estate properties that were zoned residential or for mixed use. Scrutinizing the zoning of a property to define it as a “residential property” also inadvertently captured significant amounts of land used for commercial purposes such

as industrial warehouses, manufacturing facilities, office buildings and shopping centres. Subsequently, the Canada Mortgage and Housing Corporation (the “**CMHC**”) issued a clarification that this prohibition was intended to capture only vacant land that is zoned residential or mixed use. The Amendments have now repealed this provision altogether so that the prohibition no longer applies to the purchase of property (whether vacant or not) that does not contain any habitable dwellings and is zoned for residential and mixed use.

Threshold of *Control* Increased

In our previous publication, we identified that the definition of “control” of a corporation or entity in the Regulation limited a far larger group of corporations from participating in real estate transactions involving residential property than what was likely intended. Previously, a corporation was deemed a non-Canadian under the Act if it was “controlled” by more than 3% of non-Canadians. This has now been addressed in paragraph 1 of the Amendments, where the threshold for “control” of a corporation or entity was increased from 3% to 10%.⁵

Publicly-Traded Canadian REITs and Limited Partnerships Excluded

The Amendments broaden the scope of real estate transactions permitted under the Act for publicly-traded entities. Section 2(b) of the Regulation previously excluded publicly-traded corporations listed on a designated Canadian stock exchange from the definition of “non-Canadians.”⁶ However, this narrow exception failed to also exclude publicly-traded non-corporate entities listed on a designated stock exchange, such as Canadian real estate investment trusts (“**REITs**”) and Canadian limited partnerships.

Accordingly, these publicly-traded non-corporate entities had to meet the control threshold to purchase residential property. Pursuant to the Amendments, Canadian REITs and other publicly-traded Canadian entities (including limited partnerships) can now participate in real estate transactions that involve residential property, without meeting any control threshold.

Exception for Development

The most sweeping change contained in the Amendments is the introduction of an exception for the acquisition by a non-Canadian of residential property for the purposes of “development.”⁷ The Amendments do not define “development,” but the CMHC has published a guideline (in the form of Frequently Asked Questions) that sets out criteria and indicia of what could constitute “development.”

The CMHC defines “development” as “the process of evaluating, planning and undertaking of alterations or improvements (with or without a change in use) to a residential property or the land on which the residential property is located and, for greater certainty, includes redevelopment of an existing building.” The key element is the existence of “good faith intention at the time of purchase.”⁸

Wider Pool of Purchasers

The Amendments amend the requirements for non-Canadians who hold a work permit under the *Immigration and Refugee Protection Regulations*⁹ to become eligible to purchase residential property. Such work permit holders are eligible if they have 183 days or more of validity remaining on their work permit or work authorization at time of the purchase of their residential property, as long as they have not purchased more than one residential property. The Amendments remove the previous requirement of having filed tax filings for a minimum period of three years within the preceding four years and having worked full time in Canada.

Takeaways

While not all of the submissions from the real estate industry have been adopted, the Amendments represent a substantial improvement permitting commercial transactions, which were obviously not intended to be caught by the Act, to proceed without prohibition.

Nonetheless, parties to a transaction involving real estate should still be wary of the Act before proceeding, especially if a residential property may be involved.

If you have any questions about how this may impact you or your business, please contact a member of the Aird & Berlis Real Estate Group.

[1] *Regulations Amending the Prohibition on the Purchase of Residential Property by Non-Canadians Regulations*.

[2] *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations: SOR/2022-250*.

[3] *Prohibition on the Purchase of Residential Property by Non-Canadians Act, SC 2022, c 10, s 235*.

[4] *Supra* note 2.

[5] *Supra* note 1.

[6] *Supra* note 2.

[7] *Supra* note 1.

[8] *Prohibition on the Purchase of Residential Property by Non-Canadians Act* – Frequently asked questions (March 2023), online: Canada Mortgage and Housing Corporation (CMHC) <<https://www.cmhc.schl.gc.ca/en/professionals/housing-markets-data-and-research/housing-research/consultations/prohibition-purchase-residential-property-non-canadians-act/faq>>

[9] *Immigration and Refugee Protection Regulations: SOR/2002-227*.



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Disclaimer

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New Year, New Details: Canadian Regulations Banning Foreign Home Buyers Released

By: [Norman I. Kahn](#), [Kristian N. Arciaga](#), [Jennifer Glied-Goldstein](#) and [Jasraj Shergill](#)

On December 21, 2022, the Canadian federal government released the [*Prohibition on the Purchase of Residential Property by Non-Canadians Regulations*](#) (the “**Regulations**”)^[1] made pursuant to Section 8 of the recently enacted [*Prohibition on the Purchase of Residential Property by Non-Canadians Act*](#) (the “**Act**”).^[2] The Act prohibits the purchase of residential real estate by non-residents, directly or indirectly, for a two-year period beginning January 1, 2023. The Regulations outline exceptions, definitions and clarifications to the Act. This publication supplements our [previous bulletin](#) circulated on November 3, 2022, and should be read in conjunction with same.

Who Is Deemed “Non-Canadian”?

Section 2 of the Act defines a *non-Canadian* as:^[3]

- an individual who is neither a Canadian citizen nor a person registered as an Indian under the *Indian Act* nor a permanent resident;
- a corporation that is incorporated otherwise than under the laws of Canada or a province;
- a corporation incorporated under the laws of Canada or a province whose shares are not listed on a stock exchange in Canada for which a designation under section 262 of the *Income Tax Act*^[4] is in effect and that is controlled by a person referred to in paragraph (a) or (b); and
- a prescribed person or entity.

Section 2(d) of the Act requires that the Regulations clarify what would constitute a *prescribed person or entity*. Accordingly, the Regulations outline the following as a *prescribed person or entity*:^[5]

- entities not formed under the laws of Canada or a Canadian province; and
- entities formed under the laws of Canada or a Canadian province that are (a) controlled by entities not formed under the laws of Canada or (b) entities that are controlled by *non-Canadian* individuals or entities, as per Section 2 of the Act.

Both the Act and the Regulation use the word *control* as a tool in determining whether an entity is *non-Canadian*. The “control test” outlined in the Regulations particularly clarifies which corporations and entities are impacted by the Act.

Section 1 of the Regulations defines *control* as, with respect to a corporation or entity:

- direct or indirect ownership of shares or ownership interests of the corporation or entity representing 3% or more of the value of the equity in it, or carrying 3% or more of its voting rights; or
- control in fact of the corporation or entity, whether directly or indirectly, through ownership, agreement or otherwise.

While neither the Act nor the Regulations provide any guidance, the “control in fact” (de facto control) requirement in the definition of *control* has been similarly applied in foreign buyer legislation in British Columbia and Ontario, as well as in British Columbia’s unique *Land Owner Transparency Act*.

Furthermore, while the Act and the Regulations do not define “Entities”, it is clear that the intention was to include partnerships and trusts (in addition to corporations).

What Is Residential Property?

The Regulations do, however, exclude properties not located within a census agglomeration (“**CA**”) or a census metropolitan area (“**CMA**”) from the definition of Residential Property.^[6]

The definitions of CA and CMA are derived from the *Standard Geographical Classification (SGC) 2021*, which explains that a CA or CMA is formed:

by one or more adjacent municipalities centred on a population centre (known as the core)... To be included in the CMA or CA, other adjacent municipalities must have a high degree of integration with the core, as measured by commuting flows derived from data on place of work.^[7]

A CA must have a core population of at least 10,000 based on data from the previous Census of Population Program (“**CPP**”). A CMA must have a total population of at least 100,000, based on data from the then-current CPP and 50,000 or more must live in the core based on adjusted data from the previous CPP.^[8] Statistics Canada outlines these areas [here](#).

Accordingly, this definition includes many smaller cities, towns and villages across Canada, in addition to major urban centres.^[9] Additionally, the Regulations widened the reach of the Act to capture land that is available for future residential use by adding to the definition of Residential Property in Section 2 of the Act to include land that does not contain any habitable dwelling, that is zoned for residential use or mixed use, and that is located within a CA or a CMA.^[10]

What Purchases Are Excluded?

A *purchase*, for the purposes of the Act, is the acquisition, with or without conditions, of a legal or equitable interest or a real right in a residential property.^[11] While this definition does not expressly indicate the precise moment in time when the transaction is caught by the Act, it is quite obvious that it was intended to include any transaction upon the parties executing the agreement of purchase and sale even if the transaction is conditional in nature. However, the Regulations do specify Purchases that are not subject to the Act:^[12]

- the acquisition of residential property resulting from death, divorce, separation or a gift;
- the rental of a dwelling unit to a tenant for the purpose of its occupation by the tenant;

- the transfer under the terms of a trust that was created prior to the coming into force of the Act; and
- the transfer resulting from the exercise of a security interest or secured right by a secured creditor.

Who Is Exempt From the Requirements?

The Act does not apply to temporary residents within the meaning of the *Immigration and Refugee Protection Act* (“**IRPA**”) who satisfy the following prescribed conditions:^[13]

1. if they are enrolled in a program of authorized study at a designated learning institution per the *IRPA Regulations*,
 - they filed all required income tax returns under the *Income Tax Act* for the five preceding taxation years,
 - they were physically present in Canada for a minimum of 244 days in each of the five preceding calendar years,
 - the purchase price of the property does not exceed \$500,000, and
 - they have not purchased more than one residential property; or
2. if they hold a work permit pursuant to the *IRPA Regulations*, or are authorized to work under section 186 of the *IRPA Regulations*,
 - they worked in Canada for a minimum period of three years within the preceding four years, if the work is *full-time* work as defined in subsection 73(1) of the *IRPA Regulations*,
 - they filed all required income tax returns under the *Income Tax Act* for a minimum of three of the four preceding taxation years, and
 - they have not purchased more than one residential property.

The Regulations also deem the following to be prescribed classes of persons to whom the Act does not apply:^[14]

- foreign nationals who hold a passport that contains diplomatic, consular, official or special acceptance issued by the Department of Foreign Affairs, Trade and Development;

- foreign nationals with temporary resident status whose temporary resident visa was issued or temporary resident status was granted pursuant to an exemption under section 25.2 of *IRPA*; and
- persons that have made a claim for refugee protection in accordance with subsection 99(3) of *IRPA*.

Further, the Regulations specify that the prohibition on non-Canadians looking to purchase residential property in Canada is not effective to the extent that the Act is incompatible with the Indigenous rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, which recognizes and affirms Aboriginal and treaty rights of Aboriginal peoples.^[15]

Orders To Sell Property

Pursuant to section 7(1) of the Act, if a non-Canadian is convicted of having contravened the Act, the superior court of the province in which the Residential Property is situated may order the property to be sold.^[16] The Regulations clarify that such order can only be made if the following conditions are met:^[17]

- the non-Canadian is the owner of the property at the time the order is made;
- notice has been given to every person who may be entitled to receive proceeds from the sale; and
- the superior court of the province is satisfied that the impact of the order would not be disproportionate to the nature and gravity of the contravention, the circumstances surrounding the commission of the contravention, and the resulting conviction.

Orders that are granted under section 7(1) of the Act must provide that the proceeds of the sale are distributed in the following order:

- payment of the costs of the sale, including the costs incurred by the Minister in bringing the application for the order, along with any unpaid fines by the non-Canadian;

- payment to the Canadians who are entitled to receive the proceeds of the sale according to priorities that the superior court may determine;
- the repayment to the non-Canadian of an amount that is not greater than the purchase price they paid for the property; and
- the payment of any amount remaining to the Receiver General for Canada.

Implications

Neither the Act nor the Regulations impose any compliance requirements related to information collection, processing or reporting by Canadian professionals when dealing with potential non-Canadians. However, any person or entity that counsels, induces, aids or abets a non-Canadian to purchase a residential property in contravention of the Act is liable. The *Regulatory Impact Analysis Statement* that was published with the Regulations creates an expectation that Canadian professionals will establish prudent business practices with respect to the review of information in the course of a business transaction that employs more rigorous due diligence practices in relation to non-Canadians. Unfortunately, there is a lack of helpful guidance as to what is expected in that regard. Real estate professionals such as builders, developers, real estate brokers and agents, and lawyers are advised to broaden their current “know your customer” due diligence systems to ensure compliance with the Act and Regulations over the next two years.

In addition, entities interested in purchasing residential property in Canada should especially pay attention to the definition of *control*. This definition creates a very low threshold and will ultimately capture a far broader group of corporations or entities than was originally expected. Such entities looking to purchase residential property should examine their ownership structure and composition to determine whether this Act will restrict their purchasing power for the next two years.

If you have any questions about how this may impact your business, please contact a member of the [Aird & Berlis Real Estate Group](#).

^[1] *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations: SOR/2022-250.*

^[2] *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, SC 2022, c 10, s 235.

^[3] Section 262 of the *Income Tax Act* gives the Minister of Finance authority to designate a stock exchange, or a part of a stock exchange.

^[4] *Supra* note 2.

^[5] *Supra* note 1.

^[6] *Supra* note 1.

^[7] Statistics Canada, *Dictionary, Census of Population, 2021 Census metropolitan area (CMA) and Census agglomeration* (Ottawa: Statistics Canada, 2021) <
<https://www12.statcan.gc.ca/census-recensement/2021/ref/dict/az/Definition-eng.cfm?ID=geo009>> accessed December 27, 2022.

^[8] *Ibid.*

^[9] *Ibid.*

^[10] *Supra* note 1.

^[11] *Supra* note 1.

^[12] *Supra* note 1.

^[13] *Supra* note 1.

^[14] *Supra* note 1.

^[15] *Supra* note 1.

^[16] *Supra* note 2.

^[17] *Supra* note 1.



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Toronto Vacant Home Tax Occupancy Declarations Due Before February 2, 2023

By: [Brodie Kirsh](#) and [Megan Lambert](#)

In 2021, the City of Toronto introduced an annual tax to be levied on vacant Toronto residential property, payable beginning in 2023. A Vacant Home Tax of one per cent (1%) of the Current Value Assessment of the property will apply to residences that are vacant or deemed vacant. Residential property is considered vacant where the property has been unoccupied for a total of six months throughout the previous year or is otherwise deemed vacant under the City of Toronto [bylaw](#) unless an eligible exemption applies. Eligible exemptions include the death of the registered owner and where the principal resident is in a hospital, long-term or supportive care facility.

All residential property owners in Toronto are required to declare the occupancy status of their property or properties, even if the property is occupied. The City of Toronto has sent yellow notices by mail containing the information required to make a declaration.

A late declaration or failure to make a declaration will result in a minimum fine of \$250 and may result in your property being deemed vacant. Once deemed vacant, your property will be subject to the Vacant Home Tax and you will be issued another notice. The declaration of occupancy status is made through the City of Toronto's [online declaration portal](#) or a paper declaration form that can be obtained by contacting [311 – Toronto at Your Service](#). The paper declaration form must be completed and received by the City of Toronto before February 2, 2023.

If you have any questions or would like more information on the Vacant Home Tax, please contact a member of our [Tax Group](#).



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Canada's Prohibition on Foreign Home Buyers Knocking on the Door

By: [Norman I. Kahn](#), [Kristian N. Arciaga](#), [Jennifer Glied-Goldstein](#) and [Jasraj Shergill](#)

Canada's Parliament recently passed the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the "**Act**"), which has prohibited the purchasing of residential real estate by non-residents, directly or indirectly, for a two-year period beginning January 1, 2023.¹ Individuals who do not have Canadian citizenship or permanent residency will not be able to purchase Canadian residential real estate during this two-year window, unless liability under the agreement of purchase and sale is assumed prior to January 1, 2023.²

Who Is Deemed "Non-Canadian"?

For the purposes of the Act, a "non-Canadian" is defined as follows:³

- an individual who is not:
 1. a Canadian citizen,
 2. a person registered as an Indian under the *Indian Act*, or
 3. a permanent resident of Canada;
- a corporation that has not been incorporated in Canada;
- a corporation incorporated in Canada that is controlled by foreign corporations or foreign individuals; and
- a prescribed person or entity pursuant to regulations.

“Control” of a corporation has not yet been defined in the Act, but is expected to be fleshed out in the regulations.

What Type of Properties Are Affected?⁴

Non-Canadians will not be able to purchase detached houses or similar buildings that contain up to three dwelling units. Semi-detached houses, rowhouse units, residential condominium units, or any part of these buildings that are intended to be owned separately from other units in the building are also captured. Notably, detached houses that contain more than three dwelling units are not captured by the Act.

Exceptions to the Act⁵

The following are exempt from the application of the Act:

- temporary residents within the meaning of the *Immigration and Refugee Protection Act*;⁶
- non-Canadians who purchase residential property in Canada with their spouse or common-law partner, if the spouse or common-law partner is:
 1. a Canadian citizen,
 2. a person registered as an Indian under the *Indian Act*, or
 3. a permanent resident of Canada; and
- foreign states that purchase residential property in Canada for diplomatic or consular purposes.

Offences and Penalties⁷

Under the Act, every non-Canadian that contravenes the Act and every “person or entity” that “counsels, induces, aids or abets or attempts to counsel, induce, aid or abet” the contravention of the Act is: (1) guilty of an offence and (2) is liable on summary conviction to a maximum fine of \$10,000.

Directors, officers, senior officials and managers of corporations can also be found liable if they aid or authorize a corporation to commit or aid in the offence, whether the

corporation has been prosecuted or convicted. The superior court of the province in which the residential property is located may also, on application by the Minister, order the property to be sold in a manner and with conditions to be addressed in supporting regulations. Furthermore, upon the court-ordered sale of the property, the non-Canadian purchaser would not receive more than the amount paid for the property, and may even receive less.

This offence provision of the Act imposes a broad range of liability that is not limited to the contracting parties of an agreement of purchase and sale. It is currently unclear whether and under what circumstances any non-contracting party that is involved in a transaction, such as developers, mortgage agents, professional advisers, lawyers and others, may be considered to have been counselling, inducing, aiding, or abetting the contravention of the Act.

Takeaways for Developers, Vendors and Purchasers

Agreements of purchase and sale entered into that do not comply with the Act will not be deemed invalid simply due to such contravention of the Act.⁸ In effect, contracting parties will still be required to adhere to their contractual legal obligations. It may be prudent for contracting parties to negotiate contractual terms regarding the validity of agreements of purchase and sale contravening the Act. For example, participants in Canadian residential real estate transactions may seek to include contractual provisions confirming whether the purchasers are residents within the meaning of the Act and involve ancillary documents, such as requiring a statutory declaration or other evidence.

Developers, mortgage agents, real estate agents, lawyers and others should inform their respective staffs of the requirements of the Act to avoid potential liability by inadvertently entering into agreements of purchase and sale with non-Canadians. However, until the regulations are released, it is still unclear as to where the requirements of the Act and the scope of liability extend.

Meanwhile, the Act could face constitutional challenges on the basis that property rights fall under the purview of provincial governments, pursuant to Section 92 of the *Constitution Act, 1867*.

Many details about the applicability and enforceability of the Act are to be set by regulations in the coming months. The Aird & Berlis Real Estate Group will continue to monitor further developments. Please contact a member of the group for more information.

¹ *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, SC 2022, c 10, s 235.

² *Ibid*, s 5.

³ *Ibid*, s 2.

⁴ *Ibid*.

⁵ *Ibid*, s 4(2).

⁶ Subject to the satisfaction of prescribed conditions.

⁷ *Ibid*, s 6.

⁸ *Ibid*, s 5.



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Disclaimer

This communication offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.



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TAB 8

20th Real Estate Law Summit - Day 1

Camps, Cabins, and Cottages: Oh My! Recreational
Property Issues in Northern Ontario (PowerPoint)

Kady Stachiw

Larson Lawyers Professional Corporation

Stephanie Eiley

Torkin Manes LLP

April 19, 2023



CAMPS, CABINS, AND COTTAGES: OH MY! RECREATIONAL PROPERTY ISSUES IN NORTHERN ONTARIO

Kady Stachiw, Larson Lawyers Professional Corporation

Stephanie Eiley - Torkin Manes LLP

AGENDA

Introduction

Shoreline Road Allowances

SRO, MRO, Timber

Access Issues

Zoning

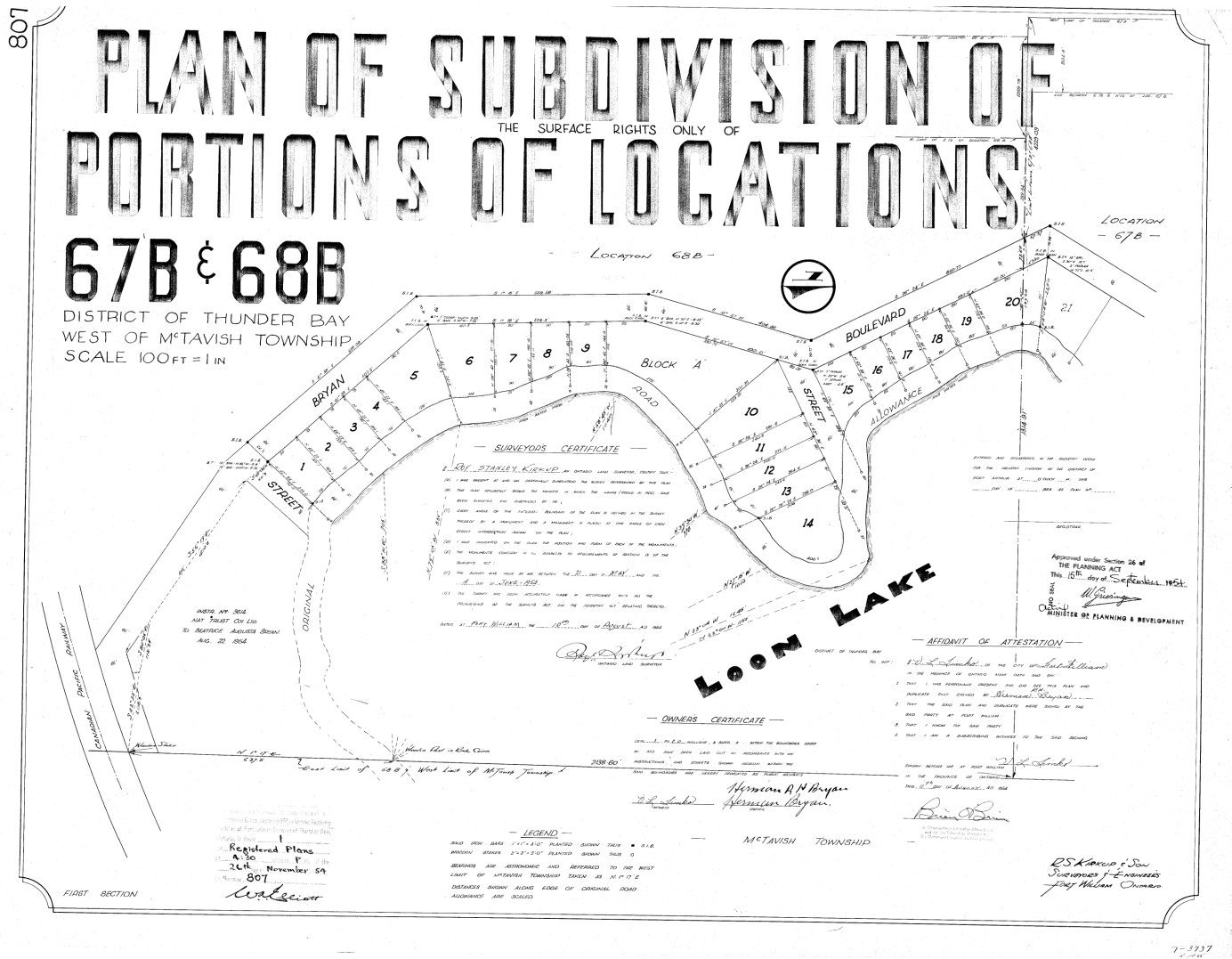
Well and Septic

Financing Issues

Easements

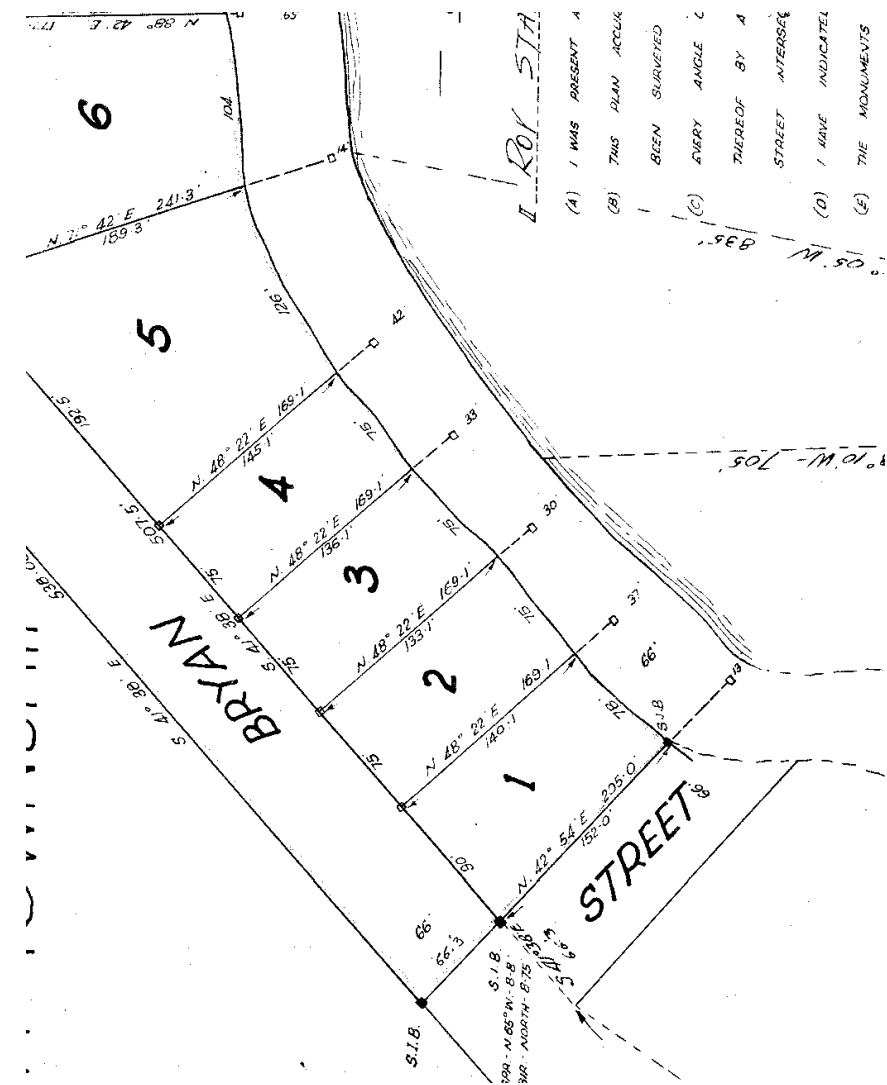
Title Insurance

SHORELINE ROAD ALLOWANCE



Camps, Cabins and Cottages: Oh My!

SHORELINE ROAD ALLOWANCE



Camps, Cabins and Cottages: Oh My!

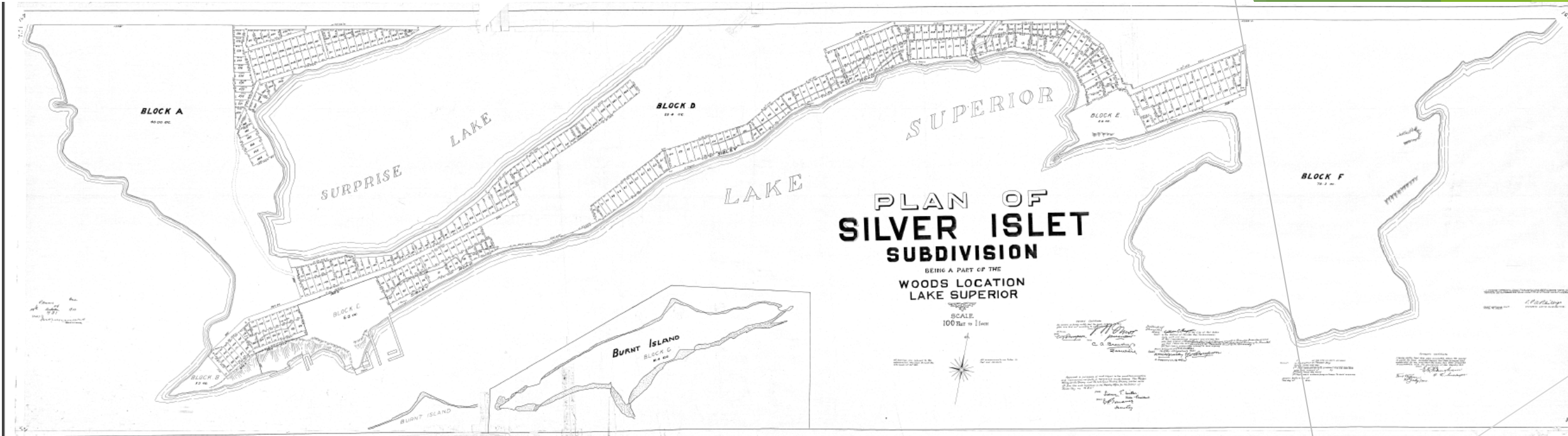
ACCESS ISSUES



Camps, Cabins and Cottages: Oh My!



WATER



Camps, Cabins and Cottages: Oh My!

WATER



THANK YOU!

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Law Society
of Ontario

Barreau
de l'Ontario

TAB 9

20th Real Estate Law Summit - Day 1

What Gives on the Law of Takings?

Annapolis Group Inc. vs. Halifax Regional Municipality

Simon Crawford

Bennett Jones LLP

Tatiana Zalar

Bennett Jones LLP

April 19, 2023



What Gives on the Law of Takings?

Annapolis Group Inc. vs. Halifax Regional Municipality

Simon Crawford and Tatiana Zalar¹
Bennett Jones LLP

I. SUMMARY

1. Fast Facts

A private developer, Annapolis Group Inc. ("**Annapolis**"), owned nearly a thousand acres in Halifax, Nova Scotia (the "**Lands**"). The zoning laws and by-laws in Halifax prohibited development until the requisite changes to the official plan and applicable local zoning by-laws had been passed, which the Regional Municipality of Halifax ("**Halifax**") repeatedly denied.² After several failed attempts to develop the Lands, Annapolis commenced a proceeding claiming that Halifax's regulatory measure deprived the company of reasonable or economic uses of its Lands, and resulted in a constructive taking without compensation. Halifax sought a partial summary judgment by way of a preliminary *motion to dismiss* arguing that a constructive taking could not be proven based on Halifax's refusal to initiate the planning process. The Nova Scotia Supreme Court dismissed Halifax's motion, finding that Annapolis' claim raised genuine issues of material fact requiring a trial. The Nova Scotia Court of Appeal overturned the motions judge, summarily dismissing the constructive taking claim on the basis that it had no reasonable chance of success. In a 5-4 decision, the Supreme Court of Canada overturned the Nova Scotia Court of Appeal, sending the matter back to trial.³

2. Taking

A "taking" is a forcible acquisition by the Crown of privately owned property for public purposes. A *de jure taking* is statute based and occurs when a statutory authority takes title to privately owned land for a public purpose following a process established by statute that includes compensation.⁴ A *constructive taking* (sometimes called a "de facto taking"), is common law based and occurs when a governmental authority does not become the formal or legal owner of the subject property, but has regulated a landowner's property to the extent that they have effectively lost the use and enjoyment of their property in a substantial and unreasonable way. The common law requires governments to pay compensation for land it takes — unless its enabling legislation clearly expresses an intention *not* to compensate.⁵

¹ The authors are grateful for the assistance of Jacob Schroeter, Student-at-Law, Bennett Jones LLP.

² Practical Law Canada Commercial Real Estate Supreme Court of Canada Expands the "Constructive Expropriation" Definition, (November 1, 2022) Resource ID W-037-4294

³ *Ibid*

⁴ Sarah Jacobs and Giorgia Chum, "A Tweak to the Law on Constructive Taking or an Impending Chill on Land Use Planning Regulation? Understanding the Implications of Annapolis Group Inc. v. Halifax Regional Municipality 44 R.P.R. (6th) 123" 33 MPLR-ART 123.

⁵ *Annapolis Group Inc. v. Halifax Regional Municipality* 2022 SCC 36, 2022 CSC 36, 2022 CarswellINS 716, 2022 CarswellNS 717, 2022 A.C.W.S. 2630, 21 L.C.R. (2d) 1, 33 M.P.L.R. (6th) 1, 44 R.P.R. (6th) 1, 52 C.E.L.R. (4th) 171 at para 22

3. The CPR Test

Long before Annapolis, in *Canadian Pacific Railway v. Vancouver (City)* ("**CPR**"), the Supreme Court of Canada established a two-part test, known as the *CPR Test*, to determine if a constructive taking has occurred. The CPR Test required compensation to the landowner if there had occurred: (1) an acquisition by the Crown of a beneficial interest in the property or flowing from it; and (2) the removal of all reasonable uses of the property.⁶

4. Revisiting the CPR Test

I'm going to tell you how this ends. The magic of Annapolis is that it loosens the CPR Test. Summed up, the Supreme Court held:

- (a) That the governmental authority only needs to receive an *advantage*, not actually acquire the beneficial interest in the land. If the *advantage* flows from the owner's beneficial interest, that is sufficient to satisfy the first part of the CPR Test.
- (b) Intention *may* matter. The underlying objective pursued by a public authority may provide supporting evidence for a constructive taking claim, but it is neither necessary nor sufficient to prove a taking.⁷

II. INTRODUCTION TO THE LAW OF TAKINGS

Expropriation or "taking" is a "forcible acquisition by the Crown of privately owned property for public purposes." It may take the form of a constructive taking (effective appropriation of private property by a public authority exercising its regulatory powers), or a de jure taking (formal expropriation) by (in the case of land) taking title.⁸

For de jure takings, the requirement to compensate is codified in provincial and territorial legislation, such as in Nova Scotia's *Expropriation Act*, RSNS 1989, c 156, which states that, "where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act".⁹

Constructive takings can occur (as we know understand it from Annapolis), where a government authority has regulated the property to such an extent that the landowner has, "...effectively lost the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property."¹⁰ The Court in Annapolis clarified that not every instance of regulating the use of property amounts to a constructive taking; rather, governments and municipalities may validly regulate land in the public interest without effecting "takings".¹¹ The

⁶ *Canadian Pacific Railway v. Vancouver (City)* (2006), 2006 SCC 5, 2006 CarswellBC 404, 2006 CarswellBC 405, 262 D.L.R. (4th) 454, 18 M.P.L.R. (4th) 1, 40 R.P.R. (4th) 159, 345 N.R. 140, 88 L.C.R. 161, 221 B.C.A.C. 1, 364 W.A.C. 1, [2006] 1 S.C.R. 227 at para 30

⁷ *Supra* note 5 at para 57.

⁸ *Ibid.*

⁹ *Expropriation Act*, R.S.N.S. 1989, c. 156 s. 24. In Ontario, refer to the *Expropriations Act*, R.S.O. s. 13(1)

¹⁰ *Supra* note 5 at para 19.

¹¹ *Ibid* at para 18.

line between valid regulation and a constructive taking is crossed where the effect of the regulatory activity "virtually abolishes" the owner's right to reasonable use of the property.¹²

In general, a series of lower court decisions have dismissed claims for compensation where the regulation left the owner with some reasonable use of the property and required that there be a "total loss of the plaintiff's interest in property for the Crown's action to constitute a taking."¹³ At common law, the taking of property by the state must be authorized by law and triggers a presumptive right to compensation, which can be circumvented by including clear statutory language indicating an intention *not* to compensate – thus immunizing governments from liability to pay compensation for a taking.¹⁴

CPR is the foundational case in the law of takings. The case involved a dispute over CP Rail's desire to develop defunct railway corridor lands for residential and commercial uses. The City of Vancouver adopted the Arbutus Corridor Official Development Plan By-Law, which designated CP Rail's rail corridor as a public thoroughfare for transportation and "greenways", such as heritage walks, nature trails and cyclist paths. The test for compensation at common law for constructive taking was not met. It was held that CP Rail failed to show that the City of Vancouver acquired a beneficial interest related to the land, and that the by-law removed all reasonable uses of the property.

III. FACTS AND JUDICIAL HISTORY OF ANNAPOLIS

The facts of Annapolis had been brewing since the 1950s when Annapolis started to incrementally acquire acreage in the Blue Mountain Birch Cove Lakes area outside of Halifax, Nova Scotia. Over the past seventy years, Annapolis had aggregated 965 acres of land, which they intended to develop. In 2006, Halifax Regional Municipality ("**Halifax**") included the Lands in a Regional Municipal Planning Strategy ("**RMPS**"), a guide for land development in the municipality over a 25-year period.¹⁵ The RMPS is a statement of broad policies and priorities for growth and development of Halifax, but did not commit Halifax to any particular development or policy. The RMPS reserved a portion of the Lands for possible future inclusion in a regional park, approximately 1/3 of the Lands were zoned as "Urban Settlement" (which contemplate the development of serviced residential communities *within* 25 years) and the remaining 2/3 of the Lands were zoned "Urban Reserve" (which contemplate the development of serviced residential communities *after* 25 years).

Both the "Urban Settlement" and "Urban Reserve" designations contemplate, but do not permit, future residential development and both require that Annapolis convince Halifax to adopt a resolution authorizing a "secondary planning process" and amend the *Halifax Mainland Use By-Law*.¹⁶

¹² *Ibid* at para 19.

¹³ *Ibid* at para 20.

¹⁴ *Ibid* at para 22.

¹⁵ *Supra* note 5 at para 6.

¹⁶ *Ibid*.

Starting in 2007, Annapolis made several attempts to commence the secondary planning process and to amend the Halifax Mainland Use By-Law. Annapolis provided evidence that Halifax had promoted the Lands for use as a park with signage for trails and that city employees referred to the Lands as a "park". Finally, in September 2016, Halifax adopted a resolution refusing to initiate the secondary planning process – effectively ending Annapolis's attempts to develop the Lands.

In 2017, Annapolis sued Halifax for over \$120,000,000 alleging that Halifax's regulatory measures deprived it of all reasonable or economic uses of its land, resulting in a constructive taking without compensation, contrary to ss. 65 and 237 of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, and ss. 6 and 24 of the *Expropriation Act*, R.S.N.S. 1989, c. 156.¹⁷

1. Nova Scotia Supreme Court

The motion judge denied Halifax's application, holding that several of the facts could be material.¹⁸ In particular, the motion judge highlighted the following issues of material fact that made Annapolis' claim worthy of a trial:

- (a) "whether Halifax had erected signage on the Lands depicting Halifax's logo on various trails;
- (b) whether a Halifax employee had been 'overseeing the park's creation';
- (c) whether the Lands would be treated as development lands and not parklands;
- (d) the existence of clauses in the Planning Strategy that mandate consideration of policy concepts without committing Council to adopt the policy, and clauses discussing an urban settlement designation boundary;
- (e) discovery evidence to the effect that Halifax had decided that the Annapolis Lands would be treated as development lands, not parklands; and
- (f) correspondence between counsel, including letters containing Halifax's denial of Annapolis' allegations."¹⁹

The possibility of an ulterior motive on Halifax's part was also a triable issue. Specifically, the motion judge relied on *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577 ("*Lorraine*"), a case involving a claim under Quebec's *Expropriation Act*, CQLR, c. E-24, in which the Supreme Court of Canada (SCC) affirmed that, "where property is expropriated outside a legislative framework for an ulterior motive [...] a 'disguised' expropriation occurs."²⁰ Here, the motion judge equated the Quebec law concept of disguised expropriation to

¹⁷ *Ibid* at para 9.

¹⁸ *Annapolis NSSC*, *supra* note 5 at paras 43-44.

¹⁹ *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 at para 11 [*Annapolis SCC*].

²⁰ *Ibid* at para 12.

the concept of constructive expropriation as it was understood in another SCC decision, *The Queen in Right of the Province of British Columbia v. Tener*, [1985] 1 S.C.R. 533 ("*Tener*").²¹

The motion judge reasoned that expropriation cases are fact-specific analyses and offer different scenarios in which a constructive taking claim may succeed. In the eyes of the Nova Scotia Supreme Court (NSSC), this case was no different. Annapolis' claim raised "genuine issues of material fact" and therefore required a trial.²²

2. Nova Scotia Court of Appeal

On appeal by Halifax, the Nova Scotia Court of Appeal (NSCA) reversed the NSSC's decision. The Court of Appeal held that Annapolis' constructive taking claim could not reasonably establish an acquisition by Halifax of a beneficial interest in the Lands or flowing from the Lands, and the removal of all reasonable uses of the Lands, as required by *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227 ("*CPR*").

Citing *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 177 D.L.R. (4th) 696 ("*Mariner*"), the NSCA held that proof of regulatory measures reducing the value or limiting the use of land is insufficient for such a claim.²³ Rather, for a "beneficial interest" to be acquired, the NSCA stated that land must "actually be taken" from Annapolis and acquired by Halifax.²⁴ In the Court of Appeal's view, the latter had not occurred. The NSCA reasoned (1) that the city had not acquired a beneficial interest despite Annapolis' argument that Halifax encouraged the public to use the property as a public park, and (2) that that Annapolis' reasonable uses of the land had not changed over time.²⁵

The NSCA also held that Halifax's intended use for the Lands was not relevant to the constructive taking analysis.

3. Supreme Court of Canada

On further appeal to the SCC, a majority of the Court reversed the NSCA summary judgment dismissal of the constructive taking claim and ordered that the issue proceed to trial. Critically, Justices Côté and Brown, writing for the majority, clarified and restated the applicable legal test for claims of constructive taking set out in *CPR*, which requires that the public authority have (1) acquired a beneficial interest from the Lands or flowing from it, and (2) acted in a way that removed all reasonable uses of the Lands.²⁶

On the first issue, the majority held that the NSCA erred in holding that an acquisition of a beneficial interest requires land to actually be taken from an owner and acquired by the state. Since the wording under the first part of the *CPR* test – "a beneficial interest in the property or flowing from it" – leaves room for a broader application,

²¹ *Ibid.*

²² *Halifax Regional Municipality v Annapolis Group Inc.*, 2021 NSCA 3 at para 44 [*Annapolis NSCA*].

²³ *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 177 D.L.R. (4th) 696 at para 57 [*Mariner*].

²⁴ *Annapolis NSSC*, *supra* note 22 at paras 71, 89, 91.

²⁵ *Ibid.*

²⁶ *Annapolis SCC*, *supra* note 5 at para 14.

the majority held that the claimant must only show that an "advantage" flowed to the state from the regulation of the Lands.²⁷

In terms of the broader constructive taking analysis, the majority directed courts to undertake realistic appraisals and to examine the issues "in the context of the specific case."²⁸ A court applying the two-part test might therefore consider: (a) the nature of the government action, (b) the nature of the land and its uses, and (c) the substance of the alleged advantage.²⁹ Though the public authority's intention *may* also prove material in some cases – specifically with regards to the second element of the test – the majority says it is neither necessary nor determinative.³⁰

For their part, the dissenting justices suggested that the majority's reasons departed from the *CPR* test, as the test required proprietary acquisition. This deviation, according to the minority, would dramatically expand on the potential liability of municipalities engaged in land use regulation.³¹ The dissenting judges also disagreed with the majority's view that intention is relevant to the determination, arguing that the focus must be on "the *effects* of the public authority's regulatory activity."³²

The SCC ultimately did not apply the test to the facts to determine if a constructive taking had occurred in this instance since *Annapolis* was an appeal from a summary judgment application.

4. CPR Test Part 1: An Acquisition of a Beneficial Interest in the Property or Flowing from it

The Court argued that the first branch of the *CPR* test should not be viewed through the technical lens adopted in the domain of equity.³³ Rather, a "beneficial interest in the property or flowing from it" ought to be understood more broadly as an "advantage".³⁴ This means that the interest acquired by the state can fall short of an actual acquisition.³⁵ In an attempt to give further meaning to the expression "beneficial interest", the Court revisited and relied on two of its previous decisions, *Manitoba Fisheries* and *Tener* (also cited by the lower court), which seem to support this proposition.³⁶

a. Manitoba Fisheries

Manitoba Fisheries involved the enactment by Parliament of the *Freshwater Fish Marketing Act*, R.S.C. 1970, c. F-13, which granted a federal Crown corporation a commercial monopoly on the export of fish from Manitoba, and delegated power to the corporation to grant licenses to private enterprises to continue operating notwithstanding the *Act*. Manitoba Fisheries Ltd., a private fish export company that was put out of business after

²⁷ *Ibid* at para 40.

²⁸ *Ibid* at para 45.

²⁹ *Ibid*.

³⁰ *Ibid* at para 57.

³¹ *Ibid* at para 115.

³² *Ibid* at para 86.

³³ *Supra* note 5 at para 25.

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ *Ibid* at para 27.

not being granted a license, brought an action for a declaration that it was entitled to compensation for the loss of its business. The SCC held that Manitoba Fisheries was entitled to the declaration.

The Court ascribed significance to the to the *effect* on the property holder, and the correspondence between the acquisition and deprivation. Although there was no actual acquisition of property in this case, Ritchie J found that the loss of the business had the effect of depriving the private fishery of its goodwill – the property that was acquired by the corporation, and their whole advantage – and consequently rendering its physical assets "virtually useless".³⁷ In the Court's view, there was a clear correspondence between the acquisition and the deprivation; the lost goodwill was the same goodwill that was "by statutory compulsion acquired by the federal authority."³⁸ Moreover, the Court rested on its view that the government had acquired an obvious *advantage* through the acquisition of a statutory monopoly, which ultimately entitled the state to any benefits that would have flowed to Manitoba Fisheries, such as reputation and connections.³⁹

b. Tener

In *Tener*, the Court also ascribed significance to the *effect* of a regulatory measure and the *advantage* acquired therefrom by the government. In that decision, the Teners were the owners of mineral claims on lands later designated as a public park. After gradually imposing more onerous conditions for the exploitation of those claims, the Crown eventually refused permits to the owners of the registered mineral claims. The Court deemed that the Crown's actions were an effective expropriation of the Teners' mineral claims. Estey J, for the majority, determined that the regulation had the effect of securing an advantage by confining all reasonable uses of the property to the Province's preferred use as a park.⁴⁰ In other words, by regulating away the Teners' ability to enjoy its right and property interest (i.e., the ability to access and extract the minerals), the Province had effectively appropriated the Teners' right and interest to itself.⁴¹

Wilson J, concurring in the result, took a different approach. In her eyes, the interest held by the Teners had not actually been acquired because the Province did not itself obtain a right of exploitation.⁴² Critically, however, the Province's regulation allowed it to acquire an *advantage* by preventing the Teners from exploiting their mineral rights and, in turn, preserving the land as a provincial park in the public interest.⁴³ This effect of the regulation, she argued ought to be the focus of the analysis and not any actual acquisition of proprietary interest by the Province.⁴⁴ After all, even though the Teners retained legal title to a property interest (i.e., the registered mineral claims), that interest had been rendered virtually useless by way of the Province's newly acquired advantage.

³⁷ *Ibid* at para 31; *Manitoba Fisheries*, *supra* note 31 at p. 118.

³⁸ *Manitoba Fisheries*, *supra* note 31 at p. 110.

³⁹ *Annapolis SCC*, *supra* note 2 at para 29.

⁴⁰ *Ibid* at para 33.

⁴¹ *Ibid* at para 34.

⁴² *Ibid* at para 35.

⁴³ *Ibid*.

⁴⁴ *Ibid* at para 36.

c. Defining the Nature of a "Beneficial Interest"

Based on the foregoing jurisprudence, the Court in Annapolis arrived at the conclusion that the CPR test supports an understanding of the term "beneficial interest" as a kind of *advantage* derived from the *effect* of a regulatory measure.⁴⁵ On the one hand, requiring actual acquisition would ultimately "collapse the distinction between constructive (*de facto*) and *de jure* takings," which CPR preserves.⁴⁶ After all, "if a constructive taking requires an actual taking, then it is no longer constructive."⁴⁷ The foregoing jurisprudence also did not understand "benefits" in a strict equitable sense.⁴⁸ Applied correctly, the Court argues, *CPR* "trains the court's eye on whether a public authority has derived an advantage, in *effect*, from private property, as opposed to the formal acquisition of a proprietary interest."⁴⁹ If courts are to maintain *CPR*'s coherence with those decisions, it is thus critical to interpret "beneficial interest" in the broader sense.⁵⁰

d. Further Guidance and Examples from the Supreme Court

"A court deciding whether a regulatory measure effects a constructive taking must undertake a realistic appraisal of matters in the context of the specific case, including but not limited to:

- (i) The nature of the government action (i.e., whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations;
- (ii) The nature of the land and its historical or current uses. Where, for example, the land is undeveloped, the prohibition of all potential reasonable uses may amount to a constructive taking. That said, a mere reduction in land value due to land use regulation, on its own, would not suffice; and
- (iii) The substance of the alleged advantage. The case law reveals that an advantage may take various forms. For example, permanent or indefinite denial of access to the property or the government's permanent or indefinite occupation of the property would constitute a taking (*Sun Construction* , at para. 15). Likewise, regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. It could also include confining the uses of private land to public purposes, such as conservation, recreation, or institutional uses such as parks, schools, or municipal buildings."⁵¹

⁴⁵ *Ibid* at para 38.

⁴⁶ *Ibid* at para 39.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at para 40.

⁴⁹ *Ibid* at para 41.

⁵⁰ *Ibid* at para 40.

⁵¹ *Ibid* at para 45.

5. CPR Test Part 2: Removal of all Reasonable Uses of the Property

a. Actual vs. Theoretical Uses

The Court in *Annapolis* raised two questions that should be considered when determining whether the effect of government regulation has deprived the claimant of all actual reasonable uses of their property, as opposed to potential theoretical uses:⁵²

- (i) Has the claimant's property been confined to and/or preserved for public use(s);⁵³ and
- (ii) Has the claimant's preferred use of the property been restricted *indefinitely* such that the state has effectively taken away all rights of ownership?⁵⁴

b. Intention:

The Court also reviewed the issue of whether the intention of a public authority is relevant to the analysis of constructive taking claims. The motion judge and Court of Appeal notably disagreed on this point. For its part, the motion judge cited the SCC's definition of disguised expropriation articulated in *Lorraine*, which concluded that "an ulterior motive" was applicable to finding a constructive taking at common law.⁵⁵ The Court of Appeal, however, argued that motive is not a material requirement for a constructive expropriation analysis. The SCC in *Annapolis* settled the debate, stating that neither position is correct. The Court concludes that while a public authority's intention is not an element of the test for constructive takings at common law, some cases suggest that intention can still be relevant to the inquiry.⁵⁶ For instance, Ritchie J in *Manitoba Fisheries* endorsed a passage from *Ulster Transport Authority v. James Brown & Sons, Ltd.*, [1953] N.I. 79 (C.A.) highlighting the relevance of intention in constructive taking cases.⁵⁷ In a further decision, *Lynch v. St. John's (City)*, 2016 NLCA 35, 400 D.L.R. (4th) 62, the City's intention in refusing to allow any development on the subject watershed land was also treated as germane to whether a constructive taking had occurred.⁵⁸ While these examples suggest that the underlying objective pursued by a public authority *may* provide supporting evidence for a constructive taking claim, the Court is clear that intention "is neither necessary nor sufficient."⁵⁹

IV. IMPACT OF THE ANNAPOLIS DECISION:

While the majority decision in *Annapolis* was not determinative of the outcome of the claim because the Court simply affirmed Annapolis' right to take their constructive taking claim to trial, the Court's guidance on the issue is impactful in the law of expropriation and constructive taking.

⁵²Jacob R.W. Damstra, Andrew Hentz, and Matthew McGuckin "Tackling the Thorny Issue of Constructive Expropriation Claims: Annapolis Group Inc. v Halifax Regional Municipality" <<https://www.lerners.ca/lernx/tackling-the-thorny-issue-of-constructive-expropriation-claims-annapolis-group-inc-v-halifax-regional-municipality/>>

⁵³ *Supra* note 5 at paras 33 and 58.

⁵⁴ *Ibid* at para 56, 70, and 72.

⁵⁵ *Ibid* at para 51.

⁵⁶ *Ibid* at para 53.

⁵⁷ *Ibid* at para 54.

⁵⁸ *Ibid* at para 55.

⁵⁹ *Ibid* at para 57.

Judging solely by the number of interveners in the Annapolis case – Attorney Generals of Canada, Ontario, Nova Scotia, and British Columbia; Canadian Constitution Foundation; Ecojustice Canada; Ontario Landowners Association, and the Canadian Homebuilders Association – the outcome of this case was important to a variety of stakeholders and will be closely watched when it goes to trial.

1. Dramatic Expansion of Potential Liability for Municipalities?

Ecojustice Canada expressed that they were "extremely disappointed" with the majority decision citing that the decision will likely undermine governments' willingness and ability to regulate in the public interest. Ecojustice went on to point out that, "it's certainly conceivable that court will conclude that a government obtains an advantage when a restriction on a property owner or rights holder allows it to avoid health care costs, meet climate targets, or protect species at risk."⁶⁰ This signals an important point – that municipalities will likely have to carefully review their empowering legislation – not just in zoning, but other regulations that may indirectly impact property uses and values – and make sure that are very clear on what protections they have regarding expropriation issues. Constructive taking claims on this basis have been raised in the past and been unsuccessful under the pre-*Annapolis* interpretation of the CPR Test. For example, the Alberta Court of Queen's Bench's decision in *Altius Royalty Corporation v. Her Majesty the Queen in Right of Alberta*, where the plaintiffs unsuccessfully claimed that their royalty interest in coal from a coal mine was constructively expropriated by existing regulations prohibiting coal-fired electricity generation.⁶¹ With the newly clarified CPR Test, a claim like this could conceivably have a different outcome.

The newly refined CPR Test could also prove to be a useful tool to developers in their battles against municipal zoning overreach and intentional municipal inaction on development applications. The Canadian Constitution Foundation was "thrilled" with the decision: "The Court's decision significantly expands the protections available to Canadian property owners who lose their rights through regulatory measures. Compensation will now be presumptively available in a much wider range of cases. Before today, the biggest obstacle to a successful claim to compensation based on a constructive taking was the requirement that the government acquire a 'beneficial interest' in the property. Today, the Court clarified that a 'beneficial interest' simply means some kind of advantage. In a case involving constructive takings, the focus will now be on the effect of the measure on an owner, not what was acquired by the government."⁶²

However, the majority in *Annapolis* made it clear that their clarification of the CPR Test was not intended to slam municipalities with liability: "we reiterate that provincial legislatures remain free, as they always have been, to "alter the common law" in respect of constructive takings (CPR, at para. 37, referring to the immunity conferred

⁶⁰Zena Olijnyk, "SCC rules that case on whether Halifax is effectively expropriating developer's land can go to trial" <<https://www.canadianlawyermag.com/practice-areas/real-estate/scc-rules-that-case-on-whether-halifax-is-effectively-expropriating-developers-land-can-go-to-trial/370855>>

⁶¹ *Ibid.*

⁶² "Canadian Constitution Foundation thrilled with SCC decision that expands the test for constructive takings and protect property rights" <<https://theccf.ca/ccf-annapolis-win/>>

by s. 569 of the Vancouver Charter) — by, in this case, immunizing Halifax by statute from the obligation to pay compensation for taking private property in the public interest."⁶³

2. A Few Words on Up-zoning:

The dissenting justices in *Annapolis* cautioned that, "[o]ur colleagues' reformulation of the acquisition requirement and departure from CPR as precedent has significant ramifications. It dramatically expands the potential liability of municipalities engaged in land use regulation in the public interest and throws into question the settled law that a refusal to up-zone is not a de facto taking."⁶⁴

However, the majority in *Annapolis* directly challenged the minority Justices' view by clarifying that a "refusal to upzone vacant land" is not tantamount to a constructive taking.⁶⁵ A refusal to up-zone, standing alone, will not generally remove all reasonable uses of vacant land. The Court dipped its toes into the analysis of whether *Annapolis* had been denied "all reasonable uses of their property", but left it to the lower courts to assess: "As we have explained, Halifax's alleged conduct in this case is more than a mere refusal to up-zone. *Annapolis* claims that Halifax has effectively transformed its Lands into a public park. We emphasize, however, that Halifax may defeat *Annapolis*' constructive taking claim by showing a single reasonable use of the property."⁶⁶

⁶³ *Supra* note 5 at para 78.

⁶⁴ *Ibid* at para 115.

⁶⁵ *Ibid* at para 76.

⁶⁶ *Ibid* at para 75.



Law Society
of Ontario

Barreau
de l'Ontario

TAB 10

20th Real Estate Law Summit - Day 2

**Reserve Funds and In-Suite and
Common Element Alteration**

Audrey Loeb, LLM, LSM, OOnt
Shibley Righton LLP

April 20, 2023



**Reserve Funds and Alterations to Units,
Exclusive Use Common Elements and Common Elements**

Audrey Loeb
Shibley Righton LLP.

RESERVE FUNDS

Lawyers need to understand what a reserve fund is, how it is funded and how the monies can be used.

Reserve funds exist to ensure that money is available to pay for the cost of major repair and replacement of major capital items in the property.

When we talk about major capital components, we are referring to all the components of the condominium including, roads, walkways, lighting, lobby's, hallways, underground garages, landscaping, mechanical and electrical components, elevators, recreational facilities and building exteriors including windows, roofs and walls. In some condominiums it can include sewage lines and septic tanks.

Ontario has among the best legislation anywhere for dealing with the establishment and funding for reserves. The law is simple. The board is obligated to carry out a reserve fund study, within the first year after a condominium corporation is created and set up a separate reserve fund account into which funds must be transferred, usually monthly, and the monies can only be used as prescribed in the act.

The reason the government gave this authority to the boards of directors is so that we won't have the Florida situation where the owners won't vote to make the necessary contributions to do repairs. Florida, for example only requires a building engineering review 40 years after construction.

We knew securing owner approval would be impossible when we amended the act in 1978. We knew that the boards needed to be charged with the responsibility and given the rights to ensure this was done.

There are some things you should know as lawyers acting for purchasers. The government has not yet mandated adequate contributions to reserve funds by the developer community. A couple of developers who want their clients to know what the true cost of living in their buildings will be, will make a fair assessment and show an appropriate contribution in the condominium's first year budget. Most do not. They budget 10%-15% of the annual operating budget as the reserve fund contribution.

Many developers include in their agreements of purchase and sale an adjustment to collect two months' worth of common expenses on closing. This is paid to the reserve fund and that extra two months' contribution reduces the monthly common expense payments owners pay monthly because it boosts the money in the reserve fund at the end of the first year after registration of the condominium without showing higher monthly common expense payments.

Purchasers will have no idea of the common expense increase they are going to incur in year two when the first reserve fund study is completed. We have seen common expenses rise by significant percentages. The costs often increase dramatically because in addition to a proper reserve fund study with appropriate contributions to be made, some developers hide the real costs of condominium ownership, by not requiring that certain costs be paid for until year two of the condominium's existence. If not payable in year one, they are not included in the first-year budget. It is the first-year budget numbers on which a buyer of a new build makes the decision to purchase. They never see the hidden or deferred costs.

Add these second-year costs to the failure to properly fund the reserve fund and it can be quite shocking for many unit owners.

The government has the prohibition of these two tactics on its agenda as part of the legislative amendments passed in 2015 but they are not proclaimed.

As with most of the condominium act amendments affecting developers, nothing is happening.

Let's talk now about reserve funds themselves. The act requires that condominiums carry out reserve fund studies. Typically, they are done by engineers.

There are three types of studies provided for in the regulations and studies must be done every three years.

The first is an on-site assessment and analysis of all the components of the common elements of the condominium, with a value in excess of \$500. An estimate is made of all the projected costs for repair and replacement over the next 30 years, taking into account interest earned on the monies and inflation.

The second study 3 years later is again on site but without the physical analysis of all the components.

The third study 3 years later is an off-site study and essentially a review of the numbers in studies 1 and 2.

Reserve fund studies are not an exact science. The estimate for lifespan and replacement costs is no more than an educated guess. Each listed item in the reserve fund study will have a date when it is expected that major maintenance, repair and/or replacement will be required and a guesstimate as to the cost at that time.

The study is not a bible. It is a guide. Some things may fail sooner, others later. Decisions may be made to move work forward or back depending on the condition of the items.

Just because the study says the roof is projected to cost \$500,000 it doesn't mean that if the cost ends up being \$750,000 the corporation cannot use funds from the reserve to complete the work. The monies in the fund are not earmarked just to be used for specific purposes, they are fungible. If, a condominium has a large unanticipated expense that requires the use of significant amounts from the reserve that were not allocated for a particular repair and more monies are used than contemplated in the study, the corporation should carry out a new reserve fund study and disclose in its status certificates that an interim update is being carried out.

In addition to the inability to contemplate all the things that might affect lifespan and costs going forward, the engineers have to consider other matters.

When preparing the reserve fund study and plan for contributions the engineers have to think about repair and replacement projects for things we haven't seen before like tall glass walled buildings. When that glass needs replacement and/or repair in addition to the cost of the materials required, they need to consider the equipment and labour costs that will be needed to carry out that work. We can only imagine what these repairs will cost.

Once a reserve fund study is completed by only those qualified in the regulations under the act, typically an engineer, the engineer will present a draft plan of projected repair and replacement timelines and the costs for same. The engineer will also deliver the contribution table to set out the payments needed to fund the reserve account.

If the condominium's reserve fund is in good shape and the funding is not going to have a serious impact on cash flow for owners, a reserve fund plan is prepared, which must be sent to all owners, showing their contributions. These are the easy ones.

However, where the reserve funds are in poor condition, non-existent or in some cases in a deficit and there is a lot of work to be done the financial shock can be overwhelming. The board is faced with telling the owners that there are huge increases needed. The board members who also have to pay these amounts either by way of special assessment, increased common expenses or both will often be faced with a rebellion.

Some corporations borrow and these costs are added to the common expenses.

Reserve fund information is included in the status certificate. The form requires this information and also information as to whether the corporation anticipates any increases in common expenses. This is where we mention the updated reserve fund study being done or that an engineering study is being done which might result in increased costs. The problem is we don't always know what those costs will be and in those instances the parties who want to close the transaction will need to determine a holdback or reduced purchase price.

Condominiums created after 2001 are typically in better shape than many of the older ones when it comes to reserve funds because that is when reserve fund studies became mandatory. Prior to that it was just taken that 10% was adequate, although that is not what the act said. Many buildings have never caught up to where they should be and now have no funds to carry out repairs.

If in the information you receive with the status certificate you determine that no reserve fund study has been done in the last three years or there is a note in the financial statements that the corporation is not compliant with the reserve fund study. These are red flags, and the client needs to know about them.

If there is a very large reserve fund, that may be a good sign but only if the condominium has been maintaining and repairing the building and there are no major projects on the horizon. \$5 million in reserve can disappear in a flash on one or two projects.

Alterations to units, common elements and exclusive use common elements.

These provisions apply whether the condominium is residential or commercial.

This is becoming a much more significant issue as buildings age and people are renovating units and installing improvements.

In-suite/unit alterations

There are three kinds:

1. Decorative alterations which do not require approval.

This is typically painting and decorating only.

2. Alterations which do require approval but do not impact common elements.

Examples are installing new kitchen and baths, without changing the plumbing or wiring, opening, or removing walls or installing hard surface flooring. These types of changes in many buildings will require that plans be submitted to the board for its approval and in some cases municipal permits will be required, depending on work to be done.

If removing walls an engineer will have to certify that there will be no impact on the structural integrity of the building.

If the owner wants to install hard surface flooring there are usually provisions requiring that sound attenuation material be laid below it and even with that requirement and the installation of same, if after the hard surface floor is installed, there are noise complaints the owner may have to take further steps to reduce noise.

If there is no in-suite approval provision in the declaration, we like the corporations to have rules which require board approval. That approval will require that those doing renovations enter into in-suite renovation agreement. A precedent from our office is in the materials. These are rarely standard and always require some modification depending on the circumstances. They are not registered on title and bind the owner only. They include obligations I will speak about in a moment.

3. *In-suite alterations, which require approval, and which impact common elements.*

These are the alterations which may involve annexation to common element pipes or wires for the installation of a new bathroom, adding windows or doors, incorporating space above a ceiling that is common element space. These changes are governed by s.98 of the condominium act. They will not only require written approval of the board but also a s.98 alteration agreement. A precedent from our office is in the materials. Again, each one has variations.

If your client needs to run pipes into the concrete floor or above the ceiling permission may not be given.

Some corporations are now trying to catch up with alterations that never had s.98 agreements either because:

- The alterations were made before the act required them, or
- The boards did not know about them when they gave approval or
- as is often the case no approval was sought.

If you receive a status certificate saying that an agreement must be entered into by the vendor or the alteration will be removed the purchaser must decide if the alteration stays and if so, an agreement has to be signed by the vendor or the purchaser has to sign it in place of the vendor.

Alterations to common elements.

Exclusive use alterations

Most alterations are to exclusive use common elements. These are things like opening up attics, enclosing balconies, extending patios and doing landscaping on terraces. S.97 of the act sets out the criteria that must be considered by a board when deciding on changes an owner wants to make to their exclusive use terrace or patio.

Common element alterations

Few if any owners get the right to make modifications to the common elements but it does happen. These are things like fencing in an area that will encroach onto common elements or digging below the floor in a building. In those circumstances the board needs to comply with the notice provisions in s. 97 of the act depending on the cost of the change. If an owner wants to alter the common elements and the cost of the alteration is above the amounts set out in the act, the board may have to give notice of the alteration to the owners who can then requisition a meeting to reject it or even better if the cost, which the owner is going to pay, is over 10% of the corporation's annual budget, the board will require approval of 66 2/3% of owners. Seeking owner approval may sound like an unlikely occurrence but in some condominiums the budgets are very small.

In addition to s. 97 approval in some cases, all these alterations must have:

- Approval of the board, and
- A s. 98 agreement

Getting a municipal permit for an alteration does not mean the unit owner can make the alteration. The municipal permit is one thing. The condominium approval something quite different. Some

condominiums have advised city building departments that no permits can be issued without the condominium's approval.

If acting for a purchaser who wants to make changes usually a landscaped terrace, and it is a new build you need to make sure that the first board takes all the required steps to approve the alteration and enters into a s. 98 agreement with the purchaser that is registered on title. This must be a term of the agreement of purchase and sale.

A s. 98 agreement must include certain provisions to be compliant with the act.

- It must set out who owns the alteration,
- Who bears responsibility for maintenance, repair, and insurance of the alteration.

It will also include depending on who drafted it:

- The obligation to pay a security deposit in advance of the work commencing. This deposit will cover the cost of the preparation of the agreement, any engineering and legal fees and the registration of the agreement on title.
- The hours when work can be done,
- Limitations on when pneumatic drills can be used,
- Advance notice be given to management of when that work will be carried out,
- a time frame within which the work will be completed,
- The delivery of plans possibly stamped by an engineer,
- Municipal permits or an engineer or architect's letter that none are required,
- Obligations during the construction period to keep the common areas clean of debris etc., and
- All costs relating to the agreement and compliance with it to be to the account of the unit owner.

A typical s.98 agreement will also require that:

- The owner removes the alteration, at the owner's cost, if the condominium has to carry out repairs.
- All the costs, which can include the cost of an independent engineer if the circumstances so require, are to the account of the owner.
- All costs incurred in enforcing the agreement will be to the owner's account and collectable as common expenses.
- If additional interior space is being created the corporation can levy a charge for it and collect it as common expenses. If the unit is for example 2000 sq ft and a portion of the ceiling attic space is opened to enlarge the unit and the enclosure will add an extra 200 sq ft. The corporation can collect, as common expenses, an additional 10% of what the owner pays for the unit so the \$2000/ month would increase to \$2200.

The s. 98 agreement must be registered on title, or it is not effective. Once registered on title it binds successors and assigns. The existence of the agreement has to be noted in the status certificate and a copy of the agreement should be included so a buyer can know about it before purchasing. If acting on the purchase of a unit with a s.98 agreement on title do not requisition its removal. It must stay there, or the alteration must be removed.

Some takeaways

- Never rely on the manager for approval.
- Approval must be from the board and in writing.
- If putting landscaping materials on a deck or terrace make sure the containers sit on wheels. They will have to be moved at some time.
- Understand it will take time. I am currently dealing with several of these cases. In one situation there is an owner who cannot get the job finished. In another a condominium allowed management to approve a renovation with no in-suite renovation or s.98 agreement and the renovation is expected to take 18 months.

Almost daily someone is delayed getting approval or owners start work without permission. There is no shortage of issues and work on renovations and alterations.

- SHIBLEY RIGHTON LLP website for getting the booklets: www.shibleyrighton.com
- To join the SHIBLEY RIGHTON LLP Newsletter List:
http://www.shibleyrighton.com/Newsletter_Subscription

IN-SUITE RENOVATION AGREEMENT

THIS AGREEMENT made pursuant to section 98 of the *Condominium Act, 1998* dated the _____ day of _____, 20__.

B E T W E E N :

**** CONDOMINIUM CORPORATION NO. ****

(the “**Corporation**”)

- and -

**

(individually and collectively, the “**Owner**”)

RECITALS:

- (a) The Owner is the registered owner of the condominium unit designated as **, comprising Unit **, Level ** according to ** Condominium Plan No. ** (the “**Unit**”);
- (b) The Owner wishes to make changes and/or alterations to the Unit in accordance with the requirements and/or specifications contained in Schedule "A" attached to this Agreement, including any plans and/or drawings referenced therein, all in compliance with applicable laws and to the extent only that the changes and/or alterations and the construction thereof are not contrary to the *Condominium Act, 1998* (the “**Act**”) or the declaration, by-laws, rules and any agreements listed therein relating to the Corporation or any other governing law (collectively, the “**Alteration**”);
- (c) The foregoing recitals are made as representations and statements of fact by the Owner;
- (d) The Owner agrees to enter into this Agreement pursuant to and in accordance with Section 98 of the Act;
- (e) The board of directors of the Corporation (the “**Board**”), by resolution, shall approve the proposed Alteration, subject to the terms and conditions of this Agreement;

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants and agreements hereinafter contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

In this Agreement, the terms used herein shall have the same meaning in the Act unless otherwise specified.

1. Costs Concerning the Alteration.

The Owner shall have ownership of and shall be solely responsible for the installation, construction and insurance of the Alteration, including but not limited to, the maintenance and repair after damage of the Alteration in a first-class condition, any damages caused as a result of the installation of the Alteration and for all costs associated therewith. The Corporation has no obligations in respect of the Alteration.

2. Compliance with Schedule “A”.

The Owner is aware of and will comply with the provisions of Schedule “A” attached to and forming part of this Agreement, as well as the Final Working Drawings (if applicable) referred to in Section 4.

3. Conditional Approval.

The approval to the Alteration granted by the Board referred to in recital (e) above is and shall continue to be conditional upon compliance by the Owner with this Agreement.

4. Deliveries and Written Approval Before Starting the Alteration.

The Owner shall, at least seven (7) days prior to the commencement of any Work, provide the following to the Corporation:

- the Final Working Drawings prepared and stamped by a certified architect or engineer in good standing to be used to construct the Alteration, which drawings will show in complete detail the final proposed Alteration (the "**Final Working Drawings**");
- a letter from the architect or qualified engineer that the Work will not affect the structural integrity of the building;
- a letter from the architect and/or engineer who prepared the Final Working Drawings, stating that the Alteration will be built in accordance with the Final Working Drawings;
- permits from the City or a letter from the appropriate authority confirming that permits are not required, and
- a certificate of insurance from the Owner's contractor indicating that the contractor has obtained liability insurance and workers compensation insurance satisfactory to the Corporation.

The Owner represents, warrants and agrees that the Alteration will be built in compliance with all applicable laws, regulations and codes and in accordance with the Final Working Drawings. The Owner agrees that the Alteration will not affect the structural integrity of the building.

The Owner agrees that until the Corporation provides written approval for the Alteration, that no work will commence.

Within thirty (30) days after completion of construction of the Alteration, the Owner shall provide:

- (a) a certificate from the architect and/or engineer who prepared the Final Working Drawings, certifying that the Alteration has been completed in accordance with the Final Working Drawings and all applicable laws and building codes, the structural integrity of the building has not been impaired or affected, and the Alteration does not and will not interfere with or impair any structure or the functioning or operation of any machinery or equipment forming part of the common elements; and
- (b) colour photographs of the Alteration showing in sufficient detail all material changes to the Unit completed in the course of the construction of the Alteration.

5. Final Working Drawings Maintained by Corporation.

A complete set of the Final Working Drawings and the photographs referred to in section 4 above shall be maintained by the Corporation.

6. Security Deposit.

The properly protected service elevator is to be used exclusively for the transportation of all equipment and materials. The service elevator must be booked in advance with the Management office for all materials, tools and equipment to be used to install/construct the Alteration. The Owner shall submit a **\$5000 damage deposit as security for this Alteration**, use of the service elevator and any legal, engineering, professional and administrative costs and any other costs the Corporation may incur in any way relating to the requirements of this Agreement. Upon completion of the Alteration, to be performed to the satisfaction of the Corporation, any necessary adjustment shall be made between the parties and the Corporation shall provide the Owner with copies of all invoices with the final account. Upon final completion of the construction of the Alteration, the Corporation agrees, if applicable, to return the security deposit to the Owner, minus all costs and expenses and any deduction for the damages as may reasonably be determined by the Corporation and the costs of registration of this Agreement upon title to the Unit. The requirement

to provide the deposit in no way limits the obligation of the Owner to make additional payments as provided in this Agreement.

7. Completion of Construction.

Construction of the Alteration must be completed within a reasonable time to the satisfaction of the Corporation. If the Owner fails to complete the Alteration within the time permitted, or the Owner's contractor abandons the construction, or fails to meet the requirements of this Agreement, then the Board may by written notice to the Owner cancel the approval granted in connection with the Alteration and require the Owner to promptly restore the Unit to the original condition prior to the commencement of construction of the Alteration, at the sole expense of the Owner.

8. General Construction Matters.

- (a) All construction must be completed by no later than , or as agreed upon by the parties.
- (b) The service elevator must be used exclusively for the transportation and the delivery of goods and materials. The elevator must be reserved at least three (3) working days in advance. The delivery of goods and materials, shall be carried out only between the hours of 9:00 a.m. and 6:00 p.m. from Monday to Saturday and shall not take place on Sundays and public holidays.
- (c) Construction of the Alteration (including the delivery of goods and materials and the reservation and use of the service elevator) shall be carried out in accordance with the Corporation's By-laws and Rules as they may be amended from time to time. Work may only be carried out from 9:00 a.m. and 6:00 p.m. from Monday to Saturday. No construction shall be carried out on Sundays and public holidays.
- (d) Work must be performed under the supervision of a licensed contractor and all trades must be licensed. The Corporation shall be provided with the licensing information for the persons working on the Unit.
- (e) Building materials, supplies and equipment shall be stored in the Unit and/or the Unit's exclusive use common elements, if any. None of the workers or other persons involved in the construction of the Alteration shall be within the building or on the property other than during the hours in which construction is being carried out on the Alteration.
- (f) Construction of the Alteration shall be carried out in such a manner as to prevent:
 - (i) damage to other units, the common elements or exclusive use common elements of the property;
 - (ii) interference with or disturbance to the use and enjoyment of other unit owners of their units and the common elements and exclusive use common elements; and
 - (iii) the cancellation or threatened cancellation of any policy of insurance in existence with respect to the property.
- (g) The Owner covenants, undertakes and agrees that he/she shall be liable and responsible for any costs and expenses arising from or relating to damage to other units, common elements or exclusive use common elements due to the construction of the Alteration, to the extent that such costs and expenses are not covered by the proceeds of the Owner's insurance coverage.
- (h) Construction of the Alteration shall be carried out in compliance with all applicable laws, regulations, codes and rules, including without limitation, building codes, fire codes, zoning by-laws and the declaration, by-laws, rules and any agreement listed thereunder of the Corporation. Prior to commencement of any work, the Owner shall provide the Corporation with evidence that all necessary permits have been obtained from the appropriate municipal or other governmental authorities (if required) and shall submit all such drawings and permits to the Corporation or in

the alternative, shall provide the Corporation with a letter from the appropriate authorities confirming that permits are not required in connection with the construction of the Alteration. Where a final inspection of the Alteration by municipal or other governmental authorities is required, the Owner shall provide the Corporation with proof that such inspection has been completed to the satisfaction of the applicable authorities. Prior to commencement of any work the Owner shall provide the Corporation with a certificate of insurance from the Owner's contractor indicating that such contractor has obtained liability insurance and workers compensation insurance satisfactory to the Corporation.

- (i) Any common elements or exclusive use common elements affected by the construction of the Alteration, excluding the Alteration, shall be restored to their original condition as soon as practical and to the satisfaction of the Board.
- (j) All common elements and exclusive use common elements which could be damaged, defaced or marked directly or indirectly by reason of the construction of the Alteration shall be adequately protected at the cost of the Owner during the construction; provided, however, that the protection shall be removed during hours in which construction of the Alteration is not being performed or as the Corporation may direct.
- (k) The elevator, lobby, corridors and all common elements must be kept free of but not limited to debris, dust, spills, construction materials, appliances and fixtures. All debris shall be disposed of directly into containers approved by the Manager and located as the Manager shall direct or by other means satisfactory to the Manager. The supply and removal of containers shall be at the cost of the Owner, at times specified by the Manager. In no event will debris be allowed to accumulate in or about the building other than on the containers.
- (l) No door giving access to the building or any other area of the property shall be kept open other than when actually in use and no apparatus, scaffolds or hoisting device shall be left unsafely or unattended in a manner so as to permit access to the building by unauthorized persons..
- (m) No interruption of electrical, water or other service to any unit shall be made except at times and for durations specified in writing and then only after at least twenty-four (24) hours' notice has been to the occupant(s) of the units affected.
- (n) No pneumatic or other percussion tools or hammers shall be used without the specific written authorization of the Board and/or the manager of the Corporation, and then only at such times and in such manner as specified.
- (o) The Owner covenants, undertakes and agrees that the construction of the Alteration will not give rise to a construction lien, mortgage, security interest or any other encumbrance affecting the common elements or any unit, and if such an encumbrance should arise, the Owner shall forthwith and without dispute pay the Corporation all amounts and execute all such documents as are required to pay for and effect the discharge and removal of such encumbrance, together with all legal costs and disbursements and any other costs incurred by the Corporation.

9. Failure to Comply.

If the Owner is in breach of any of his/her obligations under this Agreement, or if there are any complaints from residents that the Alteration or the construction of the Alteration creates a noise or other problem, the Board may, acting reasonably, by written notice to the Owner rescind the approval given pursuant to this Agreement and/or require the Owner to remedy the breach which may include the removal of the Alteration and the restoration of the Unit to the original condition prior to the commencement of construction of the Alteration, all at the sole expense of the Owner. If the Owner fails to remedy the breach as required by the Board within ten (10) days after receipt of written notice of the breach, without limiting the Corporation's rights and remedies, the Corporation may (but shall not be obligated) at its option, remedy the breach. Any expenses and costs incurred by the Corporation in remedying any breach by the Owner shall be the responsibility of the Owner in accordance with Section 13 of this Agreement.

10. Insurance and Indemnity.

The Alteration is an improvement made or acquired by the Owner and the Corporation shall have no obligation to place insurance in connection with the Alteration. The Owner acknowledges and agrees that the Alteration is an improvement made by the Owner to the Unit and that the Corporation is under no obligation to insure the Alteration under the Act. The Owner shall indemnify and save harmless the Corporation, its Board of Directors, owners, property manager and its agents and employees from all claims, actions or causes of action that might arise by reason of any or all the construction, installation, operation, use, inspection, maintenance, repair and repair after damage of the Alteration, including:

- (a) any insurance deductible payable by the Corporation;
- (b) liability to third parties (e.g., personal injury, property damage, etc.) and property damage of any nature, whether to the Alteration or to the Unit, common elements, exclusive use common elements or other units in, or assets of, the Corporation or otherwise;
- (c) the costs referred to in Section 13 of this Agreement, and
- (d) any breach by the Owner of the terms of this Agreement.

11. Removal of Alteration.

- (a) The Owner shall not remove the Alteration without the prior written consent of the Board, which consent will not be unreasonably withheld. Any consent to the removal of the Alteration may, at the discretion of the Board, require restoration of the Unit to its original condition, at the Owner's cost and expense.
- (b) The Owner agrees that if notice is received from the Corporation that the common elements and/or exclusive use common elements of the building are not in good repair as a result of the Alteration and that maintenance and/or repairs to the common elements and/or exclusive use common elements must be carried out, the Corporation has, acting reasonably, the right to carry out any maintenance and/or repair necessary to bring the common elements and/or exclusive use common elements into good repair and all costs incurred by the Corporation including an administrative cost for overseeing the work, shall be the responsibility of the Owner.
- (c) The Owner will temporarily remove the Alteration or part(s) thereof (if so indicated by the Corporation) at his/her sole expense within ten (10) days after being notified by the Corporation, acting reasonably, (except in an emergency, in which case only reasonable notice in the circumstances is required) that repairs are required to be made to either a Unit, any common elements and/or the exclusive use common elements, which require the removal. If the Owner fails to remove the Alteration or part(s) thereof when so notified, the Corporation may remove and dispose of it without further notice, liability or compensation whatsoever to the Owner and restore the common elements to their original condition. All costs incurred by the Corporation in doing so shall be the responsibility of the Owner, including any increased costs incurred by the Corporation to carry out its maintenance and/or repair obligations as a result of the existence of the Alteration.

12. Inspection.

At any time during construction of the Alteration and upon request for a Status Certificate, the Owner consents to the Corporation causing an inspection to be made of the Alteration to confirm compliance with this Agreement. The Owner agrees to provide access to the Unit for the purposes of the inspection. If the Owner shall be unavailable to provide access upon twenty-four (24) hours' notice, the Corporation is hereby authorized to access the Unit for purposes of the inspection, at any time between 9:00 a.m. and 5:00 p.m. The Owner consents that notice of this Agreement shall be included in any such Status Certificate issued by the Corporation regarding the Unit.

13. Recovery of Costs.

All costs, charges, damages or expenses (including all utility charges that may be metered for the Alteration, if any, and legal costs) incurred by the Corporation, with respect to the Alteration or this Agreement together with interest at the rate specified in the Corporation's by-law for non-payment of common expenses, shall be the responsibility of the Owner, including, without limitation, costs relating to the following:

- (a) the failure of the Owner to comply with the terms of this Agreement;
- (b) the failure of the Owner to insure, repair after damage, maintain and/or replace the Alteration;
- (c) any damage to other units, common elements or exclusive use common elements of the property;
- (d) the enforcement of this Agreement; and
- (e) any other costs incurred by the Corporation relating to this Agreement or the Alteration whether or not expressly stated in this Agreement.

The Owner agrees that the above-noted costs, together with interest and all legal costs and disbursements, shall be paid by the Owner within twenty (20) days after receipt of written request/invoice from the Corporation and shall be deemed to be common expenses attributable to the Unit and recoverable by the Corporation as such.

14. Notice.

Any notice given to the Owner shall be given in accordance with the by-laws of the Corporation. Any notice given to the Corporation shall be given personally or by registered mail to the President or Secretary of the Corporation, or Property Manager.

15. Consideration.

In consideration of the consent and permission hereinbefore granted to the Owner by the Corporation, the Owner covenants and agrees with the Corporation and its successors that he/she will diligently perform all of the Owner's obligations under this Agreement, which binds the Unit and that they are enforceable against the Owner, as well as the Owner's successors, assigns and all subsequent transferees, purchasers or successors in title of the Unit.

16. Registration.

In accordance with clause 98(3)(b) of the Act, the Owner hereby consents to the registration of this Agreement on title to the Unit by the Corporation, at the Owner's cost. The Owner further acknowledges that this Agreement and the approvals granted herein are not binding until this Agreement is registered on title to the Unit.

17. Deletion from Title.

If the Owner does not complete the Alteration as required and within the time frame provided for in this Agreement and the Corporation cancels this Agreement, or if the Alteration is removed and not replaced or if for any reason the Corporation cancels this Agreement in accordance with the terms hereof, the notice of this Agreement may be deleted from title to the Unit by the Land Registrar on the direction of the Corporation and the Owner hereby consents to such deletion.

Initials of Owner: _____ Initials of Owner: _____

18. Severability.

If any provision of this Agreement is found to be void, voidable, or unenforceable for any reason whatsoever, then that provision shall be deemed to be severed from the remainder of this Agreement and all other provisions of this Agreement shall remain in full force and effect.

19. Counterpart and Electronic Signatures.

This Agreement may be executed (including by electronic means) in any number of counterparts, each of which (including any electronic transmission of an executed signature page) is deemed to be an original, and such counterparts together constitute one (1) and the same Agreement.

20. Successors and Assigns.

The Owner covenants and agrees with the Corporation and its successors and assigns that the Owner shall diligently perform all of his/her obligations under this Agreement. The Owner acknowledges that this Agreement binds the Unit and is enforceable against the Owner's successors and assigns.

21. Mediation and Arbitration.

In the event a dispute arises with respect to any issue referred to in this Agreement, either party may require mediation, and if necessary, arbitration in accordance with the provisions set out in Section 132 of the Act, subject to compliance with any mediation or arbitration provisions as may be contained in a by-law of the Corporation from time to time.

IN WITNESS WHEREOF the parties hereto have executed this Agreement.

OWNER:

_____	_____
WITNESS	NAME
NAME:	

The person consenting below is my spouse:

_____	_____
WITNESS	NAME
NAME:	

THE CORPORATION:

**** CONDOMINIUM CORPORATION NO. ****

Per: _____
NAME
TITLE

Per: _____
NAME
TITLE

We have the authority to bind the Corporation

SCHEDULE “A”

1. The Alteration includes:

Pictures, plans and/or specifications are maintained by the Corporation for the Alteration

2. Building Permit Number(s) (if any): _____.
3. Plumbing Permit Number(s) (if any): _____.
4. Electrical Permit Number(s) (if any): _____.

SECTION 98 ALTERATION AGREEMENT

THIS AGREEMENT made pursuant to section 98 of the *Condominium Act, 1998* dated the _____ day of _____, 20__.

B E T W E E N :

(the “**Corporation**”)

- and -

(individually and collectively the “**Owner**”)

RECITALS:

- (a) The Owner is the registered owner of the condominium unit municipally known as Unit , comprising Unit , Level , in Condominium Plan No. (the “**Unit**”);
- (b) The Owner wishes to make changes and/or alterations to the exclusive use common elements relating to the Unit, in accordance with the requirements and/or specifications contained in Schedule "A" attached to this Agreement, including any plans and/or drawings referenced therein, all in compliance with applicable laws and to the extent only that the changes and/or alterations and the construction thereof are not contrary to the *Condominium Act, 1998* (the “**Act**”) or the declaration, by-laws, rules and any agreements listed therein relating to the Corporation or any other governing law (collectively, the “**Alteration**”);
- (c) The foregoing recitals are made as representations and statements of fact by the Owner;
- (d) The Owner agrees to enter into this Agreement pursuant to and in accordance with Section 98 of the Act; and
- (e) The board of directors of the Corporation (the “**Board**”), by resolution, have approved the Alteration, subject to the terms and conditions of this Agreement.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants and agreements hereinafter contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

The foregoing recitals are true and correct in substance and in fact and form an integral part of this Agreement by reference. In this Agreement, the terms used herein shall have the same meaning in the Act unless otherwise specified. Any reference in this Agreement to "common elements" shall

be deemed to include those portions of the common elements designated as being for the exclusive use by one (1) or more unit owners.

1. Costs Concerning the Alteration.

The Owner shall have ownership of and shall be solely responsible for the installation, construction and insurance of the Alteration, including but not limited to, the maintenance and repair after damage of the Alteration in a first-class condition, any damages caused as a result of the installation of the Alteration and for all costs associated therewith. The Corporation has no obligations in respect of the Alteration.

2. Compliance with Schedule "A".

The Owner is aware of and will comply with the provisions of Schedule "A" attached to and forming part of this Agreement, as well as the Final Working Drawings (if applicable) referred to in Section 4 of this Agreement.

3. Conditional Approval.

The approval to the Alteration granted by the Board referred to in recital (e) of this Agreement is and shall continue to be conditional upon compliance by the Owner with this Agreement.

4. Deliveries and Written Approval Before Starting the Alteration.

The Owner shall, at least seven (7) days prior to the commencement of any Work, provide the following to the Corporation:

- the Final Working Drawings prepared and stamped by a certified architect or engineer in good standing to be used to construct the Alteration, which drawings will show in complete detail the final proposed Alteration (the "**Final Working Drawings**");
- a letter from the architect or qualified engineer that the Work will not affect the structural integrity of the building;
- a letter from the architect and/or engineer who prepared the Final Working Drawings, stating that the Alteration will be built in accordance with the Final Working Drawings;
- permits from the City or a letter from the appropriate authority confirming that permits are not required, and
- a certificate of insurance from the Owner's contractor indicating that the contractor has obtained liability insurance and workers compensation insurance satisfactory to the Corporation.

The Owner represents, warrants and agrees that the Alteration will be built in compliance with all applicable laws, regulations and codes and in accordance with the Final Working Drawings. The Owner agrees that the Alteration will not affect the structural integrity of the building.

The Owner agrees that until the Corporation provides written approval for the Alteration, that no work will commence.

Within thirty (30) days after completion of construction of the Alteration, the Owner shall provide:

- (a) a certificate from the architect and/or engineer who prepared the Final Working Drawings, certifying that the Alteration has been completed in accordance with the Final Working Drawings and all applicable laws and building codes, the structural integrity of the building has not been impaired or affected, and the Alteration does not and will not interfere with or impair any structure or the functioning or operation of any machinery or equipment forming part of the common elements; and
- (b) colour photographs of the Alteration showing in sufficient detail all material changes to the Unit and common elements completed in the course of the construction of the Alteration.

5. Final Working Drawings Maintained by Corporation.

A complete set of the Final Working Drawings and the photographs referred to in Section 4 of this Agreement shall be maintained by the Corporation.

6. Security Deposit.

The properly protected service elevator is to be used exclusively for the transportation of all equipment and materials. The service elevator must be booked in advance with the Management office for all materials, tools and equipment to be used to install/construct the Alteration. The Owner shall submit a **\$5,000.00** damage deposit as security for the Alteration, use of the service elevator and any legal, engineering, professional and administrative costs and any other costs the Corporation may incur in any way relating to the requirements of this Agreement. Upon completion of the Alteration, to be performed to the satisfaction of the Corporation, any necessary adjustment shall be made between the parties and the Corporation shall provide the Owner with copies of all invoices with the final account. Upon final completion of the construction of the Alteration, the Corporation agrees, if applicable, to return the security deposit to the Owner, minus all costs and expenses and any deduction for the damages as may reasonably be determined by the Corporation and the costs of registration of this Agreement upon title to the Unit. The requirement to provide the security deposit in no way limits the obligation of the Owner to make additional payments as provided in this Agreement.

7. Completion of Construction.

Construction of the Alteration must be completed within a reasonable time to the satisfaction of the Corporation. If the Owner fails to complete the Alteration within the time permitted, or the Owner's contractor abandons the construction, or fails to meet the requirements of this Agreement, then the Board may by written notice to the Owner cancel the approval granted in connection with the Alteration and require the Owner to promptly restore the Unit and/or the common elements to the original condition prior to the commencement of construction of the Alteration, at the sole expense of the Owner.

8. General Construction Matters.

- (a) All construction must be completed by no later than , or as agreed upon by the parties.

- (b) The service elevator must be used exclusively for the transportation and the delivery of goods and materials. The elevator must be reserved at least three (3) working days in advance. The delivery of goods and materials shall be carried out only between the hours of 9:00 a.m. and 6:00 p.m. from Monday to Saturday and shall not take place on Sundays and public holidays.
- (c) Construction of the Alteration (including the delivery of goods and materials and the reservation and use of the service elevator) shall be carried out in accordance with the Corporation's By-laws and Rules as they may be amended from time to time. Work may only be carried out from 9:00 a.m. and 6:00 p.m. from Monday to Saturday. No construction shall be carried out on Sundays and public holidays.
- (d) Work must be performed under the supervision of a licensed contractor and all trades must be licensed. The Corporation shall be provided with the licensing information for the persons working on the Unit.
- (e) Building materials, supplies and equipment shall be stored in the Unit and/or the Unit's exclusive use common elements, if any. None of the workers or other persons involved in the construction of the Alteration shall be within the building or on the property other than during the hours in which construction is being carried out on the Alteration.
- (f) Construction of the Alteration shall be carried out in such a manner as to prevent:
 - (i) damage to the property;
 - (ii) interference with or disturbance to the use and enjoyment of other unit occupants of their units and the common elements; and
 - (iii) the cancellation or threatened cancellation of any policy of insurance in existence with respect to the property.
- (g) The Owner covenants, undertakes and agrees that he/she shall be liable and responsible for any costs and expenses arising from or relating to damage to other units or common elements due to the construction of the Alteration, to the extent that such costs and expenses are not covered by the proceeds of the Owner's insurance coverage.
- (h) Where a final inspection of the Alteration by municipal or other governmental authorities is required, the Owner shall provide the Corporation with proof that such inspection has been completed to the satisfaction of the applicable authorities.
- (i) Any common elements affected by the construction of the Alteration, excluding the Alteration, shall be restored to their original condition as soon as practical and to the satisfaction of the Board.
- (j) All common elements which could be damaged, defaced or marked directly or indirectly by reason of the construction of the Alteration shall be adequately

protected at the cost of the Owner during the construction; provided, however, that the protection shall be removed during hours in which construction of the Alteration is not being performed or as the Corporation may direct.

- (k) The elevator, lobby, corridors and all common elements must be kept free of but not limited to debris, dust, spills, construction materials, appliances and fixtures. All debris shall be disposed of directly into containers approved by the Board and located as the Board shall direct or by other means satisfactory to the Board. The supply and removal of containers shall be at the cost of the Owner, at times specified by the Board. In no event will debris be allowed to accumulate in or about the building other than on the containers.
- (l) No door giving access to the building or any other area of the property shall be kept open other than when actually in use and no apparatus, scaffolds or hoisting device shall be left unsafely or unattended in a manner so as to permit access to the building by unauthorized persons.
- (m) No interruption of electrical, water or other service to any unit shall be made except at times and for durations specified in writing and then only after at least twenty-four (24) hours' notice has been to the occupant(s) of the units affected.
- (n) No pneumatic or other percussion tools or hammers shall be used without the specific written authorization of the Corporation, and then only at such times and in such manner as specified.
- (o) The Owner covenants, undertakes and agrees that the construction of the Alteration shall not give rise to a construction lien, mortgage, security interest or any other encumbrance affecting the common elements or any unit, and if such an encumbrance should arise, the Owner shall forthwith and without dispute pay the Corporation all amounts and execute all such documents as are required to pay for and effect the discharge and removal of such encumbrance, together with all legal costs and disbursements and any other costs incurred by the Corporation in accordance with Section 13 of this Agreement.

9. Failure to Comply.

If the Owner is in breach of any of the Owner's obligations under this Agreement, or if there are any complaints from unit occupants that the Alteration or the construction of the Alteration creates a noise or other problem, the Board may, acting reasonably, by written notice to the Owner rescind the approval given pursuant to this Agreement and/or require the Owner to remedy the breach which may include the removal of the Alteration and the restoration of the Unit and/or common elements to the original condition prior to the commencement of construction of the Alteration, all at the sole expense of the Owner. If the Owner fails to remedy the breach as required by the Board within ten (10) days after receipt of written notice of the breach, without limiting the Corporation's rights and remedies, the Corporation may (but shall not be obligated) at its option, remedy the breach. Any expenses and costs incurred by the Corporation in remedying any breach by the Owner shall be the responsibility of the Owner in accordance with Section 13 of this Agreement.

10. Insurance and Indemnity.

The Alteration is an improvement made or acquired by the Owner and the Corporation shall have no obligation to place insurance in connection with the Alteration. The Owner acknowledges and agrees that the Alteration is an improvement made by the Owner to the Unit and/or the common elements and that the Corporation is under no obligation to insure the Alteration under the Act. The Owner shall indemnify and save harmless the Corporation, its Board, owners, property manager and its agents and employees from all claims, actions or causes of action that might arise by reason of any or all the construction, installation, operation, use, inspection, maintenance, repair and repair after damage of the Alteration, including:

- (a) any insurance deductible payable by the Corporation;
- (b) liability to third parties (e.g., personal injury, property damage, etc.) and property damage of any nature, whether to the Alteration or to the Unit, common elements, or other units in, or assets of, the Corporation or otherwise;
- (c) the costs referred to in Section 13 of this Agreement, and
- (d) any breach by the Owner of the terms of this Agreement.

11. Removal of Alteration.

- (a) The Owner shall not remove the Alteration without the prior written consent of the Board which consent shall not be unreasonably withheld. Any consent to the removal of the Alteration may, at the discretion of the Board, require restoration of the common elements to their original condition, at the Owner's cost and expense.
- (b) The Owner agrees that if notice is received from the Corporation that the common elements are not in good repair as a result of the Alteration and that maintenance and/or repairs to the common elements must be carried out, the Corporation has, acting reasonably, the right to carry out any maintenance and/or repair necessary to bring the common elements into good repair and all costs incurred by the Corporation including an administrative cost for overseeing the work, shall be the responsibility of the Owner in accordance with Section 13 of this Agreement.
- (c) The Owner will temporarily remove the Alteration or part(s) thereof (if so indicated by the Corporation) at his/her sole expense within ten (10) days after being notified by the Corporation, acting reasonably, (except in an emergency, in which case only reasonable notice in the circumstances is required) that repairs are required to be made to either a Unit, any common elements and/or the exclusive use common elements, which require the removal. If the Owner fails to remove the Alteration or part(s) thereof when so notified, the Corporation may remove and dispose of it without further notice, liability or compensation whatsoever to the Owner and restore the common elements to their original condition. All costs incurred by the Corporation in doing so shall be the responsibility of the Owner, including any increased costs incurred by the Corporation to carry out its maintenance and/or repair obligations as a result of the existence of the Alteration.

12. Inspection.

At any time during construction of the Alteration and upon request for a Status Certificate, the Owner consents to the Corporation causing an inspection to be made of the Alteration to confirm compliance with this Agreement. The Owner agrees to provide access to the Unit and common elements for the purposes of the inspection. If the Owner shall be unavailable to provide access upon twenty-four (24) hours' notice, the Corporation is hereby authorized to access the Unit and common elements for purposes of the inspection, at any time between 9:00 a.m. and 5:00 p.m. The Owner consents that notice of this Agreement shall be included in any such Status Certificate issued by the Corporation regarding the Unit.

13. Recovery of Costs.

All costs, charges, damages or expenses (including all utility charges that may be metered for the Alteration, if any, and legal costs) incurred by the Corporation, with respect to the Alteration or this Agreement together with interest at the rate specified in the Corporation's by-law for non-payment of common expenses, shall be the responsibility of the Owner, including, without limitation, costs relating to the following:

- (a) the failure of the Owner to comply with the terms of this Agreement;
- (b) the failure of the Owner to insure, repair after damage, maintain and/or replace the Alteration;
- (c) any damage to the property;
- (d) the enforcement of this Agreement; and
- (e) any other costs incurred by the Corporation relating to this Agreement or the Alteration whether or not expressly stated in this Agreement.

The Owner agrees that the above-noted costs, together with interest and all legal costs and disbursements, shall be paid by the Owner within twenty (20) days after receipt of written request/invoice from the Corporation and shall be deemed to be common expenses attributable to the Unit and recoverable by the Corporation as such.

14. Notice.

Any notice given to the Owner shall be given in accordance with the by-laws of the Corporation. Any notice given to the Corporation shall be delivered to the Corporation at its address for service as amended from time to time.

15. Consideration.

In consideration of the consent and permission hereinbefore granted to the Owner by the Corporation, the Owner covenants and agrees with the Corporation and its successors that the Owner will diligently perform all of the Owner's obligations under this Agreement, which binds

the Unit and that they are enforceable against the Owner, as well as the Owner's successors, assigns and all subsequent transferees, purchasers or successors in title of the Unit.

16. Registration.

In accordance with clause 98(3)(b) of the Act, the Owner hereby consents to the registration of this Agreement on title to the Unit by the Corporation, at the Owner's cost. The Owner further acknowledges that this Agreement and the approvals granted herein are not binding until this Agreement is registered on title to the Unit.

17. Deletion from Title.

If the Owner does not complete the Alteration as required and within the time frame provided for in this Agreement and the Corporation cancels this Agreement, or if the Alteration is removed and not replaced or if for any reason the Corporation cancels this Agreement in accordance with the terms hereof, the notice of this Agreement may be deleted from title to the Unit by the Land Registrar on the direction of the Corporation and the Owner hereby consents to such deletion.

Initials of Owner: _____ Initials of Owner: _____

18. Severability.

If any provision of this Agreement is found to be void, voidable, or unenforceable for any reason whatsoever, then that provision shall be deemed to be severed from the remainder of this Agreement and all other provisions of this Agreement shall remain in full force and effect.

19. Successors and Assigns.

The Owner covenants and agrees with the Corporation and its successors and assigns that the Owner shall diligently perform all of his/her obligations under this Agreement. The Owner acknowledges that this Agreement binds the Unit and is enforceable against the Owner's successors and assigns.

20. Use of the Singular.

In this Agreement the use of the singular shall be deemed to include plural wherever the context so requires and vice versa.

21. Joint and Several Liability.

If there is more than one (1) Owner:

- (a) all covenants, obligations, representations and warranties made by the Owner in or on account of this Agreement shall be deemed to have been made on a joint and several basis;
- (b) in the event of default by any Owner pursuant to this Agreement, each Owner shall be deemed to be in default under this Agreement; and

- (c) default by any Owner shall permit the Corporation, without limiting its rights at law, to exercise its remedies pursuant to this Agreement or otherwise at law, against any Owner, as the Corporation shall determine in its discretion.

22. Counterpart and Electronic Signatures.

This Agreement may be executed (including by electronic means) in any number of counterparts, each of which (including any electronic transmission of an executed signature page) is deemed to be an original, and such counterparts together constitute one (1) and the same Agreement.

23. Mediation and Arbitration.

In the event a dispute arises with respect to any issue referred to in this Agreement, either party may require mediation, and if necessary, arbitration in accordance with the provisions set out in Section 132 of the Act, subject to compliance with any mediation or arbitration provisions as may be contained in a by-law of the Corporation from time to time.

IN WITNESS WHEREOF the parties hereto have executed this Agreement.

Witness

▶ (Name)

Witness

▶ (Name)

**** CONDOMINIUM CORPORATION NO. ****

Per: _____

Name: ▶

Title: ▶

Per: _____

Name: ▶

Title: ▶

I/We have authority to bind the corporation

SCHEDULE “A”

1. The Alteration includes:

Updating the master bedroom balcony floor with granite grip.

Pictures, plans and/or specifications are maintained by the Corporation for the Alteration

2. Building Permit Number(s) (if any):



Law Society
of Ontario

Barreau
de l'Ontario

TAB 11

20th Real Estate Law Summit - Day 2

Dealing with Environmental Consultants
Who, What, When, Where and How?

Rosalind Cooper, C.S.

Fasken Martineau DuMoulin LLP

April 20, 2023



Dealing with Environmental Consultants

Who, What, When, Where and How?

Rosalind H. Cooper

Fasken Martineau DuMoulin LLP

One of the most commonly asked questions in the environmental law area from real estate practitioners relates to environmental consultants. The questions span from which ones to hire, when one should engage them and for what purpose, the terms of engagement, the scope of work, reliance, limits of liability, and who should interpret the results of environmental reports.

Having mediated numerous environmental disputes, I have seen multiple occasions where consultants and/or legal counsel get drawn into litigation, often because there is a failure to properly manage client expectations or a misunderstanding as to what is being done and by whom.

The following are some key points and advice for real estate practitioners when it comes to managing consultants, although it is always important to evaluate each situation and determine what is appropriate on a case by case basis.

WHO to Hire?

As with lawyers, the consultant that is retained on a project is important, both from the perspective of expertise and experience in the particular subject matter area, and the intended purpose for the work product.

For example, if I was asked to suggest an environmental consultant in connection with a case, where there will be the need to liaise with the Ministry of the Environment, Conservation and Parks (“Ministry”), I would be inclined to select a consultant that I know has a solid reputation and is well-respected by the Ministry, even if the engagement fees will be higher than might otherwise be the case. However, in a situation where there is no need to liaise with the Ministry and the key is getting a solid work product done as economically as possible, my recommendations for an environmental consultant might be quite different.

Similarly, if the task relates to a matter where there could be litigation, either at hand or ensuing, my inclination would be to recommend a consultant that would function as a good expert witness at trial. I might also target my recommendations, depending on the nature of my client. For example, I might ask my client whether they are looking for an extremely thorough technical review, regardless of cost versus a “quick and dirty” review because costs are an issue. It is important to properly explain to the client and document the pros and cons associated with the selection of the consultant based on the objectives of the client and the project so that there is no dispute on this point down the road. If a client indicates that they can only spend a limited amount on a consultant, then you should document those instructions and your caution to the client that this means that the review may not be as fulsome as otherwise.

There are some consultants that are particularly good at conducting peer reviews of other consultant reports, but perhaps less so at doing the underlying technical work. Therefore, a recommendation for an environmental consultant for a peer review would be quite different than for a different task.

Costing amongst consultants can also differ considerably. In some instances when the scope of work is significant, it is worthwhile to obtain several proposals from different consultants, both to assess the recommended scope of work, but also to assess differences in costing for such work. In that regard, it is important to not simply look at the final estimate of costs without considering other aspects, including the scope of the work, contingencies, and other elements of the proposal, including in the terms and conditions (discussed below). It is often too easy to recommend engaging the less costly consultant, but it is important to conduct a proper analysis of the entire proposal. For example, if one proposal entails 4 boreholes/monitoring wells and costs \$25,000 and another one provides for 7 boreholes/monitoring wells and costs \$40,000, one might be inclined to presume the

more costly one is more than what is required. However, it may be that the more expensive proposal involves areas that need to be assessed and that the less expensive proposal is not properly evaluating. It takes experience reviewing and evaluating proposals to provide proper advice and guidance to your client on selecting the appropriate environmental consultant.

Similarly, when wells are installed, they need to be decommissioned. When waste is generated from environmental investigations, it needs to be removed. All of these additional costs need to be included in the costing for a fair comparison to be made amongst consultants in terms of their costing proposals.

In addition, given the commentary below regarding limitations on liability for environmental consultants, ensuring that your client is relying on a strong environmental consultant becomes even more important since there may not always be recourse for your client.

All of these examples serve to illustrate the point that not all environmental consultants are created equal. My own practice is to often recommend several consultants and explain to the client the basis for the recommendations but ultimately leave the final selection to the client, with my guidance.

WHAT needs to be done?

Other than completing a Phase 1 Environmental Site Assessment or a Phase II Environmental Site Assessment, both of which must follow certain CSA standards, it is important to properly direct an environmental consultant with respect to the terms of the engagement.

In circumstances, for example, where a peer review is being conducted, it is important to set out the specific questions and the nature of the expected review and the areas on which advice is required from the environmental consultant. There must be a common understanding between client and legal counsel and between legal counsel and consultant with respect to expectations and scope of work. The failure to ensure such a common understanding can often lead to dissatisfaction and potentially litigation for both legal counsel and consultant.

I have seen many instances where an environmental consultant is not properly instructed on scope of work and expectations by other counsel. Many environmental consultants are experienced with transactions and other circumstances that your client may be facing. Providing the consultant with proper background and context is important for ensuring that the work product meets expectations and achieves the intended purpose.

WHEN - Timing

This is often an overlooked aspect when dealing with environmental consultants that can be critical, particularly in the context of transactions. The time required to properly complete a Phase 1 Environmental Site Assessment or a Phase II Environmental Site Assessment can vary depending on various factors but a general guideline would be 4 to 6 weeks for completing a Phase 1 Environmental Site Assessment and 8 to 10 weeks minimum for completing a Phase II Environmental Site Assessment. Factors affecting these timelines include how busy the environmental consultant is, availability of drillers, and restrictions on site access.

Closing conditions and other facets of a transaction may be impacted by these timelines and it is therefore important to discuss them in advance with environmental consultants to ensure an understanding by the environmental consultant of the importance of meeting particular deadlines and the consequences of failing to meet those deadlines. In one recent transaction, an environmental consultant was selected out of three possible options on the basis that the environmental consultant had the shortest delivery date of the work product and this

was critical to the transaction. As the deadline approached, the environmental consultant indicated that he might be a “few days late”. We quickly explained that the delivery date was critical to the time-sensitive transaction and the loss of a few days would put the client in the position of having to waive an environmental condition without any information on which to base the decision. The consultant was able to expedite his review and deliver on time.

Counsel’s role includes monitoring the progress of the work and checking in with the environmental consultant to ensure that the delivery date and the product meets the required specifications. The commitment to a particular timeframe for completion of work should be a term and condition of the retainer with the environmental consultant, but this is a frequently overlooked aspect of the terms of engagement for the environmental consultant.

Timing can also be important in terms of when testing is conducted. For example, indoor air testing is often best carried out during the winter season when doors and windows are kept sealed in order to be properly representative of the worst case scenario.

WHERE Are they Located

In dealing with clients located in other provinces or in the United States, they will often wish to use environmental consultants that do not operate in the jurisdiction where the land is situate. I recommend exercising caution in this regard. Environmental consultants in other jurisdictions are not often well versed with the rules of play elsewhere and this can impact the advice they are providing in some cases. It is important to assess the scope of work and decide if the consultant being located outside of the jurisdiction might have an impact or play a role in the work product and guide your client appropriately depending on the answer to that question.

That said, larger transactions involving a portfolio of multiple properties requires a consultant that has the staff to mobilize concurrently to numerous sites in various locations. It is important to assist your client in identifying the appropriate

consultant that is properly situated or with locations in proximity to the sites that are part of the acquisition.

HOW - Terms and conditions

One of the most frequent errors that I come across, when environmental consultants are retained, relates to the terms and conditions included in the retainer.

Of greatest significance is a limitation of liability clause where the consultant purports to limit the exposure to liability, based on the cost of the work or \$50,000, whichever is less. While one might completely understand why an environmental consultant would wish to limit its liability, this is wholly unsatisfactory from a client perspective. Take the example where a client is intending to purchase a property and is relying on an environmental consultant's assessment of the property in terms of the potential for contamination. The client proceeds with the transaction and later finds out the environmental consultant was wrong in its assessment and the property is heavily contaminated. It will be a great disappointment for that client to realize that they are limited to total damages of \$20,000 because that was the cost of the work undertaken by the environmental consultant. And that disappointment may lead to blaming legal counsel for failing to point out this risk when engaging the environmental consultant.

Most consultants will carry insurance for their work, and the limits of such insurance are generally \$2 million or higher. There is no reason why a reasonable environmental consultant would not be able to provide a limitation of liability that is reflective of their insurance coverage.

Similarly, I will often see terms and conditions that require a client to indemnify the environmental consultant with respect to any claims. It is often the case the consultants are named in litigation, even by parties that did not retain the consultant, and it would be unfortunate for your client to have to pay the defence costs associated with such a scenario simply because they agreed to terms and conditions requiring indemnification of the environmental consultant.

Some terms and conditions from environmental consultants will state that no reliance will be extended to any third parties on the work product. This could be problematic if the intent is to provide a lender or another party with reliance on the report prepared by the environmental consultant. If the retainer contains such a term, it is important to negotiate on that and exclude such a prohibition, failing which a retainer with a different environmental consultant should be pursued.

These examples demonstrate why it is extremely important to review in detail the terms and conditions associated with the environmental consulting retainer to ensure that it properly reflects the agreed-upon terms and, more importantly, to ensure that you communicate to the client and that the client understands what they are getting and not getting, and any restrictions that might be at play.

HOW - Privilege and Consultant Retainers

This is a complex area that goes well beyond the scope of this paper, but it is important for lawyers to appreciate that there are circumstances where the retainer of an environmental consultant could or ought to be subject to solicitor client privilege or litigation privilege, depending on the circumstances. If that is the case, it is critical to ensure that the appropriate safeguards are in place to ensure that such a privilege can be upheld if challenged at some point in the future. It is also important to ensure that, when working with a consultant under privilege, the consultant is familiar with and understands the requirements of adhering to privilege. You should ask the consultant whether or not they have had experience working under legal privilege and never assume that that is the case when working with an environmental consultant.

HOW - Commenting on Consulting Reports.

As lawyers, we are often asked to explain for our clients the contents of environmental reports, or perhaps, assumptions are made by the client as to the role of legal counsel and their expertise in advising on such reports.

A good practice is for legal counsel to, when providing to the client the report that has been solicited on behalf of the client, to either advise the client that the report has not been reviewed and will not be reviewed absent further instructions or to request instructions on whether the client wishes a review to be conducted of the environmental report.

If the client does not wish the report to be reviewed, that should be made clear in writing by stating that the lawyer is not reviewing the environmental report, but simply passing it along to the client for its own review and consideration. If, however, the client would like a review to be conducted by legal counsel, it is important to ensure that the lawyer has the requisite expertise and experience in order to be able to properly review and comment on the report. Most environmental reports are, by their nature, extremely technical, and there can be subtleties attached that not all lawyers may understand because they are not in the practice of reviewing such reports. This may prevent them from identifying gaps or deficiencies in reports which they review. For this reason, it is important to either engage experienced environmental counsel to conduct the review or to make it clear to the client that you are not an expert and are reviewing the environmental report without the requisite expertise to avoid potential liability issues.



Law Society
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TAB 12

20th Real Estate Law Summit - Day 2

Common Errors by Lawyers That Lead to Title Insurance Claims

Common Errors by Lawyers That Lead to Title Insurance Claims (PowerPoint)

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Common Errors by Lawyers that Lead to Title Insurance Claims

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Most claims under title insurance policies arise, not because of errors by lawyers, but simply are due to circumstances that exist, but are unknown, at the time of closing, and which are covered by the terms of the policy. Nonetheless, some of the costliest claims are preventable and are caused by lawyer error. Contained within this paper are some of the frequent examples of these errors, as well, as some guidance on ensuring clients obtain the appropriate coverage.

There are three main categories in which these errors fall as set out below.

- 1- Failure to comply with real estate practice standards
- 2- Failure to identify and recognize unique aspects of a particular transaction
- 3- Title insurance related errors

Most of these can be avoided by having proper protocols in place, including:

- using a comprehensive client intake form;
- maintaining and following proper checklists;
- obtaining clear instructions from your client and getting those instructions in writing (including using acknowledgments);
- monitoring and supervising your support staff;
- understanding the title insurer's requirements;
- recognizing when to seek guidance from a mentor; and
- turning down deals at the outset for which you do not possess the requisite expertise, or which have problematic elements (signs of title fraud) in them.

Failure to Comply with Real Estate Practice Standards

There are a wide range of issues that can arise under this category. They range from issues regarding the failure to pay enough attention to the details of a transaction to not understanding and/or applying legal principles correctly.

(A) Dealing with Mortgages

Mortgage Discharge Statements/Verifying Outstanding Balances

Lawyers continue to accept improper material as evidence as to what is outstanding on an existing mortgage. This information may be needed because an existing mortgage is to be discharged or, when acting for a second/third etc. priority lender, that new lender requires confirmation as to the balance of the prior mortgages.

Lawyers should recall the following:

- A printout of a mortgage balance from online banking is not a reliable statement as to what is owed under a mortgage.

- The principal amount shown on the parcel register does not necessarily reflect the maximum that could be owed under the mortgage as that lender may have paid off a prior lender and added the amount paid to its outstanding balance.
- Never accept a mortgage statement from the borrower directly – always obtain it from the lender. Borrowers have forged statements on many occasions, including ones indicating a zero balance.

Proper practice requires that all statements should come from the lender directly (or the lender's legal counsel). The adverse results that occur when a statement is falsified include: i) the second priority lender not being able to recover if there is a default because the balance on the first is larger than expected and thus takes all the sale proceeds; ii) the existing mortgage is not discharged due to lack of sufficient funds; iii) the transaction is a title fraud and the forged statement is just one part of the fraudulent documentation generated by the fraudster.

Payment of Mortgage Proceeds

Title fraud received a lot of media attention at the beginning of 2023. It is a significant problem for the real estate industry. Two factors are common in title fraud – i) impersonation; and ii) misdirection of the proceeds of the mortgage. With respect to the latter factor, the fraudster simply instructs the lawyer to send the proceeds of the mortgage to a party that is not the title holder(s) and not a prior registered encumbrancer (or other party permitted by title insurer requirements). In private lender refinances title insurers require the borrower's lawyer to provide the lender's lawyer with an undertaking to pay the proceeds of the insured mortgage only to permitted parties. Too often lawyers disregard their undertaking and pay the proceeds to unpermitted third parties. Sometimes these transactions turn out to be fraudulent and the mortgage proceeds have been successfully diverted to a virtually untraceable location. When the lawyer has not complied with their undertaking, this facilitates the movement of the mortgage proceeds and such a request by a client is a major red flag of possible title fraud. It is more difficult for a fraudster to commit a title fraud when they have to negotiate a cheque made payable to the name of the registered title holder(s). If they successfully deposit that cheque into a bank account in the name of the registered title holders(s) there are banking rules that facilitate the return of the money from the bank that negotiated the cheque. Accordingly, losses can be mitigated by ensuring that the only permitted parties receive the funds. These circumstances have occurred in both refinance and purchase/sale transactions.

Additionally, several recent title frauds have involved mortgage proceeds being wired/deposited into accounts without verification that the account was actually in the name of the registered title holder(s). Simply receiving wiring instructions/bank account information without confirming to whom the account belongs is problematic.

Mortgage Discharges

Secured lines of credit may cause claims where the line is paid off on closing, but not properly closed. Subsequently, the seller then continues to withdraw funds and the balance goes up again. The lender will refuse to discharge the mortgage, even though the purchaser is an innocent party. Attempts to get the seller to pay off the balance are often unsuccessful.

Accordingly, lawyers who are paying off secured lines of credit must be sure to request that that line be closed, and the mortgage discharged from title.

A final comment on mortgage discharges - in the last couple of years at least two real estate lawyers absconded with large sums of money that was intended to be used to pay off mortgages. This left

innocent homeowners with mortgages on their titles that they had believed were paid off. The practice of real estate law functions only because of trust between lawyers and clearly in these cases that trust was breached. Thus, while trust is important, it is equally as important to be aware of red flags such as not receiving timely discharges or not receiving replies to your inquiries with another lawyer. It is important to be vigilant in following up on outstanding mortgage discharges. This may require contacting the lender directly to confirm that the mortgage was paid out. While the initial theft may not be preventable, further thefts may be avoided if the malfeasance is caught quickly.

(C) Section 116 of the *Income Tax Act*

The case of *Kau v. The Queen*, 2018 TCC 156 (CanLII) provides a good example of why it is important to pay attention to transaction details. In this case, the purchaser ended up having to pay the 25% of the purchase price withholding tax as per s. 116 as a result of the purchaser's lawyer failure to determine whether the seller was a non-resident.

The question according to the Court was whether the purchaser's lawyer, on behalf of his client, satisfied paragraph 116(5)(a) by having made "reasonable inquiry" resulting in "no reason to believe that [the Vendor] was not resident in Canada."

Information available concerning the vendor included that the seller's address for service was an address in Danville, Calif., U.S. In addition, the purchaser's lawyer became aware also that two years earlier in 2009 the seller had had that same address for service when purchasing the condominium. Also, the purchaser's lawyer knew that the seller did not reside the Toronto condominium he was selling – rather, a tenant of the seller had lived there.

The purchaser's lawyer requisitioned "satisfactory evidence of compliance with section 116". This request yielded draft unsworn "affidavit" and nine days later an actual unsworn "affidavit" signed by the seller who declared therein before a California notary public that, "I am not a non-resident of Canada within the meaning of Section 116 of the Income Tax Act (Canada)".

The Court indicated that "If the unsworn affidavit had at all responded to the specific red flags as to potential non-residency (unlikely as the purchaser's lawyer seems not to have asked about such flags), and assuming such responses were corroborative of the Vendor being a resident of Canada, that almost certainly would have been sufficient to constitute for the purchaser's lawyer a "reasonable inquiry". It is obvious that "reasonable inquiry" entails consideration of not just what was asked, but also of response(s) received. Here, follow-up questions would have been appropriate. To say a brief and bald unsworn statement was sufficient to quell concerns raised or that should have been raised by the California-related red flags is not sufficient. Such statements as to residency can well be wrong, intentionally or not. In my view it is not reasonable that they should unconditionally be accepted where, as here, the option of further enquiry exists. Speaking completely generally, in terms of trustworthiness it must not be overlooked that what is said in these statements, including those unsworn, can mean an immediate lessening by 25% of a seller's proceeds of sale."

The Court further stated, "Thus I conclude that what happened in this case did not constitute "reasonable inquiry". I find this taking into account that what is "reasonable" could be any of a range of actions, or inaction, determined by the pertinent factual context. The factual context here was such that it was not reasonable to not pursue the matter beyond receipt of the unsworn affidavit. Simple questions such as what was the Vendor's permanent address as opposed to "address for service" and

provision of a copy of the Vendor's driver's license, would have done much to bring clarity to this situation without undue further efforts. (It is recognized that answers to these questions would often (but not always) lead to an accurate understanding as to residency, noting as well in this regard subsections 250(3) and (5) of the Act.) The statutory provision involved, subsection 116(5)(a), calls for and deserves more than a brief, baldly stated affidavit or solemn declaration when there are factual red-flags potentially suggestive of non-residency. The matter should then be pursued, to give due effect to the fiscal concern that Parliament sought to address in its drafting of subsection 116(5)(a)."

There are obvious lessons for lawyers from this case. Most importantly, lawyers must pay attention to details in the transaction that could indicate a non-resident and properly investigate them; affidavits must be sworn; and where the facts at hand give rise to questions about the validity of a statement in an affidavit, even a sworn one, and the lawyer must make further inquiries.

Whether there is coverage for this in a title insurance policy may depend on whether the policy includes coverage for errors and omissions of the lawyer acting for the insured.

(D) Not transferring condominium parking and/or locker units

Problems of this nature often arise when the purchaser client is trying to close a future sale transaction and it is determined that, although the purchaser has been occupying the parking and/or locker, they do not have legal title. This may lead to a transaction not closing. Poor client communication and not reading the agreement of purchase and sale thoroughly is often the reason for this occurring – in other words, lawyers should be asking their client if they are purchasing parking and/or lockers too and determining whether they are owned or an exclusive use common element. The parcel register may not even be in the name of the prior seller as title insurers regularly see condominium transactions where these have been omitted for several transactions. On another note, the parcel registers for all units being purchased must be obtained – it is not sufficient to assume that they will be identical.

(E) Not confirming that the Servient Tenement Land is "Subject To" an Easement or Right of Way to which the Client's Land is Intended to Be "Together With"

Where a client's title is "together with a right of way", the corresponding parcel register(s) for the servient lands should be checked for a "subject to" corresponding right of way. This type of issue typically comes to light at a future sale or if the use of the right of way is blocked. As the discussion below of legal access indicates, lack of the ability to use an easement or right of way may have serious consequences for a client.

(F) *Planning Act* Issues

Two of the common errors are: – i) mortgaging land that abuts land in common ownership where there is no applicable exemption; ii) registering a transfer of title to a property and not recognizing that the person owns an abutting property too – resulting in an inadvertent merger of title. While title insurers have streamlined *Planning Act* search requirements, it is still required to, at least, make simple inquiries of your client as to other properties that they own that may abut the property that will be the subject of your current transaction.

Failure to Identify and Recognize Unique Aspects of a Particular Transaction

(A) Legal Access for Cottage Properties – issues with access typically occur with cottage properties. These can result in expensive and time-consuming claim resolutions, particularly where the access is completely blocked. See for example, the case of *Toronto-Dominion Bank v. Wise*, 2016 ONCA 629 (CanLII). For some lawyers who are not located in “cottage” country there may be a tendency to treat the purchase of a cottage just like the purchase of a home in a city. Unfortunately, this is often not an appropriate approach.

Many cottages are accessed via roads that are not public highways. When acting on a cottage transaction, inquiries should be made with the purchaser as to how the land is accessed. This can lead to inquiries into whether the access road is actually a public highway maintained by the local municipality. Frequently, physical access exists at the time of the purchase, but there is no legal right to that access. Claims regularly occur after a closing when the new owner changes or intensifies the use of the access road. In other circumstances, title insurers have seen a party purchase the access land for the sole purpose of “extorting” money from the users of the road to allow for access. If access is via a right of way/easement, these should be investigated. If there is an issue with access, title insurers may, in appropriate circumstances, offer to insure over the access issue.

(B) Parking Requirements – the availability of parking can be of significant importance to a purchaser. It is important to know the local requirements if front yard parking is used. For example, in Toronto, front yard parking spaces require a license, and the license is not automatically transferred to the new owner – thus, the new owner must apply for to have the license transferred. Accordingly, you need to know the requirements of the municipality in which the property you are acting on is located in order to determine what inquiries to make and what advice to give your client. In the City of Toronto, for example, the Toronto.ca website (<https://www.toronto.ca/services-payments/streets-parking-transportation/applying-for-a-parking-permit/residential-front-yard-boulevard-parking/>) has a list of the addresses that have a license and sets out the number of spaces allowed. Accordingly, this should be searched if the client has a front yard parking space. A lawyer will only know if there is such a space if the client intake asks this type of question.

Title Insurance Related Errors

Search Errors

Many off title searches are no longer conducted due to the coverage available in title insurance policies. This has created efficiency and cost savings. However, this does not mean that off title searches are irrelevant to real estate conveyancing. Common errors with respect to searches that have been revealed at the time a claim is made are:

- a. *Not reading the results* – title insurers have seen situations where a search was ordered and the result obtained before closing BUT, the law firm did not review the search result, which revealed an adverse matter. As a result, the matter was not requisitioned, nor was an underwriting decision sought on the matter. It is

certainly embarrassing to the law firm to have to explain to a client why the search received before closing disclosed an issue but was not addressed. Proper procedures and checklists can assist avoid this situation.

- b. *Not following search requirements* – two key issues arise in this regard which are discussed below.
 - i. Not considering coverage differences between commercial and residential policies and how that impacts search decisions- Certain coverage available in residential owner policies is not available in commercial owner policies. For example, commercial owner policies do not contain any coverage for work orders or open permits without the requirement for a search. If there is any coverage provided, it is by way of an endorsement that has limited coverage and requires a current search – i.e., generally not older than 30 days and such search result must be clear. [Please review the actual endorsement for details]. A Government Response endorsement may also be added to commercial policies and that endorsement insures against loss or damage in the event that the result obtained from the listed governmental searches are inaccurate as at the date of policy. Thus, for both endorsements there are searches that are required to be conducted. Accordingly, law firms should i) ensure that they recognize the nature of the property at the beginning of their retainer; iii) obtain instructions from clients regarding searches to conduct; and iii) order necessary searches, including within time frames outlined in title insurance endorsements, if applicable. This type of scenario more frequently ends up with a situation where a claim is filed only for the insured to find out that there is no coverage available because the matter is not covered under the commercial policy obtained.
 - ii. Failure to follow the multi-unit residential search requirements on purchase transactions. When ordering a policy for a multi-unit property (2-6 residential units) there are two questions that must be answered – i) how many units exist; and ii) how many units are legal? In order to answer these questions, the lawyer needs to confirm with the client how many units exist and then also conduct a building and zoning search AND verify what the zoning for the land permits.

It is important to recall that unless the building and zoning specifically says what the zoning permits, the lawyer needs to actually review the bylaw to confirm that the number of units is permitted in that zone.

In addition, the lawyer needs to be aware of the licensing and registration requirements for second units of the municipality. Basement apartments or secondary suites may be legal but only IF there is appropriate permits

and registration (if required) has occurred. If there is a registration requirement this must be checked to confirm that the unit is registered.

Where a search indicates that the number of units is not permitted (or not registered as required) this should be discussed with an underwriter. In addition, the questions in the policy order must be appropriately answered. Thus, if there are 3 units in the building but only 1 is legally permitted, the questions must be answered in this manner.

All too often lawyers order single family residential policies where the property is actually a multi-unit. This can be avoided if lawyers pay attention at the outset to determining with the client how many units exist and following the proper search requirements. Besides speaking with clients, the agreement of purchase and sale often provides “clues” that there is more than one unit – such as mention of multiple fridges and stoves and tenants.

The fact that the wrong form of policy was obtained is frequently exposed at the time of a claim. The claim related to multi-unit use is denied due to the fact that the policy insures only the use as a single-family residence.

- c. *Not communicating results to title insurer* – Hand in hand with reviewing searches is advising the title insurer as soon as possible of adverse results. In some cases, the insurer may provide some affirmative coverage for the adverse matter. Where coverage is not available, lawyers are in a better position if they determine this early on in their due diligence process when there is still time to requisition a matter.
- d. *Condominium status certificate requirements* – title insurers have requirements to update status certificates that are outdated. Lawyers often do not comply with these requirements and instead close with an outdated certificate. Had an update been obtained as per the requirements of the title insurer, an adverse matter such as a recent special assessment would have been disclosed and could have been resolved before closing with the vendor. While there is often coverage for the insured purchaser for the special assessment, if a lawyer repeatedly ignores the title insurers requirements, they may be refused the ability to obtain future policies.

Language about title insurance in the Agreement of Purchase and Sale - be cognizant what it says:

The standard residential OREA form of APS includes language that indicates that a requisition may be resolved by the obtaining of insurance, generally considered to be title insurance. The case of *Bronfman-Thomas v. Carreno*, 2013 ONCA 566 stands for the proposition that the obtaining of title insurance to deal with a requisition is a satisfactory answer where the APS language provides for insurance as a solution.

When a lawyer fails to agree to close a transaction when coverage is being offered and the APS contains the standard insurance language, this could expose their client for liability if a transaction does not close.

Errors Regarding Filing Claims

Policies have conditions in them regarding the filing of a claim. When approached by a client to assist with the filing of a claim, these provisions should be reviewed. Some important concepts to note:

- Claims need to be filed on a timely basis (in some cases there are time frames noted)
- Failure to file on a timely basis to the extent it prejudices the title insurer's ability to resolve a claim may reduce or eliminate the title insurer's liability for the claim
- The claimant must be able to prove their loss – it is not the title insurer's responsibility to do so
- Generally, claimants should not take action – for example, filing a statement of defence; agreeing to a settlement; etc. without the title insurer's express consent
- The insured under the policy is the homeowner or lender, as the case may be. It is not the lawyer. Therefore, a lawyer cannot file a claim asking for the title insurer to cover the lawyer. Additionally, the lawyer cannot file a claim on behalf of the insured unless the insured has actually retained them to do so. In other words, the lawyer cannot attempt to hide the error from the client and get the title insurer to fix it without the client knowing.
- The title insurer is not obliged to pay legal fees it did not authorize.
- If acting on a sale of a property and a matters is requisitioned that you think may be covered under the title insurance policy, do not wait until the last minute before closing to contact the title insurer.

Lawyers can provide valuable assistance to their clients if they have a claim. Understanding these key concepts will help avoid claims pitfalls. And, of course, if in doubt as to whether or how to file a claim, simply contact your title insurer.

Prepared: April 5, 2023

This material is intended to provide information of a general nature, is subject to change, and is not intended as legal advice. It is based on the current practices and policies of Stewart Title Guaranty Company regarding residential transactions and may not apply to those of other insurers. The descriptions of coverage and examples have been used for illustrative purposes only and should not be treated as a statement of definitive policies or a commitment to insure in any particular context. The terms of the actual policy issued will always prevail. Each claim is reviewed on its own merits based on the transaction specific facts and the policy coverage provided. Sample policies are available on request. However, the sample policy may not represent the final policy language issued for any particular transaction.



Common Errors by Lawyers That Lead to Title Insurance Claims

Real Estate Summit 2023

Presented By:

Karen Decker

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Failure to Comply with Real Estate Practice Standards

Issues with Mortgages

Mortgage Discharge Statements/ Verifying Outstanding Balances

- Statement accepted from borrower, not obtained from lender
- New 2nd priority mortgagee requires confirmation of a certain balance owing on 1st mortgage – statement falsified to mislead 2nd lender
- Possibly part of a title fraud

Payment of Mortgage Proceeds

- *Red flag of title fraud*
- *Failure to honour undertaking as to recipient of mortgage proceeds*

Mortgage Discharges

- Lines of Credit
- Follow up on undertakings

Failure to Comply with Real Estate Practice Standards Not Paying Sufficient Attention to the Transaction Details

Section 116 of the Income Tax Act – withholding tax

Kau v. The Queen, 2018 TCC 156 (CanLII)

- Necessity to investigate when details of the transaction give signs the seller is a non-resident
- Obvious signs of possible non-resident – address for service; tenants; location where funds are to be sent; location of seller for signing documents

Not transferring condominium parking and/or locker units

- Often discovered at time of future sale
- Error can occur over multiple transactions
- Necessity to make appropriate inquiries
- Obtain parcel register for each unit to be purchased

Failure to Comply with Real Estate Practice Standards Errors With Respect to Real Estate Law Principles

Not confirming that the Servient Tenement Land is “Subject To” an Easement or Right of Way to which the Client’s Land is Intended to Be “Together With”

- May lead to access issues
- Requisitioned at future sale
- Obtain the servient land parcel register

Planning Act Issues

- Registering mortgage against land where abutting land is in common ownership and no exemption applies
- Inadvertent mergers
- Inquire of client as to other properties owned by the client

Failure to Identify and Recognize Unique Aspects of a Particular Transaction

Legal Access for Cottage Properties

- Road exists and is in use, but it is not a public highway, and no legal right to use exists
- Inquiries should be made of client as to how the land is accessed
- Access denied completely or money “extorted” to allow use
- Need to build a completely new access
- *Toronto-Dominion Bank v. Wise*, 2016 ONCA 629 (CanLII)

Parking Requirements

- Front yard parking – ask client
- In Toronto - needs a license – does not transfer to new owner
- City of Toronto on its website has a list of the legal front yard parking
- Be aware of municipal specific requirements

Title Insurance Related Errors

Search Errors

Not reading the results

- Adverse matter disclosed but not identified
- Issue with procedures in law office

Not following search requirements

- Commercial v. Residential – different requirements; different coverage
- Multi-unit residential – need to ask client – how many units exist, including basement apartments and secondary suites
- Ensure proper searches are done and policy ordered correctly

Not communicating results to title insurer

- Custom underwriting may be available

Condominium status certificate requirements

- Not sufficiently current

Title Insurance Related Errors (continued)

Errors Regarding Filing Claims

- File on a Timely Basis
- Prejudicing the ability to resolve a claim may reduce or eliminate the title insurer's liability for the claim
- The claimant must be able to prove their loss
- Do not take action – for example, filing a statement of defence; agreeing to a settlement; etc. without the title insurer's express consent
- The insured under the policy is the homeowner or lender, as the case may be. It is not the lawyer.
- The title insurer is not obliged to pay legal fees it did not authorize.

Title Insurance Related Errors (final)

Language about Title Insurance in the Agreement of Purchase and Sale

Bronfman - Thomas v. Carreno, 2013 ONCA 566 (CanLII)

Clause 10 of the APS –

“...If within the specified times referred to in paragraph 8 any valid objection to title or to any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued, or that the principal building may not be insured against risk of fire is made in writing to Seller and which Seller is **unable or unwilling to remove, remedy or satisfy or obtain insurance save and except against risk of fire (Title Insurance) in favour of the Buyer** and any mortgagee, (with all related costs at the expense of the Seller), and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction ..”

Conclusion / Questions

Legal Disclaimer

This material is intended to provide information of a general nature, is subject to change, and is not intended as legal advice. It is based on the current practices and policies of Stewart Title Guaranty Company and may not apply to those of other insurers. The descriptions of coverage and examples have been used for illustrative purposes only and should not be treated as a statement of definitive policies or a commitment to insure in any particular context. The terms of the actual policy issued will always prevail. Each claim is reviewed on its own merits based on the transaction specific facts and the policy coverage provided. Sample policies are available on request. However, the sample policy may not represent the final policy language issued for any particular transaction.



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TAB 13

20th Real Estate Law Summit - Day 2

Title Insurance Disputes: Surprising (and Unsurprising)
Lessons from the Case Law (PowerPoint)

Gord McGuire

Adair Goldblatt Bieber LLP

Title Insurance Case Law at a Glance: Coverage
Decisions In Canada 2008-2023

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April 20, 2023





Title Insurance Disputes: Surprising (and Unsurprising) Lessons from the Case Law

Gord McGuire

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Unsurprising Lesson No. 1

If the policy says a Governmental Order is required for coverage, a Governmental Order is required

Coppola v. FCT Insurance Co., 2010 SKQB 482

Covered Title Risk 24(a)

24. You are forced by a Government Authority to remove or remedy your existing structures or any part of them ...because:

(a) any portion of your existing structures was built without obtaining a required building permit from the proper Governmental Authority Office.

Unsurprising Lesson No. 2

**If the policy covers defective structures built without a permit,
don't plead that the structure was built with a permit**

Schives v. Donais, 2018 ONSC 4672

Covered Title Risk 20(f)

24. You are forced by a Governmental Authority ... to remove or remedy your existing structure(s), or any portion thereof... because:

(f) any portion of it was built without obtaining a building permit from the proper Governmental Authority, provided a building permit would have been required by such Governmental Authority at the time of construction of the structure or relevant portion thereof.

Surprising Lesson No. 1

Title insurance provisions quantifying loss may not be enforceable

Segal v. Chicago Title Ins. Co., 2022 ONSC 2866

Condition 4(a)(ix)(2) – Our Choices when we learn of a claim

2. Where the cost of removing or remedying the portion of the structure built without a permit exceeds \$50,000.00 we may:

a) pay for the removal or remediation; or

b) End the coverage described in Covered Risk 23 by paying you your Actual Loss resulting from the Covered Risk, as determined by an appraisal conducted by an AACI (Accredited Appraiser Canadian Institute) - accredited appraiser, and those costs, legal fees and expenses incurred up to that time which we are obligated to pay.

Surprising Lesson No. 1

Title insurance provisions quantifying loss may not be enforceable

Segal v. Chicago Title Ins. Co., 2022 ONSC 2866

Insurance Act, s. 128 - Contracts providing for appraisals

128 (1) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.

(2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire.

Surprising Lesson No. 2

**Sometimes the purchaser can have her cake and eat it too,
thanks to the private insurance exception**

Krawchuk v. Scherbak, 2011 ONCA 352

Example Subrogation Clause

Transfer of Your Rights

When we settle Your claim, we have all the rights You have against any person or property related to the claim. You must transfer these rights and remedies to us when we ask, and You must not do anything to affect these rights and remedies. You must let us use Your name in enforcing these rights and remedies.



Title Insurance Disputes: Surprising (and Unsurprising) Lessons from the Case Law

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Title Insurance Case Law at a Glance:

Coverage Decisions in Canada 2008-2023

Gord McGuire and Sydney McIvor, Adair Goldblatt Bieber LLP

Case	Type of Policy	Covered Risk Claimed	Result
<i>Segal v. Chicago Title</i> , 2022 ONSC 2866	Residential	Government order to remove or remedy/remove structures Township required applicants to remedy swimming pool built without permit.	Applicants awarded value of property subject to government order (to be appraised).
<i>1921645 Alberta Ltd v. FCT Insurance Company Ltd</i> , 2022 ABCA 400	Unclear (vacant lot)	Defect/lien or encumbrance on title: lien of real estate taxes or assessments imposed on the Title by a governmental authority. Lot purchased was subject to local improvement charge. There was an unpaid balance for the charge, and a charge the subsequent year following the purchase.	Chambers decision: not published but appears to have allowed coverage of both the arrears and future charges. Appeal: Appeal allowed. new charges not covered by policy (one dissenting judge). Did not appeal on arrears charges.
<i>1152729 B.C. Limited, Chicago Title Insurance</i> , 2020 ONSC 6896	Unclear (likely residential)	Challenge to title Insured bought property from vendor who was selling through power of sale. Former owner brought action seeking setting aside of the sale. No dispute that the title insurance entitled the insured to a defence, until they also lost ownership of the property for defaulting on a mortgage.	Policy applicable. Insured still potentially subject to damages in claim by former owner. Insurance still applied.

Case	Type of Policy	Covered Risk Claimed	Result
<i>Breen v First Canadian Title Insurance</i> , 2019 ONCA 598	Residential	Unmarketable title Previous owners had built home having obtained permit. The permit was based on drawings but was incomplete concerning beams and post information. Engineer reported structural deficiencies and that home should not be occupied.	Trial: Insurance applicable. FTC's policy provided coverage for latent defects not discoverable at the time of purchase. Appeal: trial judge erred. Conveyancing solicitor knew that there was no final inspection from the Township. Further, even if a final inspection had been conducted, inspection would not have revealed defects because they were hidden. Therefore, the defects did not affect the marketability of title.
<i>Steer v. Chicago Title Insurance Company</i> , 2019 ABQB 318	Residential	Unmarketable title Discovery of construction defects causing water leakage required property to be remediated before it could be used.	Summary judgment motion (master): water leakage did not create unmarketable title. Appeal: motion decision upheld. Unmarketability of title does not relate to physical defects.
<i>Schives v. Donais</i> , 2018 ONSC 4672	Residential	Unmarketable "land"/unmarketable title/government order to remove/remedy structures After purchasing, plaintiffs discovered that basement wall had been improperly built leading to structural defects in their home.	Plaintiff's summary judgment motion: Unmarketable title: coverage excluded under exclusion of coverage for arising out of failure of existing structures/failure to be constructed in accordance with applicable building codes. Unmarketable land: coverage excluded under same provision. required by government authority to remove/remedy existing structures: no order for demand or order by government for remedial work. Policy not applicable.

Case	Type of Policy	Covered Risk Claimed	Result
<i>Nodel v. Stewart Title Guaranty Company</i> , 2018 ONCA 341	Residential (lender policy)	<p>Lender policy: mortgage fraud</p> <p>Second mortgagee seeking declaration that policy covered losses. Title insurance was obtained for private mortgage obtained through identity fraud. Mortgage proceeds paid to borrower's lawyer, in trust. Lawyer disbursed the funds to third parties, not the borrower. Insurer denied coverage on basis that mortgage proceeds were paid to a person other than the registered title holder.</p>	<p>Application: Policy coverage applicable in this case. Exception did not clearly and unambiguously provide that the moneys would be "paid to" the registered titleholder only if the cheque was made out to the titleholder or the proceeds were wired to the titleholder's bank account directly. The ambiguity should be construed against the insurer.</p> <p>Appeal: application judge correct. Title insurance provides coverage for losses (1 judge dissenting).</p> <p>Exception enabling insurer to deny coverage applied if proceeds were transferred beneficially to person or entity other than borrower in insured mortgage transaction. In this case, payment was made to borrower's lawyer for benefit of borrower.</p>
<i>Hercules Moulded Products Inc. v. Foster</i> , 2017 ONCA 445	Commercial (lender policy)	<p>defect in or lien or encumbrance on the title; unmarketable title</p> <p>Plaintiff was mortgagee who advanced loan secured against two adjacent development properties. Mortgagors defaulted and plaintiff initiated power of sale.</p> <p>Prior to the policy date, the plaintiff had received notice of an upcoming court application regarding nuisance for excavation</p>	<p>Cross motions for summary judgment:</p> <p>Work order for excavation hole, no coverage:</p> <p>(i) work order issued from finding of nuisance on the land and not as a result of non-compliance with regulation. Therefore coverage not established for coverage of work orders with respect to compliance with fire safety;</p>

Case	Type of Policy	Covered Risk Claimed	Result
		<p>hole. Following the policy date, a court order was made that the hole constituted nuisance contrary to a city by-law/ Plaintiff claimed coverage for:</p> <ul style="list-style-type: none"> (i) tax bill received because of work order issued on property after policy date; (ii) coverage for damages sustained for reason of zoning issues. <p>There were also development agreements registered on title that required the development include specific structures.</p> <p>The plaintiff also claimed damages from an alleged encroachment on one property onto another.</p>	<ul style="list-style-type: none"> (ii) zoning provisions not applicable because the ordinances referred to require prohibition of use because of structure on property or removal or alteration of the structure. Issue arose out of violation of nuisance by-law. <p>In any event, the exceptions of the policy would apply because plaintiff knew of the by-law violation and upcoming court application and failed to advise the insurer.</p> <p>Registered development agreements: no coverage</p> <p>Coverage for registered development agreements: plaintiff failed to demonstrate any actual loss. Property sold for \$400k more with disclosure of agreements than previous offer without knowledge of agreements.</p> <p>Further, the policy excluded title defects assumed or agreed to by the insured. Plaintiff knew of the development agreements and that they had not been complied with and had agreed to them.</p> <p>Alleged encroachment: no coverage</p> <p>No evidence of an encroachment sufficient to allow a purchaser to close the transaction. No evidence of diminution in valuation from any encroachment.</p>

Case	Type of Policy	Covered Risk Claimed	Result
			<p>Further, plaintiff failed to give prompt notice to insured prior to failed transaction allegedly due to encroachment.</p> <p>Appeal: Application judge decision upheld. Observed that residential title insurance policies may be quite different from commercial lender title insurance policies</p>
<p><i>Gemeinhardt v. Babic</i>, 2016 ONSC 4707</p>	Residential	<p>Government order to remove/remedy structures; circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at the Policy Date</p> <p>After closing, purchaser discovered latent and major structural defects. The vendors had renovated the house and garage without building permits. The Township ordered that the purchaser remedy the unsafe garage and sewage system. The township also issued an order that prohibited occupancy as the building was unsafe and not structurally adequate.</p>	<p>Trial decision: actions against insurer and vendors combined. Vendors found to have breached the sale contract. Policy was applicable and insurer was entitled to contribution and indemnity from vendors.</p> <p>Policy applicable. Title insurance was intended to reduce lawyer's workload in performing traditional off-title searches. Lawyer testified that if he had done a building and zoning search, the search would have revealed these were done without permits.</p> <p>Exclusion for failure of existing structures to be constructed in accordance with applicable building codes not applicable because the exclusion provided that it does not apply if notice of the violation appears in the public records as of the policy date.</p>
<p><i>Small v. Chicago Title Insurance Co.</i>, 2016 ONSC 3876</p>	Residential (multi-unit residential property)	<p>Unmarketable title</p> <p>Dwelling purchased by the purchaser contained 4 residential units, but was only zoned for 3 units. Following closing,</p>	<p>Summary judgment motion: title insurance applicable. Insurer was required to indemnify lawyer. Indemnity obligation to purchaser's lawyers applies except for in light of lawyer's</p>

Case	Type of Policy	Covered Risk Claimed	Result
		structural damage came to light when basement wall collapsed. Previous owners had removed load-bearing wall without obtaining permit. City issued work order requiring remediation of damage. Purchaser sued lawyer and insurer. Action settled but Lawyer's crossclaim against insurer remained.	gross negligence or willful misconduct. Neither were applicable in this case.
<i>MacDonald v Chicago Title Insurance Company</i> , 2015 ONCA 842	Residential	Unmarketable title Previous owners had removed load-bearing wall without permit. City ordered homeowners to remediate.	Summary judgment motion: motions judge dismissed that application and granted summary judgment in favour of the title insurer. Appeal: summary judgment granted. City order affected title even though it was not registered on title. Defect that could be discovered with off-title search.
<i>Lewis v First Canadian Title</i> , 2015 ABQB 726	Residential	N/A (issue was whether homeowners covered under lender's insurance policy) Lawyer obtained lender insurance policy for mortgagee but not homeowner's policy.	Homeowners not covered by lender's policy.
<i>Fischer v. Stewart Title Guaranty Co.</i> , 2014 ONCA 798	Unclear (short decision)	Unmarketable land/ unmarketable title Purchaser discovered that previous use of the property for marijuana "grow op."	Summary judgment motion: no coverage under policy. Motion judge dismissed claim against title insurer. Not a title defect. Unmarketable land provisions were 4 enumerated reasons, all of which related to title. Appeal: appeal dismissed. Even if land was unmarketable title was marketable.

Case	Type of Policy	Covered Risk Claimed	Result
<i>Zabanah v. Capital Direct Lending Corp. et al</i> , 2014 ONCA 872	Residential	<p>Lender insurance: security of mortgage</p> <p>Second mortgagee purchased title insurance for coverage of second mortgage. First mortgage balance was higher than represented to the second mortgagee and homeowners had altered the statements for the first mortgage. Second mortgagee became aware of higher balance for first mortgage, but still elected to renew mortgage 3 times. Homeowner went into bankruptcy and sale proceeds insufficient to cover first mortgage, leaving insured with nothing.</p>	<p>Summary judgment motion: Policy was intended to cover the validity and priority of second mortgage, was not “investment” insurance. Title insurance did not cover issue. Exception in policy for reason of inaccuracies of affirmative assurances.</p> <p>Appeal: appeal dismissed.</p>
<i>Hoang v. Nguyen</i> , 2013 ONSC 6242	Commercial	N/A issue was lawyer’s negligence. Title insurance only involved because of indemnity. Issue of insurance coverage settled.	
<i>Krawchuk v. Scherbak</i> , 2011 ONCA 352	Residential	N/A issue was whether insured could recover from vendor when she had already recovered title insurance.	Private insurance exception applied to allow double recovery.
<i>Coppola v. FCT Insurance Co.</i> , 2010 SKQB 482	Residential	<p>Government order to remove/remedy structures</p> <p>After purchase, purchaser discovered water and sewage underneath crawl space house coming from a broken sewage line that had been repaired by previous owner without obtaining a permit. City permit required for this repair. Insurer denied coverage on basis that the insured had repaired the damage before required to do so by the City.</p>	<p>Insurer’s motion to strike: Claim struck. Plain and obvious no reasonable cause of action.</p> <p>Claim under policy required insured to have been forced by a government authority to remedy an existing structure because it was built without a permit/improper permit. In this case the plaintiff was not forced by the City to remedy the structure.</p>

Case	Type of Policy	Covered Risk Claimed	Result
<p>1764139 <i>Ontario Inc. v. Stewart Title Guaranty Company</i>, 2010 ONCA 744</p>	<p>Commercial</p>	<p>Unmarketable title</p> <p>Strip mall property, defect in title arose out of two competing leases for the same space. Purchaser also alleged there was a defect due to the vendor's fraudulent misrepresentation that one of the leases constituted a title defect.</p>	<p>Application: Not a circumstance where the purchaser was insured under unmarketable title. "Assuming that the leases were in fact competing and that this constituted a title defect at the time of closing...the defect no longer exists."</p> <p>No evidence of loss or damage to the purchaser. And if there was, it would fall within the exception that losses arising from any active leases were not covered.</p> <p>Appeal: appeal dismissed.</p>



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TAB 14A

20th Real Estate Law Summit - Day 2

Deposits: The Importance of Being Earnest

Doug Bourassa
Torkin Manes LLP

April 20, 2023



Deposits: The Importance of Being Earnest
Doug Bourassa, Torkin Manes LLP¹

Deposits occupy a unique status in the world of real estate transactions. They are performative.

As a buyer, we offer ever larger deposits to convince the seller that we are truly serious. All things being equal, a vendor will always prefer a larger deposit over a smaller deposit and will look to those monies as evidence of the bona fides of the buyer. During the rapid acceleration of the Ontario real estate market at the outset of the pandemic, sizable deposits became the norm throughout the GTA. What exactly are deposits? Are they a prepayment? Are they a genuine estimate of damages? Or are they something different?

This paper will attempt to address three main topics: (a) the historical nature of deposits and the purpose they serve; (b) when a deposit can be forfeited, and when the court will grant relief from forfeiture; and (c) practical issues surrounding deposit litigation.

Historical Nature of Deposits

Justice Echlin aptly described the origins of deposits in *Comonsents Inc. v. Hetherington Welch Design Ltd.*:

The practice of giving a sum of money to signify the formation of a contract is said to have originated in Phoenician times; passed through the Greeks to the Romans (where it was called *arrha*), then onto the current common law, and is now referred to as a “deposit” or earnest money.²

But what does ‘earnest money’ mean, other than as a gesture of good faith? Common sense (and the law, fortuitously) regards a deposit as something more than a mere prepayment. It is, in

¹ This paper was prepared with the invaluable assistance of Alexandra Maddeaux, student-at-law, and the author is indebted to her assistance.

² *Comonsents Inc. v. Hetherington Welch Design Ltd.* 2006 CanLII 33779 <https://canlii.ca/t/1pqvw>

effect, a guarantee of performance. And it is this nature of a guarantee that changes the character of the monies paid. In the 1884 decision of *Howe v. Smith*, Sir Edward Fry L.J. explained:

It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.³

The Supreme Court of Canada explained in *Banton v. March Brothers*:

[T]he payment is held to be a guarantee for the performance of the contract by the purchaser who cannot recover the money back in case of his failure within a reasonable time to perform his contract.⁴

None of this, on its own, sounds contentious or revelatory. But the concept is illuminated by its contrary:

... where moneys are paid simply on account of and as part of the purchase money ... [they] have not the character of a guarantee and, upon rescission of the contract, the consideration for the payment being extinguished ... restitution must be made⁵

Thus, we see the true distinct nature of deposits, or earnest money: they import by their very nature a commitment to complete the transaction, or a guarantee of performance. The monies are paid for the strict purpose of demonstrating to the counterparty that the contract and all its obligations will, in fact, be completed. In effect, deposit money is a real and tangible commitment by the payor to put some skin in the game. It is not merely a prepayment.

Of course, as is the case for any contractual provision, the specific language will dictate the interpretation and characterization of the deposit. In the case of the standard OREA Form 100 Agreement of Purchase and Sale, the language is clear in describing the moneys paid as a true deposit:

³ [Howe v. Smith \[1884\] UKLawRpCh 142; \(1884\) 27 ChD 89 \(29 May 1884\) \(commonlii.org\)](#) at 101

⁴ *March Brothers & Wells v. Banton*, 1911 CanLII 74 (SCC), 45 SCR 338, <<https://canlii.ca/t/fsmql>>

⁵ *Ibid*

Deposit: Buyer submits [insert sum] by negotiable cheque payable to [insert deposit holder] to be held in trust pending completion or other termination of this Agreement and to be credited toward the Purchase Price on completion.

The unanimous verdict of the jurisprudence is that monies paid pursuant to this clause are, in fact, a true deposit, and that as such, they include the guarantee of performance at the risk of forfeiture.

The Law of Forfeiture of Deposits

At first blush, it would seem obvious that upon the buyer's default the deposit would naturally be forfeited to the seller. And this paper will suggest nothing to the contrary. The Court of Appeal set forth a starting point for the analysis:

As a matter of law, where the purchaser fails to perform the contract, and the contract does not otherwise provide for the return of the deposit, the deposit is forfeit.⁶

Thus, where a purchaser breaches, and the first inquiry (namely, whether the funds paid were a deposit) is satisfied, the onus then shifts to the purchaser to demonstrate a contractual term contrary to the presumption of forfeiture.

No Proof of Damages is Required

Unlike a standard claim for damages, the case law is clear that no proof of damages is required to obtain an order for forfeiture of the deposit. This consideration stands in stark contrast to the vast majority of disputes one might commonly encounter. Justice Brown, writing for the Divisional Court, explained:

The law is clear that a deposit may be forfeited without proof of damages. In other words even in the case where the vendor resells at a purchase

⁶ J. E. R. Harrison Estates Ltd., 2003 CanLII 47597 (ON CA), <https://canlii.ca/t/6w60> at para. 20

price that is high enough to compensate for any loss from the first sale, the vendor may nevertheless retain the deposit.⁷

A lawyer may very well ask themselves, on what basis could the law justify forfeiture, even in situations where there is no loss whatsoever? The Supreme Court of Canada offered a justification:

It is recompense to him for the fact that his property was taken off the market for a time as well as for his loss of bargaining power resulting from the revelation of an amount that he would be prepared to accept.⁸

Whether that justification is compelling or not is another question, but it has been cited and relied upon repeatedly over the years as justification for the strictness of the rule.

Forfeiture Where Property is Re-Sold for More

It may surprise some that, even in a situation where the purchaser's default benefits the vendor, such as where the vendor resells the property for a higher purchase price, the strictness of the law remains in place. Set forth below is a non-exhaustive chart detailing instances where the Court has ordered the deposit forfeited, even where the property sold for more:

Case name	Original sale price and date	2 nd sale price and date	Amount of deposit forfeited
<i>Sinha v. Shabestari</i> 2018 ONSC 298	\$1,202,000 closing August 3, 2016	\$1,273,000 closing August 31, 2016	\$60,000
<i>Mohsin v. Empire Communities</i> 2019 ONSC 852	\$469,990 closing Mar 23, 2017	\$669,990 (sale in June 2017)	\$40,000
<i>Gajasinghe v. Dewar</i> 2007 CanLII 37682 ONSC	\$650,000 closing Dec. 17, 2004	\$662,000 (no closing date described)	\$20,000
<i>Tang v. Zhang</i> 2013 BCCA 52	\$2,030,000	Described as 'higher'	\$100,000

⁷ *Pleasant Developments Inc. v. Iyer*, 2006 CanLII 10223 (ON SCDC), <https://canlii.ca/t/1mzkl> at para. 7

⁸ *H.W. Liebig Co. v. Leading Investments Ltd.*, 1986 CanLII 45 (SCC), [1986] 1 SCR 70, <https://canlii.ca/t/1ftv4> at para. 33

In the *Mohsin* decision, for instance, the buyer's default was the best thing that could have happened to the vendor. The subsequent sale earned them an additional \$200,000. On top of that windfall, the vendor also forfeited the deposit amount in the sum of \$40,000. All for the harm of carrying the property for an additional few months. Justice Perell noted the vendor's good fortune, but was not swayed to decide otherwise:

I appreciate that it was good fortune for Empire that Mr. Mohsin did not close a transaction to purchase 186 Golden Springs Drive for \$469,990. His failure to close meant that Empire could resell the house for \$200,000 more and also to keep his \$40,000 deposit.

Forfeited Amounts are To Be Credited against Damages

In a somewhat incongruous outcome, the courts are equally clear that a deposit, if forfeited, must be credited against the damages incurred, rather than forfeited *in addition* to the damages incurred. In *Bang v. Sebastian*,⁹ the vendor argued that the deposit of \$35,000 should be forfeited without credit against the damage claim. The Court noted that the vendor was not able to cite a single case authority for the proposition. Justice Sanfilippo noted various other decisions in which the deposit was ordered to be credited against the damages (although those decisions do not appear to have analyzed the issue).

In the author's opinion, it is difficult to square this line of analysis with the strictness of the cases that forfeit the deposit even where there are no damages. After all, a vendor who sells for a higher price can earn a windfall from the forfeiture. Whereas a vendor who has suffered a loss can only be put back in the same position it would have been absent a breach. The former is decidedly better off than the latter, for no articulable reason. Despite the author's misgivings, the

⁹ *Bang v. Sebastian*, 2018 ONSC 6226 (CanLII), <https://canlii.ca/t/hvl92> at paras. 65-71

state of the law is clear, and the deposit will be applied against any damages suffered by the vendor.

Relief from Forfeiture

There is a significant body of jurisprudence speaking to the question of when equitable considerations will soften the harshness of the law and save the deposit from forfeiture. Those considerations are very restricted and are seldom applied. The analytical framework is defined best by the Court of Appeal in *Redstone Enterprises Ltd. v. Simple Technology*, where it is described as a two-part test:

- (a) Whether the forfeited deposit was out of all proportion to the damages suffered; and
- (b) Whether it would be unconscionable for the seller to retain the deposit.¹⁰

The jurisprudence has centered the unconscionability analysis on the size of the deposit as a proportion of the purchase price. In *Redstone*, the deposit was \$750,000 on a purchase price of \$10,225,000. In respect of the proportion of the deposit to the damages suffered, the court noted that no damages were shown. The analysis proceeded to the second part, and the court rejected relief from forfeiture, finding that in the absence of indicia of unconscionability, such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of bona fide negotiations, the nature of the relationship between the parties, the gravity of the breach and the conduct of the parties, the deposit was rightly forfeited.

While the Court in *Redstone* was ‘reluctant to specify a numerical percentage’ where a deposit will be held to be unconscionable, it noted that the *Tang v. Zhang* case from British Columbia forfeited a 20% deposit. In Ontario, there are various examples of proportions that were not

¹⁰ *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 (CanLII), <https://canlii.ca/t/h31t2>

problematic. For example, Justice Brown in *Pleasant v. Iyer* concluded that the deposit of 3.6% of the purchase price was not unconscionable. In *Mikhalenia v. Drakhshan*,¹¹ the deposit was 6.67% of the purchase price and was forfeited. Deposits at that level are not likely to attract much consideration for relief from forfeiture.

The highest proportion found by the author was 28% in *Nawara v. Riverstone*¹², a case from the Ontario Superior Court. In that case, the Court refused to grant relief from forfeiture, but the overall size of the deposit as a proportion of the purchase price did invite additional scrutiny:

The deposit here exceeds the 20% that appears to be the deposit amount usually required by the Vendor for this condominium complex and is above the upper range of 25% found in the cases referred to by the Vendor. Accordingly, it is appropriate to look closely at the facts for any indicia of unconscionability.

Citing the decision in *Redstone*, the Court went on to assess any concerns of unconscionability, and rejected them, noting the admonition offered in *Redstone*:

The finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case.

Practical Considerations

The reader will be forgiven for concluding that there is little in this paper that would surprise or be the subject of any real controversy. The law in this area is not contentious, nor is it in dispute. It is largely a matter of common sense.

However, it is rare that a client comes to you uncertain of who should win in such a case.

Everybody really knows what a deposit is, and everybody knows that you're likely to lose it if you don't close. But what is surprising to most clients is the actual process required in order to

¹¹ *Mikhalenia v. Drakhshan*, 2015 ONSC 1048 (CanLII), <https://canlii.ca/t/ggt7n>

¹² *Nawara v. Riverstone*, 2019 ONSC 111 (CanLII), <https://canlii.ca/t/hwvg3>

obtain that deposit. Most clients think, wrongly as it turns out, that the deposit should be in their bank account the day after closing. But of course, that is not what happens. Instead, the money sits in the real estate agent's trust account and won't be paid out unless and until the parties consent or the court orders otherwise. This puts a vendor in the position of having to commence a proceeding, incur the cost and suffer the delay inherent in our judicial system. For instance, if you are seeking to forfeit a deposit in Metro Toronto, a realistic timeline is 18 months owing to the current difficulty in scheduling motions in Toronto. Obviously, the sooner you commence that proceeding, the sooner the 18 months will elapse. But, once a party has embarked down the litigation highway, the delays inherent in the system cannot be avoided.

There are two potential alternatives that are worthy of discussion.

Specific Language in the APS

There is a possibility that a real estate brokerage may agree to release the deposit immediately where the agreement of purchase and sale specifically calls for it. For instance, the following language included in Schedule A to an agreement has been successful on one occasion:

Forfeit Deposit: Upon termination of this agreement by reason of default or breach of contract on the part of the Buyer, the Deposit together with any interest hereon shall be paid to the Seller without deduction and without prejudice to the Seller's other remedies by the Seller's Agent or Lawyer forthwith without any further direction or consent from the Buyer being required, and the Buyer shall not direct or cause or attempt to cause the Seller's Agent/Lawyer to do otherwise. The Buyer and the Seller hereby give the deposit holder irrevocable direction to release the full deposit plus any additional deposits if applicable, to the Seller herein named in this Agreement without the necessity of an additional Mutual Release signed by either party.

Ultimately, the hurdle to overcome is the Brokerage's comfort with reliance on this language.

There is some guidance from RECO that suggests, albeit obliquely, that such a clause could be

relied upon to avoid the requirement of a mutual release or other agreement.¹³ Having this clause is no guarantee that the deposit will be released, but your position is certainly improved by having it.

A second potential solution to the delay problem would be to include a specific clause requiring that any dispute over the deposit must be determined by arbitration. Drafting an arbitration clause is a bespoke exercise, and the suggestion of language is beyond the scope of this paper.

Ultimately, the objective is to grant the parties the right to accelerate the adjudicative process and allow the dispute to be handled quickly and efficiently.

Conclusion

The law of deposits is mature and clear. They are earnest money. They are a demonstration of a purchaser's intention to complete a contract. Moreover, implicit in a deposit is a guarantee that, in the event of a purchaser's default, those monies will be forfeited. And the law is equally clear that those monies can be forfeited without proof of any loss, and in fact, even in the face of a significant gain. The equitable provisions providing for relief from forfeiture are narrowly drawn and provide little comfort to defaulting purchasers. Whether the deposit is 3%, 13% or 28% of the purchase price, it is at risk, leaving no doubt as to the importance of being earnest.

¹³ <https://www.reco.on.ca/professionals-news/deal-falls-understand-handle-written-consent-release-deposit/>



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TAB 14B

20th Real Estate Law Summit - Day 2

**Troubled Transactions in Troubling Times: Closing Deals
During a Recession**

Merredith MacLennan
Merovitz Potechin LLP

April 20, 2023



Troubled Transactions in Troubling Times: Closing Deals During a Recession

Merredith A. MacLennan¹

INTRODUCTION

It is inevitable that some real estate transactions will fall apart, but the frequency with which deals are not closing has become challenging for many real estate lawyers. The law in this area is not new, but given the current economic climate, failing transactions are once again at the forefront of a real estate practice.

Whether a party is unable to close because they are not able to obtain the necessary financing, they cannot provide vacant possession as required, or market fluctuations have caused buyers or sellers remorse – we, the lawyers, are left dealing with the fledging transaction.

I have received many anxious calls from lawyers on the day of closing asking for advice on how to handle a transaction that isn't going to be completed. Many times, they knew or suspected there was going to be trouble, but didn't deal with it until the day of closing because it wasn't an actual crisis until then.

We are all busy and staff can be hard to find (or keep) so many of us are stretched thin, but our professional obligations remain the same regardless of how busy, stressed or understaffed we may be.

As lawyers, it is our job to advise our clients as to their rights and obligations under the agreement of purchase and sale, and part of that is explaining the options and consequences if a party to a transaction is unable or unwilling to close.

¹ Merredith A. MacLennan is a partner at [Merovitz Potechin LLP](#). The information provided herein is of a general nature and is not intended to provide legal advice.

The first step is to determine if there is truly no way to complete the transaction at all. Can title insurance be obtained to insure over a requisition that the vendor would otherwise be unable to satisfy? Section 10 of the standard OREA agreement provides title insurance as a possible response to a requisition.²

Does your client have any other resources that will enable them to complete the transaction? For a purchaser client who has a monetary shortfall, can they borrow funds from friends or family? Can they get a guarantor or co-borrower to improve their creditworthiness? Do they have any other properties that can be re-financed?

If the issue relates to a title requisition, could a *Vendors and Purchasers Act* application resolve it?³

Purchasing a property is generally the largest financial transaction people make. It can be stressful. It can be emotional. In hot markets, it can be rushed. Ensuring that clients understand the consequences of failing to complete a transaction is imperative.

If there is absolutely no way for one of the parties to complete the transaction, then you will be left to stick-handle the aborted transaction.

OPTIONS

There are basically three options when a party is not able to close:

1. Amend the existing agreement terms
2. Terminate the agreement
3. Sue for specific performance

This paper will explore each of these options and provide summary commentary gleaned from case law.⁴

² See *Thomas v. Carrano*, [2013 ONSC 1495 \(CanLII\)](#)

³ See *Phinny v. Macaully*, [2008 CanLII 47015 \(CanLII\)](#)

⁴ There is a plethora of caselaw on aborted real estate transaction and this paper is meant to provide a general overview of the key issues to consider. It is beyond the scope of this paper to provide a comprehensive review of all the relevant caselaw.

1. Amend the existing agreement terms

Amendments to the agreement can include an extension of the closing date, a reduction in the purchase price, a change in the payment provisions (e.g. arranging a vendor take back mortgage), or other terms of the agreement such as vacant possession requirements.

No obligation to amend

There is no obligation on the innocent or non-defaulting party to amend the agreement (to extend the closing date, to accept a lower price, to agree to a vendor take back mortgage, etc.).⁵

Any aspect of the agreement can be amended by the parties

If an innocent party does agree to amend the terms of the agreement, they can insist on terms and conditions, such as an additional non-refundable deposit, payment of their legal fees for negotiating and/or preparing an amendment, occupancy for a non-defaulting purchaser, etc..

Amending may be the most practical solution in certain situations

Amending existing terms may be a favourable option for innocent parties who have another transaction relying on the closing. For example, if a vendor has also signed an agreement to purchase another property and needs the funds from the sale of their existing house to complete the purchase of the new property, the practicalities of agreeing to a short extension or even to reducing the purchase price may outweigh the benefits of noting the purchaser of their existing house in default. Sure, the vendor may have valid legal grounds to insist on strict compliance with the agreement, but if the purchaser is unable to obtain a mortgage for the required amount, then the purchaser is simply unable to close. What good will a judgement 2 or 3 years from now do if the vendor is then forced to default on their purchase transaction because they require the funds from the sale of their existing house to complete the purchase? As unpalatable as the idea may be, in some circumstances it may make the most practical sense.

⁵ *Azzarello v. Shawqi*, [2019 ONCA 820 \(CanLII\)](#)

Time of the Essence

Most agreements contain a provision that time is to be of the essence. Paragraph 20 of the OREA form 100 standard re-sale agreement states:

20. TIME LIMITS: Time shall in all respects be of the essence hereof provided that the time for doing or completing of any matter provided for herein may be extended or abridged by an agreement in writing signed by the Seller and Buyer or by their respective lawyers who may be specifically authorized in that regard.

If neither party is ready, willing and able to complete the transaction on the scheduled closing date, the agreement continues, and time is no longer of the essence. Either party can reinstate time as being of the essence by setting a new closing date on reasonable notice.⁶ In this case, there is no innocent or non-defaulting party, so neither party can take steps to enforce their rights under the contract, as neither is in a position to complete the agreement on the scheduled closing date.

Where there have been mutual breaches of the agreement of purchase and sale and neither party is in a position to complete the transaction on the closing date and neither party restores time as being of the essence, the agreement can be treated abandoned and the purchaser is entitled to a return of the deposit.⁷

2. Terminate the agreement

The non-defaulting party can accept a repudiation of the agreement by the defaulting party and, if desired, pursue damages against the defaulting party.

Repudiation

A breach or repudiation of an agreement of purchase and sale before the scheduled completion date does not, in itself, terminate the contract. The non-defaulting party must accept the repudiation for the breach to result in a termination of the contract.⁸

⁶ *Domicile Developments Inc. v. MacTavish* [1999 CanLII 3738 \(ONCA\)](#); *King v. Urban & Country Ltd.* [\(1974\) 1 OR \(2d\) 449 ONCA](#); *Zender v. Ball* [\(1974\) 5 OR \(2d\) 747 \(ONSC\)](#)

⁷ *Malka v. Racz*, [2022 ONSC 1362 \(CanLII\)](#)

⁸ *Brown v. Belleville (City)* [114 OR \(3d\) 561](#)

If the non-defaulting party accepts the repudiation, then the contract is terminated or "disaffirmed". If the innocent party treats the contract as subsisting or "affirmed", then the contract is affirmed.⁹

Disaffirmation must be clearly and unequivocally communicated within a reasonable time. This communication can be inferred from conduct or can be express communication accepting the repudiation. If the non-defaulting party accepts the repudiation the contract is terminated.

A failure by the non-defaulting party to accept the repudiation does not mean the contract has been affirmed - the non-defaulting party's conduct must be consistent with the contract still being in force. The non-defaulting party may be given a reasonable period of time to decide whether to affirm or disaffirm the contract; however, depending on the circumstances, inaction for too long may be considered as either a failure to elect to disaffirm or as affirmation of the contract.¹⁰

Tender

Tendering is a process by which the non-defaulting party shows that they are ready, willing and able to complete the transaction on the scheduled closing date, that they are not the cause of the delay or default, and that there has been no waiver. By tendering, the innocent party puts themselves in the position of relying on time being of the essence.¹¹

Being able to become ready does not make a party "ready, willing, and able" to close.¹²

The non-defaulting party is not required to tender in the event of an anticipatory breach - when the other party has clearly repudiated the agreement or confirmed that they will be unable to complete the transaction.¹³

Where there has been an anticipatory breach, the non-defaulting party does not need to wait for the closing date to commence an action for damages or specific performance¹⁴

⁹ *Guarantee Co. of North America v. Gordon Capital Corp.* [1999] 3 SCR 423

¹⁰ *Ching v. Pier 27 Toronto Inc.* 2021 ONCA 551

¹¹ *Time Development Group Inc. (In trust) v. Bitton*, 2018 ONSC 4384 (CanLII)

¹² *Zender v. Ball et. Al.* 1974 CanLII 730 (ON SC)

¹³ *Di Millo v. 2099232 Ontario Inc.* 2018 ONCA 1051

¹⁴ *Roy v. Kloepper Wholesale Hardware and Automotive Co Ltd.*, 1951 CanLII 334 (ONCA)

Mitigation

When a purchaser fails to complete a real estate transaction and the vendor brings an action for damages, a common defence is that the vendor failed to mitigate their damages.

Where it is alleged that the non-defaulting party has failed to mitigate, the burden of proof is on the defaulting party, who needs to prove both that the non-defaulting party has failed to make reasonable efforts to mitigate and that mitigation was possible.¹⁵

An innocent party's mitigation efforts need to be reasonable, not perfect, "using what it knows then, without hindsight, and it need not do anything risky".¹⁶

It is not a failure to mitigate when an innocent vendor refuses the defaulting purchaser's revised terms to purchase the property at a lower price.¹⁷

Forfeiture of Deposits

A forfeited deposit does not constitute damages for breach of contract but stands for the performance of the contract.¹⁸

The Court of Appeal has confirmed that:

*A true deposit is an ancient invention of the law designed to motivate contracting parties to carry through with their bargains. Consistent with its purpose, a deposit is generally forfeited by a buyer who repudiates the contract, and is not dependant on proof of damages by the other party. If the contract is performed, the deposit is applied to the purchase price.*¹⁹

The test for relief from forfeiture of deposits poses two questions:

¹⁵ *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012 SCC 51](#); *Asamera; Evans v. Teamsters Local Union No. 31*, [2008 SCC 20](#); *Red Deer College v. Michaels*, [1975 CanLII 15 \(SCC\)](#); *Miller v. Wang*, [2018 ONSC 7668](#)

¹⁶ *Malatinsky v. Miri*, [2020 ONSC 16 \(CanLII\)](#)

¹⁷ *Azzarello v. Shawqi* [2019 ONCA 820](#), *Malatinsky v. Miri*, [2020 ONSC 16 \(CanLII\)](#)

¹⁸ *Ching v. Pier 27 Toronto Inc.* [2021 ONCA 551](#)

¹⁹ *Tang v. Zhang* [2013 BCCA 52](#); *Redstone Enterprises Ltd. v. Simple Technologies Inc.* [2017 ONCA 282](#)

- i) is the forfeited deposit out of all proportion to the damages suffered; and
- ii) would it be unconscionable for the vendor to retain the deposit.²⁰

Damages

For innocent vendors, the normal measure of damages at common law for the failure to complete a purchase of land is the difference between the contract price and the market value of the land, plus the out of pocket expenses incurred as a result of the purchaser's breach, including carrying costs, real estate commissions, legal fees, etc.

For innocent purchasers, damages are typically the difference between the cost of obtaining an equivalent property and the property they would have purchased, but for vendor's default, plus the out of pocket expenses incurred as a result of the vendor's breach.

In *Akelius Canada Inc.*,²¹ damages for "speculative profit" were denied. The agreement related to the purchase of several apartment buildings. The Court of Appeal noted that the purchaser was not in the business of flipping apartment buildings, but rather investment and rental. The fact that the vendor re-sold the apartment buildings 2 years later for almost 25% more was not relevant.

Conversely, in *The Rousseau Group v. 2528061 Ontario Inc.*,²² damages for lost profits was awarded to a purchaser following the failure by the vendor to close. The court considered the sophistication of the parties and the fact that the agreement of purchase and sale and the purchaser's actions showed that the purchaser was buying the land to develop and that the vendor knew this. In proving its damages, the purchaser provided expert evidence of the costs and profits of comparable developments. The purchaser was awarded its estimated profits of \$11.1 million.

3. Pursue specific performance

In some circumstances, the innocent party can bring an action for specific performance of the contract. If they do so, the agreement should not be terminated, as the non-defaulting party seeks

²⁰ *Varajao v. Azish*, [2015 ONCA 218](#); *Redstone Enterprises Ltd. v. Simple Technologies Inc.*, [2017 ONCA 282](#); *Azzarello v. Shawqi*, [2019 ONCA 820](#)

²¹ [2022 ONCA 259 \(CanLII\)](#)

²² [2022 ONSC 486 \(CanLII\)](#)

to hold the defaulting party strictly to the terms of the agreement.²³

It is advisable to carry out the tender process in order to confirm to the court that you were ready, willing, and able to complete the transaction on the scheduled closing date.

Whether specific performance for property will be granted will turn on the particular facts. The Court of Appeal in *Lucas v. 1858793 Ontario Inc. (Howard Park)*²⁴ has recently confirmed that the specific performance analysis is not merely a search for uniqueness. Other factors such as the inadequacy of damages as a remedy and the behaviour of the parties also play a role.²⁵

A FEW RECENT DECISIONS

Ching v. Pier 27 Toronto Inc.²⁶

This decision relates to a new-build condo where the vendor unilaterally extended the closing date multiple times beyond what was permitted in the Tarion Addendum. The court confirmed that each time the vendor extended the closing date without authority, it breached the agreement, and the purchasers were entitled to affirm the agreement or accept the repudiation. The purchasers did not acknowledge or accept multiple breaches of the agreement by the vendor and did not request a return of their deposits within a reasonable period following the breaches. Instead, the purchasers requested permission from the vendor to assign the agreement and to allow prospective purchasers to inspect the unit, thereby treating the agreement as if it was continuing.

The purchasers ultimately failed to complete the transaction on the final scheduled closing date and their deposits of \$214,238.85 were forfeited, even though the vendor was able to re-sell the unit at a higher price.

Ultimately, the Court of Appeal upheld the forfeiture of the deposits affirming that a forfeited deposit does not constitute damages for breach of contract but stands for the performance of the contract.

²³ *Chai v. Dabir*, [2015 ONCS 1327 \(CanLII\)](#)

²⁴ [2021 ONCA 52 \(CanLII\)](#)

²⁵ See *Landmark of Thornhill Ltd. v. Jacobson*, [1995 CanLII 1004 \(ON CA\)](#); *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, [2001 CanLII 28012 \(ONSC\)](#); *UBS Securities Inc. v. Sands Brothers Canada Ltd.*, [2009 ONCA 328](#)

²⁶ [2021 ONCA 551](#)

2174372 Ontario Ltd. v. Dharmash²⁷

This is a decision on a motion for summary judgement relating to a new home purchase where both parties allege that the other party was responsible for the failure to close. Several weeks prior to closing, the purchaser notified the vendor's sales representative that he was "unable to move forward with the completion of the agreement" without concessions from the vendor, including a price reduction and extension of the closing date. As a result of a downturn in the market, the purchaser's current property was worth less than anticipated and accordingly the purchaser was not able to provide a sufficient deposit to obtain the mortgage financing for which he had been pre-approved. The vendor declined to amend the agreement and offered to allow the purchaser to retract the repudiation of the agreement. The purchaser did not retract his repudiation of the agreement, but again requested a reduction in the price.

Shortly thereafter, the vendor's lawyer wrote to the purchaser and confirmed that the purchaser was legally obligated to complete the transaction on the scheduled closing date, failing which the deposits would be forfeited and the vendor would re-sell the property and look to the purchaser for any damages resulting from the purchaser's breach of the agreement. The purchaser replied the same day confirming that he was unable to close due to mortgage approval restrictions and noting that he was happy to meet if there was any ability to renegotiate the agreement.

A week before the scheduled closing date, the vendor's lawyer confirmed that the vendor was ready, willing, and able to complete the transaction on the scheduled closing date.

Unbeknownst to the vendor, the purchaser attended at the building site on his own and discovered that the home was not ready for occupancy – the purchaser noted that there was no electricity, no heating, no lighting, the flooring was not completed, no carpeting, there were no sinks, toilets or bathtubs, no faucets, no appliances, no countertops, no locks or garage doors. The purchaser also confirmed that no occupancy permit had been issued by the municipality and that no inspection had been requested.

The court subsequently confirmed that the property was not substantially complete and was not

²⁷ [2021 ONSC 6139](#)

ready for occupancy on the scheduled closing date.

The vendor's lawyer tendered the vendor's closing documents on the purchaser's lawyer on the morning of day of closing. Later that day, the purchaser's lawyer delivered the requisite closing documents signed by the purchaser and a copy of a certified cheque for the balance due on closing, and noted that while the purchaser was ready, able and willing to close the transaction, but he would not be taking possession as the property was not substantially complete and not ready for occupancy. He noted that the vendor was in breach of the agreement as the property was not substantially complete and not ready for occupancy.

It turns out that the purchaser had arranged for a short-term high interest mortgage, knowing that the vendor would not be in a position to provide occupancy on the closing date.

The vendor's lawyer wrote to the purchaser's lawyer the next day confirming that the purchaser's lawyer had neither asked for the purchaser's deposit to be returned nor elected to terminate the agreement. Accordingly, the agreement remained valid and the vendor's lawyer set a new closing date approximately one month later. The purchaser's lawyer replied the same day confirming that as far as the purchaser was concerned, the agreement was terminated and the purchaser was entitled to have his deposit returned.

The court confirmed that the purchaser's email to the vendor confirming that he was "unable to move forward with the completion of the agreement" was a clear repudiation of the agreement. The court also confirmed that the vendor clearly affirmed the agreement and declined to accept the repudiation when the vendor's lawyer wrote to the purchaser confirming that he was legally obliged to complete the transaction on the scheduled closing date.

It was clear and unequivocal that the vendor elected not to terminate the agreement but insisted on its continued performance right up until the scheduled closing date. Consequently, the agreement continued and both parties were obliged to close in accordance with the terms of the agreement. The vendor was unable to do so and was found to be in breach. As a result, the purchaser was entitled to a return of his deposits. In addition, the purchaser was entitled to damages in the amount of \$25,000, representing the lender fee that was payable even though the mortgage was not registered and the funds were returned to the lender shortly after the scheduled closing date.

Park Avenue Homes Corp. v. Malik²⁸

This is another decision relating to the failed closing of a newly constructed home. The vendor and purchaser signed an agreement for a new build, semi-detached home with a purchase price of \$788,900. Deposits totalling \$60,000 were paid. Between signing the agreement and the closing date, the real estate market had dropped, and the appraised value of the subject property was lower than the purchase price. The purchaser was unable to obtain adequate financing and did not close.

The court noted that the decrease in the value of the subject property was a result of a general decline in the real estate market and that purchasers assume the risk of fluctuations in the market value of the property.²⁹ “A drop in the market for real estate is not unforeseeable and not a valid basis for being let out of an Agreement of Purchase and Sale.”³⁰

LESSONS AND BEST PRACTICES

Clients can be quick to blame their lawyer if a deal goes sour, so we need to ensure that we protect ourselves as much as possible.

- Be alert to signs of a potential default. If the other party has not obtained counsel, or is not responding, this may be a sign that they are not prepared to close. If you receive overly technical or strange requisitions, this could be a sign that the purchaser is looking for an excuse to get out of the deal.³¹
- Be familiar with the Tarion requirements for delayed occupancy/closing dates and advise clients purchasing new construction homes to send you copies of delay notices received from

²⁸ [2022 ONSC 973 \(CanLII\)](#)

²⁹ See *Redstone Enterprises Ltd. v. Simple Technology Inc.*, [2017 ONCA 282 \(CanLII\)](#)

³⁰ See *Perkins v. Sheikhtavi*, [2019 ONCA 925 \(CanLII\)](#); *Burkshire Holdings v. Ngadi*, [2021 ONSC 2550 \(CanLII\)](#); *Forest Hill Homes v. Ou*, [2019 ONSC 4332 \(CanLII\)](#)

³¹ See *Karami v. Kovari*, [2019 ONSC 637 \(CanLII\)](#), where the purchaser changed counsel the day before closing and the newly retained lawyer sent a letter claiming the agreement was null and void because the purchase price was not clear because negotiations caused unclear hand written changes to the agreement (even though the purchase price had been referenced in prior amending agreements) and claimed that title was not clear because the parcel register noted that there was an exception to the Land Titles guarantees under s. 44(1) for rights by way of adverse possession, prescription, misdescription or boundaries settled by convention.

the builder so that you can review to confirm the validity of same.

- Discuss the options and consequences with your client and take notes for your file.
- Obtain written instructions as early as possible. It may take some time to resolve – so waiting until 4pm on the day of closing to try to reach your client for instructions is not only stressful, but may jeopardize your client's position. You also need to give the other lawyer sufficient time to seek instructions.
- If your client has no intention of closing, get clear instructions in writing before sending notice of anticipatory breach. Document your advice to your clients.
- If you receive notice of anticipatory breach, seek instructions and respond accordingly. Doing nothing may affect your client's options.
- Carefully consider the wording of requests to extend a closing date. I have seen many that would constitute anticipatory breach.
- In order to tender, you have to be in a position to close if the other party has their act together and is able to provide everything needed to close.

Justice Paul Perrell reviewed the decision in *Phinny v. Macaulay*³² at the 2009 Law Society Real Estate Summit.³³ The *Phinny* case is a cautionary tale for real estate lawyers and if you haven't read it, you should.

The transaction in *Phinny* related to the purchase of approximately 450 acres on Lake Huron consisting of 12 islands, a water lot, and the mainland property. Phinny, the purchaser, and Macaulay, the vendor, were both eager to complete the transaction.

However, Phinny's lawyer was not satisfied with answers that he had received to his letter of requisitions regarding a potential mining reservation and an easement and advised Phinny not to

³² [2008 CanLII 47015 \(ONSC\)](#)

³³ Perrell, Paul M., "How to Protect Yourself When the Client's Deal is in Trouble", [6th Annual Law Society Real Estate Summit](#), April 22, 2009

close. Phinny refused to close and sued for the return of his deposit of \$30,000. The vendor counterclaimed for damages in the amount of \$343,645, being the difference in the purchase price he was able to get following the re-listing and eventual sale of the property to a different purchaser.

Phinny defended the counterclaim and brought in his lawyer as a third-party claim.

The court confirmed that Phinny had defaulted on the agreement, as the requisitions were either not valid or were suitably answered prior to closing, but dismissed the vendor's counterclaim because the vendor had failed to mitigate its damages. The court confirmed that Phinny's lawyer was negligent in advising Phinny that he had reason to refuse to close the transaction and held the lawyer responsible to indemnify Phinny for his lost deposit and any other losses he suffered.

Justice Perrell summarized several lessons for real estate lawyers from the Phinny case:

1. A purchaser's lawyer is ill-advised to rush to take the position on behalf of his or her client that a real estate transaction has aborted because of the vendor's apparent inability to convey title as promised under the agreement of purchase and sale unless absolutely certain this is the case.
2. The *Vendors and Purchasers Act* may provide a real estate lawyer and his/her client with an escape route out of a troubled transaction.
3. In aborting real estate transactions, lawyers must have a very clear understanding about when their clients have the right to treat the contract at an end.
4. It is a fundamental principle that not all defects are sufficient to justify refusing to close a transaction.
5. A lawyer best protects him/herself and better serves the client by emphasizing that the modern attitude of the courts is to favour the enforcement of agreements of purchase and sale and to recognize that vendors and purchasers owe a duty of honesty to each other to perform a contract honestly made.

CONCLUSION

Real estate lawyers need to provide timely advice as to the options available and the consequences when a party is unable to complete a transaction. Being able to provide timely and accurate advice is critical. This requires an understanding of when a party can be declared in default, consideration of the practicalities of the client's situation and the consequences of the proposed actions before proceeding.

Having a litigator or two in your network experienced in real estate matters is also helpful so that timely referrals can be made for clients who find themselves involved in a troubled transaction.



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TAB 15

20th Real Estate Law Summit - Day 2

Succession Planning: Thinking about What's Next

Melissa McWilliam, Counsel, Practice Management
Law Society of Ontario

April 20, 2023



Succession Planning: Thinking about What's Next

Melissa McWilliam, Counsel, Practice Management
Law Society of Ontario

LSO Practice Supports & Resources

Contingency Planning for Lawyers

Lawyers face the possibility of numerous unexpected interruptions in their law practices. Contingency planning in the event of a disaster, disability, death, or other unexpected periods of absence from practice should be considered as a means of providing peace of mind for loved ones, clients and employees. Also, unless you properly plan for contingencies, serious prejudice can result to your clients.

The Contingency Planning Guide for Lawyers provides several practical resources that have been prepared to encourage and assist lawyers in developing such plans.

<https://lso.ca/lawyers/practice-supports-and-resources/topics/opening,-operating-or-closing-a-practice/contingency-planning-for-lawyers>



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TAB 16

20th Real Estate Law Summit - Day 2

Playing in the Family Law Sandbox

Roslyn Tsao

Epstein Cole LLP

Tannis Waugh, C.S.

Waugh & Co Professional Corporation

April 20, 2023



Playing in the Family Law Sandbox: Staying out of the Muck!

(Real Estate Lawyer Considerations)

Presented by: Roslyn Tsao and Tannis A. Waugh

Conflicts

Whether you're acting for first time homebuyers who are getting a gift from one buyer's parents or for separating spouses who are selling their matrimonial home, conflicts should and must be top of mind.

There is a general prohibition for lawyers to act for both the transferor and transferee of real property;¹ however, exceptions exist, including when the transferor and transferee are "related persons" as defined in section 251 of the *Income Tax Act* (Canada).² Related persons under this section include "individuals connected by blood relationship, marriage or common-law partnership or adoption."³

The exception in the Rules allow for a lawyer to jointly act for spouses, but in considering whether to do so, a lawyer should also consider other Rules relevant to the transaction.

The primary consideration associated with joint retainers and S. 251 is just because you *can* act, does not mean that you should.

When you consider acting for both spouses, make an assessment of whether there is already a conflict which would prohibit you from acting so that you comply with your obligations under R. 3.4, or whether there is a significant enough risk that a conflict will arise during the transaction that will require you to cease acting for both parties and refer the matter out to separate lawyers.

You should always consider:

- a. The relative sophistication of the parties generally and to each other;
- b. Immediate power imbalances that are apparent;
- c. Terms of the transaction which create more risk for a conflict;
- d. Your relationship to the clients – are these long-standing, amicable and sophisticated clients or did they find you from Google?
- e. The prejudice to both or either client(s) if a conflict were to arise that resulted in delays and additional counsel;
- f. Are there indicia of a fraudulent conveyance; and
- g. any context specific considerations that are relevant.

The safest course of action is to never act for two or more parties where a conflict could arise. Since a conflict can arise in any transaction, that is not a realistic policy so the next inquiry is whether the transaction requires independent legal advice or representation, or whether there is a significant risk that a conflict may occur during the transaction.

¹ *Rules of Professional Conduct*, Rule 3.4-16.7

² *Ibid*, Rule 3.4-16.9

³ *Income Tax Act*, R.S.C., 1985, c.1 (5th Supp.), s. 251(2)(a)

Independent legal advice and independent legal representation are not the same thing, and their obligation arises as a recommendation or a mandatory requirement in different scenarios.

The Intention of the Clients

To avoid conflicts, you need to understand the intentions of the client. According to *HSBC Securities (Canada) v. Davis, Ward and Beck*, it is the real estate lawyer's responsibility to ascertain the intention of their client regarding the transaction⁴.

This is such a key component of the transaction because intention may create a conflict between the parties, or it may require additional work on the real estate lawyer's behalf – both of which could create exposure for the lawyer.

There is also a strong argument to be made that a failure to ascertain your client's intentions is a failure to comply with the rules associated with competency set out in Section 3.1.⁵

In *Stergiopoulos v Von Biehler*, the intent of the parties was determinative in the court deciding that the transfer of properties into joint ownership were transferred with a resulting trust in favour of the applicant, Mr. Stergiopoulos.⁶

The parties were spouses who were seeking a divorce and the resolution of property and support issues. At trial, Ms. Von Biehler's position was that Mr. Stergiopoulos had gifted her his interest in two properties when he transferred them into both their names as joint tenants. The parties were at odds about the intent of the transferred properties as Mr. Stergiopoulos took the position that the transfers into joint ownership were effectuated for the purpose of having joint wills with an end view of benefitting their four children equally.⁷

This is an issue that will come up time and time again with spouses because it is a very common practice to take title to property with a right of survivorship for the purposes of estate planning. Understandably, they generally are not contemplating the consequences of separation when giving instructions on these kinds of transfers.

The real estate lawyer completing these kinds of transactions, particularly on a joint retainer, is exposing themselves to potential liability if the consequences of separation have not been raised. Lawyers do not need to give family law advice to discharge this duty to the clients if they are only acting as the parties' real estate lawyer, but they do need to advise clients of the risks of the transaction. By providing both parties with the following advice, the real estate lawyer can protect themselves from exposure:

- h. Advising the parties that the transfer could affect property entitlements upon separation in a negative way;
- i. That you are either providing family law advice or that you are *not* providing family law advice and are further advising both parties to seek family law advice; and, if applicable,

⁴ *HSBC Securities (Canada) Inc. v. Davies, Ward & Beck* (2003), 68 OR (3d) 289, [2003] OJ No 4895 (QL), 2003 CanLII 20888 (ONSC).

⁵ Law Society of Ontario. (2018, July). *Rules of Professional Conduct*. Retrieved from <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct>, Section 3.1.

⁶ *Stergiopoulos v Von Biehler*, 2014 ONSC 6391.

⁷ *Ibid* at para. 24.

- j. Obtaining a written family law waiver confirming that the party(ies) was/were advised of the potential risk, was/were given an opportunity to obtain advice and either chose to waive such advice or received it.

Importance of Intake Forms

An easy and efficient way to ascertain the parties' intention and avoid or get ahead of conflicts is the use of intake forms.

Intake forms constitute your written record of the information you are relying on to complete the transaction and can take many forms. In its most advanced, it can be a fillable website or a private client portal. It can also be a fillable pdf or printable form which is filled out and returned or it could be as analogue as a series of questions over email or a phone/in person meeting.

The intake form serves two purposes: it provides the client an opportunity to provide you the information you need to complete the transaction and potentially get ahead of any issues like conflicts or the requirement for additional work, but it also provides you an opportunity to provide written advice to the client that you can rely on later should a dispute arise directly in the form and ancillary materials. This is done by adding explanations in the intake form explaining why the information is important.

In spousal title transfers and purchases/sales, the parties may ask the real estate lawyer to represent them both under a joint retainer. A Consent to Joint Retainer should always be included with your intake forms to be agreed to by the parties anytime you are acting for two or more parties jointly.

A real estate lawyer that has gathered all the relevant information through the intake process is in a substantially better position to determine whether there are any conflicts that would preclude them from acting for both spouses. The Rules of Professional Conduct ("Rules") govern when you can and cannot act for two parties under a joint retainer.

For examples of relevant intake questions on a title transfer, please *see **Schedule A – Title Transfer Information Form questions.***

Is it a Gift or a Loan?

With the increased cost of home ownership, it is become more common for parents to contribute to the downpayment of their children's first (and subsequent) property purchases. When the child is co-buying the property with a partner, additional issues arise.

If you're acting for the buyers, the information provided to you on the intake forms will allow you to assess whether there are potential family law issues that may require further discussion or at a minimum, a recommendation to obtain family law advice and the appropriate waiver signed.

It is also more common for parents to require security for their 'gift' to their child on a joint purchase with a partner. Generally, we see that the parents' intention is to gift the downpayment contribution to the children unless they separate in which case, the gift should be treated as a loan.

There is a lot of litigation on the determination of these gift/loans and parents can protect themselves with a promissory notice and registering a private mortgage securing the amount of the gift. However, registering a security instrument is not enough and the great context of the provision of the funds is relevant.

If the parents register a mortgage in second position to secure their gift but continuously advise the child and their spouse that the funds are a gift or that the loan is forgiven (and do this in writing), the parents are going to have a lot of difficulty asserting the position that the gift was a loan.

There are strategies in the registered charge that will assist the parents in maintaining the position that the funds are a loan. Firstly, register the loan as 'on demand' and include an interest rate. The interest does not necessarily need to be paid but it represents evidence of the chargor's intentions which can be made more flexible with a statement in the schedule to the charge indicating that the interest may be waived at the discretion of the chargor. Lastly, consider having the 'borrowers' make a small payment yearly to affect the intention of the parties and avoid any limitation arguments.

Waiver of Family Law Advice

When dealing with interspousal title transfers in your real estate practice, the intersection of family law considerations will naturally occur. It is important that your clients understand that you are not their family lawyer(if you are not providing that advice) and that you encourage them to seek family law advice. If your client(s) choose(s) to waive such advice, getting the waiver in writing will provide a clear record of discharging your professional responsibility duties.

*For an example of a family law waiver, see **Schedule B**.*

Solicitor's Negligence

The topics discussed so far are included to encourage good practice habits when working with parties where both real estate and family law matters arise, including the importance of intake forms (see **Schedule A**). Failure to ask relevant questions can result in a solicitor negligence claim.

In *Foley v Cook*, a Superior Court decision by Justice Pitt, the parties were in an intimate relationship when they began acquiring properties both jointly and separately. At the breakdown of their relationship, they entered an agreement whereby Cook would give a 50 percent interest to Foley in profits from a property solely owned by Cook, but only when Cook decided to sell the property, or upon her death. Cook did not want to enter the agreement, but she felt pressured by Foley who had been harassing Cook after their separation.

The parties retained a lawyer to draft the agreement. That lawyer had previously acted for Cook and Foley in jointly acquiring other properties.

In drafting the agreement, the lawyer never explained the agreement to Cook, nor did he give her any advice on her legal interests in giving a 50 percent interest of the property to Foley. The lawyer also failed to make reasonable inquiries about the transaction and was unaware of the

history between the parties. At trial, the lawyer argued that he did not suspect anything more than a business relationship between the parties, and therefore assumed that his only duty was to put in writing the agreement reached by the parties. He took the position that there was nothing to alert him about the presence of a conflict of interest.

Justice Pitt found this explanation unsatisfactory and stated, “the real issue is whether there was a potential conflict of interest that could have been identified by merely asking Cook to confirm the instructions given by Foley.”⁸

In finding the lawyer had breached his solicitor duty to Cook, Justice Pitt stated that he “had a clear legal duty to take reasonable steps to protect the interest of Cook. He assumed unreasonably...that Cook needed no protection, on the basis of a relationship with her that would not have justified such an inference.”⁹

The *Foley v Cook* case is a reminder that when solicitors represent both parties, the duty of care is even higher.¹⁰

It is also illustrative of the importance of intake forms in identifying conflicts and shielding the lawyer from liability. If the lawyer had asked the question, “what is the relationship between the parties going on title?” from the outset, the answer would have signaled a requirement for him to make additional inquiries, provide conflict advice and potentially recommend independent representation. This case also illustrates the utility of a family law waiver to minimize exposure to liability.

Separation Transfers

Family law interactions are also engaged at the separation stage with transfers pursuant to separation agreements and sales.

Separation transfers can arise in the following circumstances: by court order, by separation agreement, or by minutes of settlement.

Court Orders

If possible, try to provide advice on the content of a court order before it is obtained and if it's overly complex, it can be sent to the Land Registry Office for pre-approval. Pre-approval can take 5-10 days so this is not always an option.

The property must be properly described to ensure it can be registered. Instead of only using the municipal address, describe property three ways: municipal address, PIN and legal description. This provides the Land Registry Office with discretion and flexibility if there happens to be a mistake in the legal description or PIN as the municipal address is not enough.

Furthermore, a court order registered on title generally cannot be removed without a further court order. To protect parties' privacy and giving yourself the ability to remove the court order from title

⁸ *Foley v. Cook*, [2002] OJ No 2120, at para. 98.

⁹ *Ibid* at para. 101.

¹⁰ *Ibid* at para. 88.

(particularly if a further sale to a third party is contemplated), you can avoid this problem by including language in your court order allowing the Land Registry Office to remove the court order if certain conditions are met.

See **Schedule D** for example language.

Separation Agreements

Separation agreements are not homogenous and can contain simple or complex directions on what is to happen with real property. Many real estate lawyers do not have the experience to comment or advise on family law matters but will be tasked with interpreting the separation agreement as it relates to the title transfer or sale. There may be contingencies or conditions that pose challenges in affecting the title transfer and the separation agreement should be requested and reviewed prior to confirming the terms of the retainer, if possible.

For example, it is not uncommon for separation mortgages to be contemplated as part of a separation agreement. A separation mortgage is a charge secured against real property for security against a future payment by the other spouse.

If there will be a new institutional mortgage contemplated as part of the transaction, this separation mortgage will usually pose problems for the institutional lender and, in many cases, is incongruent with the financing terms. This issue of the registration of the separation mortgage should be canvassed and approved in writing by the bank *prior* to agreeing to terms in the separation agreement to avoid the potential of non-compliance with the agreement. If the separation agreement has already been executed, you may need to take this issue back to the family lawyers.

Some parties will attempt to have the separation agreement and title transfer documentation executed and registered simultaneously. This should be avoided as the separation agreement is the constating document that directs the title transfer, and it creates the potential that the real estate lawyer may have to make significant revisions on the title transfer documentation if the terms change.

Land Transfer Tax Implications

Transfers between spouses or former spouses are *de facto* subject to LTT but may be exempt if they fall under an exception.¹¹ See **Schedule C** for example statements in the affidavit.

In determining the correct tax statements to make in your land transfer tax affidavit, note that if there is no separation agreement in place there is still the ability of one spouse to transfer property to the other without LTT by using the statement “My spouse is a party to this document” vs. “My spouse has released all rights under the Family Law Act by a separation agreement.” as long as there is no consideration. If there is consideration, the transaction would be subject to LTT and its avoidance would necessitate a separation agreement.

The most common exemptions in separation transfers will be that the parties have agreed in writing to live separate and apart or the transfer is mandated by court order.

¹¹ *Exemption(s) – for Certain Transfers Between Spouses*, R.R.O. 1990, Reg. 696

Determining whether ILA or ILR is Needed

The starting point for determining whether ILA or ILR is required is the relationship between the parties. In a spousal separation transfer, the parties are considered related parties under s. 251 of the *Income Tax Act* and therefore the two-lawyer rule does not apply.

However, just because you *can* act, does not mean that you should and while ILA/ILR may not be required based solely on the two-lawyer rule, it may actually be required, or you have an obligation to recommend it, because of other specific conflict considerations and the general duty to avoid conflicts as set out in Rule 3.4-1.¹²

When acting for both spouses in a separation transfer, the real estate lawyer must be hyper vigilant about the potential conflict issues at every stage of the transaction and an initial inquiry is not enough.

First, the use of intake forms may give rise to identifying a potential conflict between the parties, such as:

1. A high conflict separation;
2. An imbalance of power between the parties, particularly if there is an allegation of domestic violence;
3. A title transfer where a refinance is also being contemplated¹³;
4. A title transfer that involves a third party – e.g., a parent going on title to qualify for a new mortgage (or a new partner);
5. A failure on the part of either or one party to obtain family law advice;
6. The sophistication or one or both of the parties; and
7. The capacity of the parties.

This is not an exhaustive list.

What do you do if the parties do not have a separation agreement?

It is my practice to strongly recommend a separation agreement and separate family advice for separating spouses and I may refuse to act if the parties refuse to obtain one.

There are three important reasons for having a separation agreement in place:

1. LTT avoidance. If there is consideration flowing as a result of the transfer and there is no separation agreement in place, LTT will apply to the transaction.¹⁴

¹² Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.4-1, Retrieved from: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct>

¹³ This kind of transaction poses many potential problems such as: differing appraisal values on the property vs. the separation agreement that would need to be disclosed to the party coming off of title, the potential for other debts or property ownership on the part of the mortgagor being disclosed to the party coming off of title contrary to the wishes of the mortgagor, among others. These kinds of conflicts may arise on the eve of closing potentially creating prejudice for one or both of the parties. A refusal to accept this joint retainer ensures that a conflict will not derail a transaction.

¹⁴ *Exemption(s) – for Certain Transfers Between Spouses*, R.R.O. 1990, Reg. 696

2. Liability exposure minimization and protection of the parties. If the parties are both represented by separate family counsel, the expectation is that the parties are receiving appropriate advice. This is not the case if no family advice has been received and is even more of a problem if the parties are insisting on joint representation on the transaction. Liability exposure to the real estate lawyer intensifies if no other lawyers are involved.
3. Future financing. Parties who are opting to avoid the formal process of separation through a lawyer generally do not consider the financing problems that they will have with no separation agreement in place for future property purchases. Institutional lenders generally require proof of an executed separation agreement to confirm there are no ongoing spousal or child support obligations that will change the qualification figures for lending. Furthermore, the failure to obtain a separation agreement and subsequently purchasing property can create a leverage problem for the party purchasing – i.e., the bank insists on a separation agreement, and the buying spouse has no bargaining power because the absence of a separation agreement means they will default on their purchase agreement.

Documenting Separation Transfers in the LRO

It is common practice to add both spouses as transferors; this is not correct. If you are acting for the transferor, you are not acting for both spouses and it creates problems with the required unique lawyer and exemption statements in the transfer.

Instead, the party coming off title is noted as the sole transferor and the party acquiring full title is the transferee.

The consideration on the land transfer tax affidavit will be the assumption of half of the mortgage plus any cash payment specifically for the property (if applicable) and you will further select “All my interest to the co-owner(s)” as a statement in the transfer. Lastly, you will direct the LRO with a statement 61 describing the transfer.

*Attached as **Schedule D** is an example transfer with these items highlighted.*

Final Thoughts

Spousal transactions outside of the equal contribution purchase are never going to be cookie-cutter transactions, whether they are a result of spouses coming together or splitting apart. There is so much due diligence required at every step of the transaction, real estate lawyers do themselves a disservice if they do not charge appropriately for the work that is required.

Careful consideration should be undertaken every time a joint retainer is considered – an inquiry that does not end after the initial consult.

Lastly, trust your instincts. If something feels off, even if you are unable to articulate it, you can insist on ILR or decline the retainer altogether.

SCHEDULE A
TITLE TRANSFER INFORMATION FORM QUESTIONS

TITLE TRANSFER INFORMATION FORM

Questions about the Current Title Holder(s)

1. **Full legal names** and dates of birth for all parties **currently** on title:

Spousal Status (for all parties involved in the transaction):

- (a) Legally Married
- (b) Common-law
How Long? _____
- (c) Single
- (d) Separated
- (e) Divorced

If you are married, but holding title solely, please provide your spouse's full name below:

General Questions

1. Address of property being transferred:
2. Occupation (**job title**), work address, and work telephone number for all parties:
3. Current address (if not the property being refinanced/transferred):
4. Phone Numbers:
5. Email address(es) for all parties involved in the transaction:
6. What is the nature of this Transfer? (Why is the property being transferred?)
 - (a) Gift between family members
 - (b) Gift between spouses
 - (c) Family law transfer as a result of a separation
 - (d) Other: _____
7. Do you have two pieces of valid government issued photo identification that are not health cards?
8. What is the closing date that has been set for your transaction (if known)?
 - (a) Date: _____
 - (b) If separation, does your Separation Agreement have a deadline for the transfer?
 - (i) Yes
When: _____
 - (ii) No
9. Do you have any plans to be away on or near the closing date? If yes, when?

Residency (required information under the *Land Transfer Tax Act* for any transaction involving a Title Transfer)

1. Please confirm the residency, citizenship, or permanent residency status of **all** parties. ***If any party is not a Canadian citizen or permanent resident, please advise of your country (or countries) of citizenship.***

Title Insurance

1. Is there a Title Insurance Policy owner policy in place naming you as an owner of the property? (*In other words, was a Title Insurance Policy obtained when you purchased the property?*)

Questions about the Property (Freehold)

1. What Type of Property is being transferred?
 - (a) Detached
 - (b) Semi-detached
 - (c) Duplex
 - (d) Multi-unit (more than two) (e.g. triplex, fourplex)
Type: ___ Triplex ___ Fourplex
Other: _____
 - (e) Condominium
 - (f) Condominium Townhouse
 - (g) Freehold Townhouse
 - (h) Mobile Home
 - (i) Cottage
 - (j) Vacant land
 - (k) Mixed Commercial/Residential: *Please note percentage which is commercial/ residential*
Percentage (Residential): ___ %
Percentage (Commercial): ___ %
(l) Commercial property with no residential portion
(m) Other: _____
2. Does the property include a basement apartment, in-law suite, or other secondary unit?
3. Is any portion of the property agricultural land? If yes, what percentage?

Primary Residence and Tenancies

1. Do you, or are you going to, reside at the property?
2. If no, will the home be occupied by a family member? (please provide their name(s) and relationship to you)
3. Are there currently any tenants residing at the property? **If there are tenants, please provide us with a copy of the lease (if any) and the following information:**
Unit occupied: _____
(e.g., basement, top floor, whole property)
Name(s) of Tenants: _____

Amount of Rent: _____
Payment Date: _____
(e.g., 1st day of each month, 1st and 15th day of each month)
When did the tenancy commence?

Is there a lease? ___ Yes ___ No

Existing Mortgage/Line of Credit

1. Do you have any secured mortgages, debts, or secured lines of credit against the property?
2. Please provide the name of the bank and the branch address:
3. Is this mortgage being assumed by either owner (for family law separations)? **(i.e. is one party taking over full responsibility of the mortgage once the property is transferred?)**

Wiring Funds

1. If you will be receiving funds from the transfer, you have the option of having these funds wired into your account or picking up a certified cheque after closing. **By choosing wire, you are confirming that you agree to our wire policy found on the following pages.**

Refinance Questions – Refinance Transactions Only

1. Are you refinancing/getting a new mortgage as part of this transaction?
2. Are you using a private lender such a family member?
3. Which bank are you using?
4. Are you using a banker/broker? (If so, please list their contact information)
5. What type of new mortgage are you getting (*e.g. conventional mortgage, line of credit, dual mortgage and line of credit*)?
6. Are you getting multiple mortgages (such as a first and second mortgage/line of credit)?
7. Has the bank asked for a guarantor on your mortgage? (*if YES, please provide the guarantors name in the space provided*)
8. If the property is a condominium, has the Status Certificate has been ordered?
9. Is the purpose of this refinance to consolidate debts?
10. Do you, or your guarantors, own any other properties? If yes, please list the address(es).

ADDITIONAL QUESTIONS – PLEASE FILL-IN ALL THAT APPLY.

Additional Questions for Transfers Wherein a Party is Being Added to Title

1. Name(s) and date(s) of birth of party(ies) being added to title:
2. What is the nature of the party's(ies') relationship to the current title holder:
3. Why is/are the party(ies) being added to title?
4. How will you be taking title?
 - (a) Joint Tenants
 - (b) Tenants in Common
If Tenants in Common, shares held by each person:
Name(s): _____
Share: _____
Name(s): _____
Share: _____
 - (c) Sole (one) owner
5. Have **all parties being added to title** been physically present in (i.e. living in) Canada at least 183 days (approx. 6.5 months) of the last 12 months?
6. Are any of the parties being added to title a first-time homebuyer?
7. **If one or all parties are first-time homebuyers:** Do you have a spouse (legally married or common law) that has ever been on title to real estate anywhere in the world (even if they did not live there)?
8. Are any funds being paid to the party currently on title as part of the transaction? If yes, please provide the amount(s).

Additional Questions for Transfers Wherein a Party Is Being Removed from Title

1. Name(s) of party(ies) being removed from title:

2. Is the party being removed as a result of a family law separation? If no, why is/are the party(ies) being removed from title? **Please provide details:**
3. What is the nature of the party's(ies') relationship to the current title holder:
4. Are any funds being paid to the party being removed from title as part of the transaction? If yes, please provide the amount(s).

Additional Questions for Transfers Pursuant to a Separation Agreement

1. Is this transaction pursuant to a Separation Agreement pursuant to which title will be transferred to you?
2. If yes, does the Separation Agreement provide for any amount(s) to be paid to a former spouse? If yes, please provide the amount(s).
3. Please provide our office with the name of your family law counsel, if any.
4. Please provide our office with the name of your former spouse's family law counsel, if any, and with the name of your former spouse's real estate lawyer, if known.

SCHEDULE B
FAMILY LAW WAIVER

Acknowledgment and Waiver

To: [LAWYER]
From: [NAME]
Re: Transfer of [PROPERTY]
[LEGAL DESCRIPTION]

I, [PARTY], have retained the services of [LAWYER] of [FIRM] to assist me with a title transfer from [TRANSFEROR] *(of an interest)* in the above-noted property to [NAME] *(’s name alone pursuant to a marital separation of the title holders)*.

I confirm that [LAWYER] is not providing me with any family law advice. I confirm that [LAWYER] advised me that I should obtain family law advice with respect to this transaction and further confirm as follows:

1. I have chosen to waive said family law advice with respect to this transaction; or
2. I have already obtained family law advice with respect to this transaction.

Dated at _____ this _____ day of _____, 20____.
(location) (day) (month) (year)

WITNESS
(as to all signatures)

[NAME]

[NAME]

[NAME]

SCHEDULE C
LAND TRANSFER TAX AFFIDAVITS

SCHEDULE C

PROVINCIAL AND MUNICIPAL LAND TRANSFER TAX STATEMENTS

In the matter of the conveyance of:

BY:

TO:

Registered Owner

1.

I am

- ☐ (a) A person in trust for whom the land conveyed in the above-described conveyance is being conveyed;
- ☐ (b) A trustee named in the above-described conveyance to whom the land is being conveyed;
- ☒ (c) A transferee named in the above-described conveyance;
- ☐ (d) The authorized agent or solicitor acting in this transaction for _____ described in paragraph(s) () above.
- ☐ (e) The President, Vice-President, Manager, Secretary, Director, or Treasurer authorized to act for _____ described in paragraph(s) () above.
- ☐ (f) A transferee described in paragraph () and am making these statements on my own behalf and on behalf of _____ who is my spouse described in paragraph () and as such, I have personal knowledge of the facts herein deposited to.

3. The total consideration for this transaction is allocated as follows:

(a) Monies paid or to be paid in cash	\$125,000.00
(b) Mortgages (i) assumed (show principal and interest to be credited against purchase price)	\$272,000.00
(ii) Given Back to Vendor	\$0.00
(c) Property transferred in exchange (detail below)	\$0.00
(d) Fair market value of the land(s)	\$0.00
(e) Liens, legacies, annuities and maintenance charges to which transfer is subject	\$0.00
(f) Other valuable consideration subject to land transfer tax (detail below)	\$0.00
(g) Value of land, building, fixtures and goodwill subject to land transfer tax (total of (a) to (f))	\$397,000.00
(h) VALUE OF ALL CHATTELS - items of tangible personal property	\$0.00
(i) Other considerations for transaction not included in (g) or (h) above	\$0.00
(j) Total consideration	\$397,000.00

6. Other remarks and explanations, if necessary.

- The information prescribed for the purposes of section 5.0.1 of the Land Transfer Tax Act is required to be provided for this conveyance. The information has been provided as confirmed by _____.
- The transferee(s) has read and considered the definitions of "designated land", "foreign corporation", "foreign entity", "foreign national", "specified region" and "taxable trustee" as set out in subsection 1(1) of the Land Transfer Tax Act. The transferee(s) declare that this conveyance is not subject to additional tax as set out in subsection 2(2.1) of the Act because:
- (c) The transferee(s) is not a "foreign entity" or a "taxable trustee".
- The transferee(s) declare that they will keep at their place of residence in Ontario (or at their principal place of business in Ontario) such documents, records and accounts in such form and containing such information as will enable an accurate determination of the taxes payable under the Land Transfer Tax Act for a period of at least seven years.
- The transferee(s) agree that they or the designated custodian will provide such documents, records and accounts in such form and containing such information as will enable an accurate determination of the taxes payable under the Land Transfer Tax Act, to the Ministry of Finance upon request.
- This conveyance qualifies for an exemption from tax pursuant to R.R.O. 1990, Regulation 696 as the transferor is the spouse or former spouse of the transferee and:
- The conveyance is in compliance with the terms of a written agreement pursuant to which the parties have agreed to live separate and apart.

PROPERTY Information Record

A. Nature of Instrument: Transfer

LRO 80 Registration No. _____ Date: 2022/03/09

B. Property(s): _____ Assessment -
 _____ Roll No
 _____ Assessment -
 _____ Roll No

C. Address for Service: _____

D. (i) Last Conveyance(s): _____ Registration No. _____
 _____ Registration No. _____

(ii) Legal Description for Property Conveyed: Same as in last conveyance? Yes ☒ No ☐ Not known ☐

E. Tax Statements Prepared By: _____

PROVINCIAL AND MUNICIPAL LAND TRANSFER TAX STATEMENTS

In the matter of the conveyance of:

BY:

TO:

Joint Tenants

Joint Tenants

1.

I am

- ☐ (a) A person in trust for whom the land conveyed in the above-described conveyance is being conveyed;
- ☐ (b) A trustee named in the above-described conveyance to whom the land is being conveyed;
- ☒ (c) A transferee named in the above-described conveyance;
- ☐ (d) The authorized agent or solicitor acting in this transaction for _____ described in paragraph(s) () above.
- ☐ (e) The President, Vice-President, Manager, Secretary, Director, or Treasurer authorized to act for _____ described in paragraph(s) () above.
- ☐ (f) A transferee described in paragraph () and am making these statements on my own behalf and on behalf of _____ who is my spouse described in paragraph () and as such, I have personal knowledge of the facts herein deposited to.

3. The total consideration for this transaction is allocated as follows:

(a) Monies paid or to be paid in cash	\$0.00
(b) Mortgages (i) assumed (show principal and interest to be credited against purchase price)	\$0.00
(ii) Given Back to Vendor	\$0.00
(c) Property transferred in exchange (detail below)	\$0.00
(d) Fair market value of the land(s)	\$0.00
(e) Liens, legacies, annuities and maintenance charges to which transfer is subject	\$0.00
(f) Other valuable consideration subject to land transfer tax (detail below)	\$0.00
(g) Value of land, building, fixtures and goodwill subject to land transfer tax (total of (a) to (f))	\$0.00
(h) VALUE OF ALL CHATTELS -items of tangible personal property	\$0.00
(i) Other considerations for transaction not included in (g) or (h) above	\$0.00
(j) Total consideration	\$0.00

4.

Explanation for nominal considerations:

m) Inter-spousal transfer for natural love and affection

5. The land is not subject to an encumbrance**6. Other remarks and explanations, if necessary.**

- The information prescribed for the purposes of section 5.0.1 of the Land Transfer Tax Act is required to be provided for this conveyance. The information has been provided as confirmed by _____.
- The transferee(s) has read and considered the definitions of "designated land", "foreign corporation", "foreign entity", "foreign national", "specified region" and "taxable trustee" as set out in subsection 1(1) of the Land Transfer Tax Act. The transferee(s) declare that this conveyance is not subject to additional tax as set out in subsection 2(2.1) of the Act because:
- (c) The transferee(s) is not a "foreign entity" or a "taxable trustee".
- The transferee(s) declare that they will keep at their place of residence in Ontario (or at their principal place of business in Ontario) such documents, records and accounts in such form and containing such information as will enable an accurate determination of the taxes payable under the Land Transfer Tax Act for a period of at least seven years.
- The transferee(s) agree that they or the designated custodian will provide such documents, records and accounts in such form and containing such information as will enable an accurate determination of the taxes payable under the Land Transfer Tax Act, to the Ministry of Finance upon request.

7. Statements pertaining only to Municipal Land Transfer Tax:

No MLTT is payable as per Land Transfer Tax Act exemption statement 9049, 9146.

Explanation: This conveyance is an inter-spousal transfer for natural love and affection.

PROVINCIAL AND MUNICIPAL LAND TRANSFER TAX STATEMENTS

A. Nature of Instrument:	Transfer		
	LRO 80	Registration No.	Date:
B. Property(s):			Assessment -
			Roll No
			Assessment -
			Roll No
			Assessment -
			Roll No
C. Address for Service:			
D. (i) Last Conveyance(s):	Registration No.		
	Registration No.		
	Registration No.		
(ii) Legal Description for Property Conveyed: Same as in last conveyance? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Not known <input type="checkbox"/>			
E. Tax Statements Prepared By:			

SCHEDULE D
EXAMPLE OF TRANSFER FOR SEPARATIONS

SCHEDULE DLRO # 80 **Transfer**

Received as [REDACTED] on 2022 03 09 at 16:56

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

yyyy mm dd Page 1 of 3

Properties

PIN [REDACTED] LT Interest/Estate Fee Simple

Description [REDACTED]

Address [REDACTED]

PIN [REDACTED] LT Interest/Estate Fee Simple

Description [REDACTED]

Address [REDACTED]

Consideration

Consideration \$125,000.00

Transferor(s)

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

Name [REDACTED]

Address for Service [REDACTED]

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).

Transferee(s)

Capacity

Share

Name [REDACTED]

Registered Owner

Date of Birth [REDACTED]

Address for Service [REDACTED]

Statements

Schedule: The Transferee, [REDACTED], is one and the same person as the current co-owner of the subject lands and premises. This conveyance is in compliance with the terms of a written agreement pursuant to which the parties have agreed to live separate and apart. This conveyance deals with the Transferor's interest in the property.

Signed Byacting for
Transferor(s)

Signed 2022 03 09

I am the solicitor for the transferor(s) and I am not one and the same as the solicitor for the transferee(s).

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

acting for
Transferee(s)

Signed 2022 03 09

I am the solicitor for the transferee(s) and I am not one and the same as the solicitor for the transferor(s).

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

Submitted By

2022 03 09

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

Submitted By

[redacted]
[redacted]

Fees/Taxes/Payment

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

File Number

Transferor Client File Number : [redacted]

PLAYING IN THE FAMILY LAW SANDBOX: Staying out of the Muck!

Tannis A. Waugh and Roslyn M. Tsao

LSO 20th Real Estate Law Summit - April 20, 2023

Scenario #1 - Acting For The Happy Couple and The Parental Loan/Gift

- ▶ Jack and Diane are buying a house and getting married shortly after closing.
- ▶ Diane is contributing \$400,000 to the purchase price - \$300,000 of which is from Diane's parents and \$100,000 from Diane's savings
- ▶ Jack is contributing \$100,000 from his savings to the purchase price.
- ▶ They intend to take title as "joint tenants".
- ▶ The balance of the purchase price is coming from an institutional lender.
- ▶ Diane has asked you, in a separate call from Jack, about how to protect her parent's \$300,000 in case she and Jack separate later.
- ▶ She floats the idea of a 2nd mortgage in favour of her parents but says that Jack "sort of knows" that it is a gift to her/them to buy the house as they won't pay any interest and may not ever have pay them back.

The Issues

- ▶ Conflict issues between Jack and Diane - How is this managed?
 - ▶ Consent to joint retainer - Will Diane tell Jack that she wants to protect that \$300,000 if they separate?
 - ▶ What are the options regarding title that should be canvassed - tenants-in-common vs joint tenancy vs % title based on initial contributions
 - ▶ Potential ILA/ILR recommendation for Jack - recommendation may depend on whether Jack is getting family law advice
 - ▶ Conflict issues between Diane/Jack and Diane's parents
 - ▶ Is the parent's \$300,000 a "gift" or a "loan" or a bit of both? The unequal contributions toward the down payment suggest that a Domestic Contract be considered or, at a minimum, that Jack, Diane (and her parents) should be advised (in writing) to get family law advice
 - ▶ Cannot act for Diane's parents on the 2nd mortgage

The Issues (Cont'd)

- ▶ Conflict issues with Lender
 - ▶ Cannot register a second mortgage without consent of the first mortgagee which is highly unlikely
 - ▶ What if a gift letter has to be provided to the lender about the down payment?

Other Variations to Scenario #1

- ▶ **Does your analysis change if Jack and Diane don't plan on getting married?**
 - ▶ No. Marriage vs. common law will only change the advice that the family lawyer provides; the issues outlined above are the same for the real estate lawyer
 - ▶ Diane and her parents have to understand that equal title will result in Jack having putative equal entitlement to equity unless parents or Diane assert equitable claim such as resulting trust or unjust enrichment in future dispute
- ▶ **Does your analysis change if Jack or if Diane is not going on title?**
 - ▶ Both of your clients may believe that once they marry the house becomes "joint" which is not exactly the case.
 - ▶ Equalization of net family property regime only comes into play upon MARRIAGE - and that only governs equalization of value - no change to title unless there are equitable claims made
 - ▶ Refer parties to family law lawyers if they are not taking title that reflects their contributions! If they are both putting in same amount and title reflects that, then no harm / no foul.

Scenario #2 - Acting For The Parents

- ▶ Scenario #1 facts but you did not act for Jack and Diane.
- ▶ Tommy and Gina (Diane's parents) come to you for advice because they gave Diane \$300,000 to facilitate the purchase of her first home with her partner, Jack.
- ▶ They tell you that the funds are meant to be a gift for Diane but should be considered a demand loan if Jack and Diane separate and want to ensure they have security for their gift. What are their options?

The Advice

- ▶ Best option would be a Promissory Note with a Second Mortgage registration.
- ▶ However, you must advise that the registration of a second mortgage likely constitutes a default of the first mortgage. Enforcement by the first mortgagee/risk to the borrowers is more pronounced if it is a B-Lender down to a private lender because the business model for the lender may be in the defaults not in the loans which creates a vested interest for the lender to periodically check title.
- ▶ *Generally**, institutional lenders do not institute default proceedings against a borrower solely because of a second mortgage registration but this is always the risk and enforcement policies are always subject to change.
- ▶ There is a clear conflict between Jack and the parents which makes this mortgage vulnerable if you also represent Jack as one might in a usual mortgagee/mortgagor retainer. The best protection for the parents is ILR for Jack/Diane.
- ▶ Canvass whether they speak to Diane about a domestic contract with Jack to protect them.
- ▶ The strength of the security is also based on Tommy and Gina's behaviour moving forward and they need to be advised that they should not send emails/letters/Xmas cards to Jack and/or Diane that say things like: 'Don't worry, this mortgage registration is really a gift'!
- ▶ Point out the vulnerability in the evidence as a result of the gift letter and how it represents evidence of a contrary intention of a loan.
- ▶ Ensure that all advice on the vulnerability of the security and the behaviour moving forward is documented in writing to your clients.

* Caveat: Confirm to borrower that at borrower's risk

The Advice (Cont'd)

- ▶ **What should the terms of the mortgage/security registration look like?**
 - ▶ There should be a registered interest rate which either should be paid by the borrowers or there can be a clause in the schedule confirming that the lenders have the discretion to waive any/all interest
 - ▶ At least one payment per year should be made even if it is nominal (limitation periods)
 - ▶ These kinds of loans should be registered on demand, not as a term mortgage (limitation periods)

Scenario #3 - Sale of House by Separating (Litigating) Spouses

- ▶ Roxanne and Rhiannon, who are married, are separating.
- ▶ They have a separation agreement in place which provides that that their house shall either be bought out by Roxanne within 60 days with a payout to Rhiannon, failing which, the property will be sold.
- ▶ If Roxanne buys out Rhiannon, she can only do so by refinancing the existing mortgage.

Potential Issues

Can you act for Roxanne and Rhiannon jointly on the title transfer/refinance?

- ▶ There is no prohibition on acting but there are risks of conflicts:
 - ▶ is there an allegation of domestic violence?
 - ▶ Is there a significant power imbalance between the parties?
 - ▶ Is the separation high conflict?
 - ▶ Is Roxanne aware that a joint retainer means that the details of the financing cannot be kept confidential from Rhiannon? What if Roxanne can only refinance with her father going on title? Does that change the conflict analysis?
 - ▶ The prejudice to one or both parties re: timing if a conflict arises

Should you act for both parties?

- ▶ Consent to joint retainer (this is not enough - you need to have a conversation about the implications of a conflict and what you will need to do)

Potential Issues (Cont'd)

Roxanne can't get the financing and the property must be sold. Does your analysis change re: acting for both parties in this scenario?

- ▶ Same conflict considerations
- ▶ Confirm whether parties want to sever joint tenancy pending sale? In writing to both family lawyers
- ▶ Get consent to joint retainer and conversation re: implications of a conflict
- ▶ Also consider if Roxanne or Rhiannon are purchasing another property and how that affects your transaction. Do either of them want to retain you on their purchases? Similar analysis to the refinance considerations.

Potential Issues (Cont'd)

What happens if there's a disagreement regarding the interpretation of a clause in the Separation Agreement?

- ▶ Importance of reviewing the separation agreement **at the outset** of the retainer
 - ▶ Request clarification from both lawyers
 - ▶ Identify if you cannot implement something in the Agreement - i.e. a requirement for a second mortgage in favour of Rhiannon to secure future obligations?
- ▶ Confirm to lawyers that, absent joint Directions regarding funds, you will not distribute net proceeds and must hold in trust pending a resolution or joint direction
- ▶ Avoid holding the net proceeds but if you do: charge a fee to hold and for any time lawyers ask for update or partial release; and explain why in terms of reporting; ask for joint instructions as to interest-bearing or not and who will receive annual T5 slips for interest.

Potential Issues (Cont'd)

Are there other considerations if sale is mandated by Court Order instead of by Separation Agreement?

- ▶ If the court order dispenses with the consent of one party to the sale, it must be registered on title. You will need to consider how to get the order off title (tip: this can be included as part of the transfer such that the order doesn't need to be removed by way of a separate application)
- ▶ Does the court order require you to act for both parties?
 - ▶ Consent to Joint Retainer plus conversation re: implications of a conflict
- ▶ If the order is solely about the distribution of net sale proceeds, it does not need to be registered but the order needs to be reviewed to identify any gaps or challenges re: disbursing funds or maintaining funds in trust, if required.

Potential Issues (Cont'd)

What if the court order mandates separate lawyers for the parties?

- ▶ Indicative of a high conflict matter
- ▶ The two lawyers will need to work out who will be the lead lawyer (the direct contact for the transaction) and the logistics
- ▶ You will need to ensure the undertakings on transaction are also addressed the secondary lawyer and seller client - additional undertakings may be required depending on the circumstances

CONCLUSION

- ▶ **DO NOT COMPROMISE YOUR REPUTATION** in face of high conflict family matter.
- ▶ **BUT** the ability to assist family lawyer by being knowledgeable, neutral/even-handed, responsive and proactive in reporting to family law counsel, will get you future work!

WHAT CAN AND CANNOT BE ADDRESSED IN A DOMESTIC (FAMILY LAW) CONTRACT? PLUS SOME REMINDERS ABOUT THE MATRIMONIAL HOME

TANNIS A. WAUGH AND ROSLYN M. TSAO

LSO 20TH REAL ESTATE LAW SUMMIT – APRIL 20, 2023

IN REAL PROPERTY CONTEXT, DOMESTIC CONTRACTS CAN:

- ❖ contract around property division law that would otherwise apply under *Family Law Act* for married couples. Property division does not apply to unmarried couples in Ontario (for now).
- ❖ set out beneficial ownership of real properties or entitlements to equity (common to address unequal contributions to the purchase of property)
- ❖ make different provisions for property division in the event of death as opposed to marital separation [Remember that death of a spouse also triggers property regime under the *Family Law Act*]
- ❖ Set out specific distribution regimes for net proceeds of sale/equity of real estate in the event of separation
- ❖ Can contract around the various *Family Law Act* presumptions (below) relating to a “matrimonial home” **except right to exclusive possession**

MATRIMONIAL HOMES – *FAMILY LAW ACT*:

- ❖ Part II of the *Family Law* relates to the “**matrimonial home**”
- ❖ Lots of caveats and special treatment for the MH which differ from rest of family law property regime:
 - ❖ No “Date of Marriage” deduction for equity in a house that one spouse brings into the marriage [s. 4(1) “Net Family Property” definition at (b)]
 - ❖ No “Exclusion” for gifts/inheritances that spouse puts into the MH after the date of marriage [s. 4(2) 5]
 - ❖ Both spouses have right to possession of the MH, regardless of titled ownership [s. 19(1)]
 - ❖ The right of possession by a non-titled spouse is personal in nature and ends on death or divorce [s. 19(2)]
 - ❖ Designation of property as MH can be done unilaterally without knowledge of other spouse [s. 20]
 - ❖ Where both spouses register a joint Designation of MH, no other property that is likewise jointly registered can be a MH for family law purposes [s. 20 (4)]

MATRIMONIAL HOMES – *FAMILY LAW ACT* (CONT'D)

- ❖ Cannot alienate a MH unless comply with s. 21:

21 (1) No spouse shall dispose of or encumber an interest in a matrimonial home unless,

(a) the other spouse joins in the instrument or consents to the transaction;

(b) the other spouse has released all rights under this Part by a separation agreement;

(c) a court order has authorized the transaction or has released the property from the application of this Part; or

(d) the property is not designated by both spouses as a matrimonial home and a designation of another property as a matrimonial home, made by both spouses, is registered and not cancelled. R.S.O. 1990, c. F.3, s. 21 (1).

- ❖ s. 21(3) lists applicable spousal statements

MATRIMONIAL HOMES – *FAMILY LAW ACT* (CONT'D)

- ❖ If a spouse on title to a MH owns the MH with a non-spouse third party as “joint tenant” dies, the joint tenancy is deemed severed immediately before the death of that spouse [s. 26(1)]
- ❖ A non-titled spouse who is occupying a MH at the time of death of the titled spouse has right to exclusive possession for 60 days, rent-free, in the MH [s. 26(2)]



Law Society
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Barreau
de l'Ontario

TAB 17

20th Real Estate Law Summit - Day 2

The Five Most Negotiated Issues in Commercial Leasing

Karsten Lee

WeirFoulds LLP

Arman Poushin

WeirFoulds LLP

April 20, 2023



The Five Most Negotiated Issues in Commercial Leases

Karsten Lee, Partner; and Arman Poushin, Associate; WeirFoulds LLP

This paper highlights some of the most contested and negotiated clauses and issues in commercial leases from both the landlord and the tenant's perspective. Needless to say, that aside from these five areas of deliberation, a practitioner will also spend a lot of time fleshing out the numerous specifics of the business deal, whether it is settling on the amount of rent to be paid or determining a comfortable level of security deposit to collect. The five most negotiated clauses in commercial leases are of particular importance because they can have a significant impact on the landlord-tenant relationship, they can lead to unexpected costs, and the manner in which such they are papered in the lease can lead to subtle nuances that can have unwanted legal repercussions. In our view, the five most negotiated clauses in commercial leases are: exclusions from operating costs and additional rent; repair, maintenance and restoration obligations; redevelopment and relocation clauses; options to extend; and transfer provisions.

1. Exclusions from Operating Costs and Additional Rent

Commercial leases will typically include several costs to be paid in addition to the base rent. These costs can include the cost of utilities consumed on the premises, realty taxes and HVAC expenses. These amounts relate to the charges, expenses and costs incurred by the landlord or on behalf of the landlord with respect to the operation, maintenance, repair, replacement and management of the common area facilities or the building. To the surprise of the unsuspecting or careless tenant, these additional costs and additional rent can cause a significant increase in a tenant's monthly costs. All tenants should be cognizant of such costs and understand exactly what amounts they are responsible to pay for and better yet, how exactly such costs are to be determined by the landlord.

When reviewing a lease, a prudent tenant will attempt to get more clarification on what is included in the definition of operating costs and additional rent and how such amounts are to be calculated. Even more diligent tenants may attempt to specifically exclude certain items from the calculation of operating costs and additional rent to ensure that the landlord cannot later charge them for a service that they agreed not to pay for. Landlords on the other hand will understandably want to use broad language as a “catch all” clause to give themselves the flexibility to charge back to the tenant any and all costs associated with operating, repairing and maintaining the building, including any unexpected costs that may arise.

One of the biggest points of contention in determining operating costs, and as expanded on later in this paper, is the cost of major repairs and maintenance on the building in which the premises is situated in. Lease negotiations often come to a point where the question is asked whether the tenant needs to pay for capital repairs and replacements, and if so, should the amount be amortized over its useful life. Such repairs or replacements consist of changes made to the base building, including the structural components, the roof, parking areas, the foundations, mechanical, electrical, heating, ventilating and plumbing systems and the depreciation of such costs. Many landlords wish to charge back costs related to the maintenance of the structural components of the building and any base building services. The landlord may argue that such costs are required to maintain the building in a good and working condition, which essentially benefits the tenant. On the other hand, the tenant may argue that any such costs may amount to construction costs, if the building is new, and make up part of the original construction costs (which are paid back through the base rent amount), and therefore should not be included in operating costs to be charged back to the tenant. The types of costs that a landlord may wish charge to its tenants may depend on its own business practices. An issue that typically arises is when a repair turns into a capital repair or replacement, in which case parties may rely on generally accepted accounting principles (“GAAP”) and the concept of betterment – where if the cost is a betterment, it has enhanced or increased

the life of that asset. One may argue that if something is so greatly repaired that its natural life is increased then such costs should not be borne by the tenant but rather by the landlord, as those costs are similar to the original construction costs. However, it is also typical for landlords to insist that any costs in connection with any repairs (whether such repair is minor or major) to be charged back to tenants as part of operating costs.

It is reasonable for the tenant to expect that if the landlord is in breach of the lease, any costs or charges incurred as a result of that breach would be covered by the landlord and not charged back to the tenant. Tenants will want to ensure that such costs cannot be charged back to them and will need to put explicit language in the lease transferring responsibility to the landlord in such situations. Tenants may also ask for exclusions on any amount for which proceeds of insurance are available to the landlord or should have been available had the landlord taken out the required insurance. As tenants contribute to the landlord's insurance, a landlord should look towards their own insurance for recovery.

Landlord's typically charge administration fees and management fees on the total cost of the operating costs. Where the landlord is charging a 15% administration fee on operating costs, many tenants would view the inclusion of an additional management fee in the definition of operating costs as a sort of 'double dipping'. The purpose of the 15% administration fee is to compensate the landlord for the unquantifiable costs associated with administering the building, and so charging another management fee on top would perhaps typically be considered unreasonable by a number of tenants. On the other hand, if a landlord retains the services of a third party management company to perform the administration of the development, then it would want to charge these costs to its tenants, and they do not view an additional management fee as a duplicative cost. In any event, a prudent tenant should be careful and diligent in reading the definition of operating costs to determine if in fact the landlord is charging one or both of these amounts. If landlords are in fact going to be charging an administration or a management fee, or both, they should be extra diligent to ensure such wording is outlined in the lease

itself or better yet, in the offer to lease. It is however imperative that they include wording to that effect in the lease itself if they do intend on charging such an administration fee, as in one particular case the landlord was unsuccessful in collecting a management fee which was not provided for in the lease (*R. Denninger Ltd. v. Metro International General Partner Canada Inc.*, 1992 O.J. No. 838).

2. Repair, Maintenance and Restoration Obligations

Closely linked to the exclusions from operating costs is the requirement to repair, maintain and restore. In the absence of an express covenant or a covenant implied by statute, a tenant can argue that there is no obligation on the tenant to maintain or repair the premises, apart from the tenant's implied covenant to use the premises in a "tenant-like manner". However, most commercial leases now impose an obligation on the tenant to repair, subject to reasonable wear and tear. Likewise, without an express covenant, a landlord can argue that it is not responsible for repairing the premises, however many multitenant buildings may impose certain obligations on the landlord to repair, and such repair is passed on to the tenant as operating costs. The tenant should review such provisions carefully to understand the potential consequences of: (i) being obligated to pay for substantial renovations or improvements to the building; and (ii) not having the cost of major repairs amortized over the life of the expected repair so that the tenant does not bear a disproportionate cost in the year of the repair.

"Repair" and "maintain" are separate but related concepts (*Vicro Investments Ltd. v. Adam Brands Ltd.*, 1963 2 O.R 583). A "repair" considers damages to a portion of the premises which needs to be fixed whereas to "maintain" considers taking steps to prevent the premises needing repair. Examples of maintenance may include painting, polishing floors, cleaning and lubricating equipment, clearing drains and gutters, landscaping and replacing light bulbs and tubes. A further issue, often contemplated by parties to a lease agreement is whether a "repair" is an "improvement" to the building. Generally speaking, if the repair simply replaces something that has worn out, it will be a repair even if it involves,

to some degree, an upgrading of the item. For example, where the tenant has covenanted to repair and maintain the “plant and equipment supplying climate control” the replacement of furnaces was a repair for which the tenant was liable (*Brennan v. Brennan Educational Supply Ltd.*, 2006 SKQB 70). However, if the item is replaced by something fundamentally different it will usually be considered an improvement.

Commercial leases now generally contain provisions setting out the responsibility of each of the landlord and the tenant to maintain and repair the premises and the building. In drafting covenants to repair and to maintain there are a number of distinctions that can be made between: (i) who is responsible to do the repair and who is responsible to pay for the repair; (ii) whether the obligation to repair only arises on notice or not; (iii) the distinction between “structural” and other repairs; and (iv) the consequences of any damage arising from a failure to repair or maintain.

A typical landlord usually requires the tenant to: (i) keep the premises and its improvements in a first-class condition; (ii) repair and replace all mechanical/electrical systems within the premises to the extent that they are not part of the “common areas”; (iii) repaint and redecorate the premises as determined by the landlord; and (iv) remove hazardous material from the premises.

A diligent tenant may wish to try and amend these provisions as follows: (i) the obligation to maintain a first-class condition must be subject to reasonable wear and tear; (ii) amend the first class condition to be a good condition and ensure that the landlord has the same standard with regard to its obligation to maintain and repair the common areas; (iii) the obligation to repair or replace the mechanical/electrical systems should be subject to any warranties currently available to the landlord; and (iv) with regard to hazardous material the tenant should amend the provision to reflect only such hazardous material that the tenant has brought in.

The extent of the tenant’s obligation to maintain, repair and replace is especially important at the end of the term. The lease will typically require the tenant to return the premises to the landlord in the

same condition that it is obligated to maintain and repair the premises during the term. The obligation to return the premises to this condition also may requires the tenant remove leasehold improvements as the landlord requires. A prudent tenant may consider removing this requirement and to be obligated to only remove its trade fixtures and chattels. A landlord will want to add in language stating that if the tenant fails to return the premises to this condition at the end of the term, the term will continue on a month-to-month basis, so the landlord can continue to collect rent.

Tenants will typically want to amend the lease to have “reasonable wear and tear” be exempt from its obligation to maintain and repair. Factors that may be used in determining what exactly constitutes reasonable wear and tear include: (i) the age of the premises; (ii) the permitted use of the premises; (iii) the actual use of the premises; and (iv) the length of term. The onus on establishing that the damage to the premises is within the scope of reasonable wear and tear is on the tenant. A prudent tenant or landlord should document the condition of the premises immediately prior to occupancy. This could be through video-tape, photographs or an agreed state as to the condition of the premises (such as by way of an inspection of the premises at the time the tenant takes possession of the premises).

For shopping centre tenants, HVAC costs are typically included in the “Common Area Maintenance Costs” as such premises are served by a central plant. However, in other locations such as with industrial or office buildings, the tenant has its own roof-mounted HVAC system, with wording in the lease requiring the tenant to maintain, repair and replace the HVAC unit and system serving the premises. The tenant must be careful of such provisions as they should determine who is responsible for paying the cost of a major repair or replacement. Furthermore, it is appropriate that the tenant take out or contribute to the cost of a maintenance contract. Many landlords and tenant agree to a compromise where the costs of any major repair or replacement is to be amortized over the useful life of the HVAC unit repaired or replaced.

3. Redevelopment and Relocation Clauses

Redevelopment and relocation clauses are another contentious area for landlords and tenants in their negotiations. It is crucial that the intention to include or omit each one of these provisions is identified and noted early in the discussions, ideally by including it in the offer to lease. Generally speaking, landlords will want to include both a redevelopment and a relocation clause so as to provide them flexibility, and tenants will want to remove or limit any such clause to provide certainty and stability throughout their tenancy. As markets change landlords will want the ability to redevelop, reconfigure or even upgrade and improve their assets. Redevelopment and relocation clauses help landlords maximize their earning potential in several different ways. While closely related and often incorrectly used interchangeably, redevelopment and relocation clauses offer landlords different rights.

A redevelopment clause will permit the landlord to redevelop their property, which may entail a large-scale transformation of the entire property or an upgrade to only a small section of the property. For example, a mall may get redeveloped to include residential units above the mall – a move by a prudent owner to maximize their earning potential and bring in foot traffic to the underlying mall. Rather than wait for a tenant's term to expire before beginning construction, a landlord would rely on their redevelopment clause to terminate the lease and get access to premises to make their upgrades. The initial reaction by tenants when first realizing that their lease contains a redevelopment clause should be to ask for it to be deleted entirely – an ask not often agreed to, however. The next best thing tenants can do is to ask the landlord to push out the right so that their tenancy cannot be terminated until a certain date has been reached. In situations where a lease has several options to extend, a tenant may ask that such redevelopment rights not start until the expiry of the initial term, with the hope that they have made back at least enough money to cover their start up costs in case they get terminated. Tenants will also want to confirm the amount of notice the landlord has to provide them with prior to terminating their lease. Landlords typically provide a few months' notice period before the lease is officially terminated, but

tenants may want to ask for a longer period to help give them enough time to find a new and suitable space. Another consideration tenants have is whether the landlord will compensate the tenant for the improvements that they made to the premises in preparing the space. This would be a greater concern in situations where redevelopment right exists as of the first day of the tenancy and the tenant has just finished investing a substantial amount of money into the location. Tenants may ask that instead of terminating their lease that the landlord relocate them to a new location. Tenants may even ask landlords to relocate them to another one of their properties provided its location is fairly close or in an as favourable market.

Relocation rights, much like redevelopment rights, provide the landlord with a degree of flexibility while tenants fear the uncertainty it brings. Similarly, tenants can ask that the relocation date be pushed out, ask to lengthen the notice period required, and ask for compensation for the money spent on their improvements. Tenants will also want to ensure that there is no “downtime” between being relocated from their original premises to their new location. In other words, they will want the transition to be smooth and seamless from one day to the next. When drafting relocation clauses landlords need to pay particular attention to what they are promising their tenants. Typical wording may include a guarantee to relocate the tenant to a premises “similar in location to the original premises”. In one particular case, the landlord gave the tenant proper and ample notice of the relocation but failed in the court’s eyes to relocate the tenant to a premises similar in location as it had moved from a prime retail location to an interior location that did not receive much foot traffic (*Stonegate Enterprises Ltd. v West Oaks Mall Ltd.*, 2002 BCSC 788).

4. Options to Extend

Most tenants will seek out options to renew and extend the term of their lease, and the negotiation of this particular provision can be a complex and drawn-out process. Not only do the parties

need to agree on the business terms, but they must also settle on various legal mechanisms and formulas for determining the rights during the extensions. The lease should provide how notice of the tenant's intention to exercise an option is to be given. The clearest leases will require the tenant to give notice of its intention to exercise the option not less or more than a certain number of days before the expiration of the initial term. Tenants prefer to allow notice to be given up to the point in time in which the initial term expires. However, landlords tend to demand earlier certainty of the tenant's intention. Option provisions need to set out in some objective way a method to determine rent, absent any methodology to determine rent will render the provision unenforceable as courts are not permitted to make up a rental amount without a clear formula to follow. A well drafted lease will provide an objective mechanism for setting the rent during a renewal period should the parties not be able to reach an agreement on an amount. Typical language will state that the rental amount will be the market rate prevailing at the time to be agreed by the parties and if not then it shall be determined by a mediator or arbitration. However, if the provision states that the rent will be market rent to be agreed between the parties, then a court will not be able to impose its own determination of what market rent entails. Landlords may also want to make the option to extend be personal to the current tenant if that tenant is a strong tenant and occupies a very favourable location. If the tenant transfers their lease, the new tenant will be limited to only the initial term and the landlord will be able to get back the favourable premises sooner rather than later.

5. Transfer Provisions

Most leases contain transfer provisions that restrict a tenant's ability to transfer their lease to another entity without the landlord consent. Tenants may wish to negotiate for the ability to transfer their lease to certain entities without the landlord's consent. Typically, these entities will be corporations under the control or closely related to the tenant so that the new tenant's covenant remains just as strong. For example, a tenant may assign a lease to a subsidiary corporation without the consent of the

landlord. Some tenants may wish to negotiate for the deletion of the extensive restrictions on transfers and conditions if the transfer is part of a sale of a chain of stores. Similarly, tenant may wish to negotiate for such requirements for consent to not be required if the change of control is of a public corporation listed on a recognized security exchange. Other examples of transfers which many tenants would not want consent to be required include: (i) transfers to an affiliate; (ii) transfers resulting from a merger or amalgamation; (iii) transfers in connection with the sale of a business involving a substantial chain; and (iv) a transfer resulting from a charge on the lease as part of the tenant's corporate financing. Where the landlord is agreeable to grant the right to such transfers without consent, they should nonetheless be: (i) subject to the transferee entering into an assumption agreement to be bound by the obligations of the tenant under the lease; (ii) part of a bona fide arrangement, and one where the financial covenant of the transferee would be equal to that of the original tenant or, in any event, sufficient to satisfy the obligations of the tenant under the lease as to which the transferee shall provide reasonable evidence to the landlord; and (iii) on prior written notice to the landlord, accompanied by details of existing and proposed post-closing corporate structure and financial details.

Some landlords will seek out the right to terminate a lease if the tenant requests a consent to transfer. Tenants should be aware of this potential language and may wish to request it be removed from the lease altogether. Tenants may also negotiate for a release from any liability as of the day of the transfer; although this is a term that many landlords are reticent to agree with. Landlords are understandably reluctant to release tenants especially prior to the expiration of the originally agreed upon term. Tenants may want to provide additional comfort to the landlord by either agreeing to indemnify for the duration of the initial term or providing a larger security deposit. Landlords are typically concerned with the covenant and strength of the new tenant taking over the lease and will seek out assurances from the original landlord.

This paper only serves to set out some of the clauses that are regularly negotiated by parties when entering into a commercial lease. The outcome of the negotiation of these clauses will likely depend on many factors including the bargaining power of each party, as well as the different needs and specific circumstances of each party. There are also many other clauses within the lease that are regularly negotiated between a landlord and a tenant, with many nuances to be considered when assisting either a landlord or a tenant.



Law Society
of Ontario

Barreau
de l'Ontario

TAB 18

20th Real Estate Law Summit - Day 2

Teraview Tips & Tricks (PowerPoint)

Jennifer Connell, Registry & Property Solutions (RPS), Senior Product Manager
Teranet® Inc.

April 20, 2023

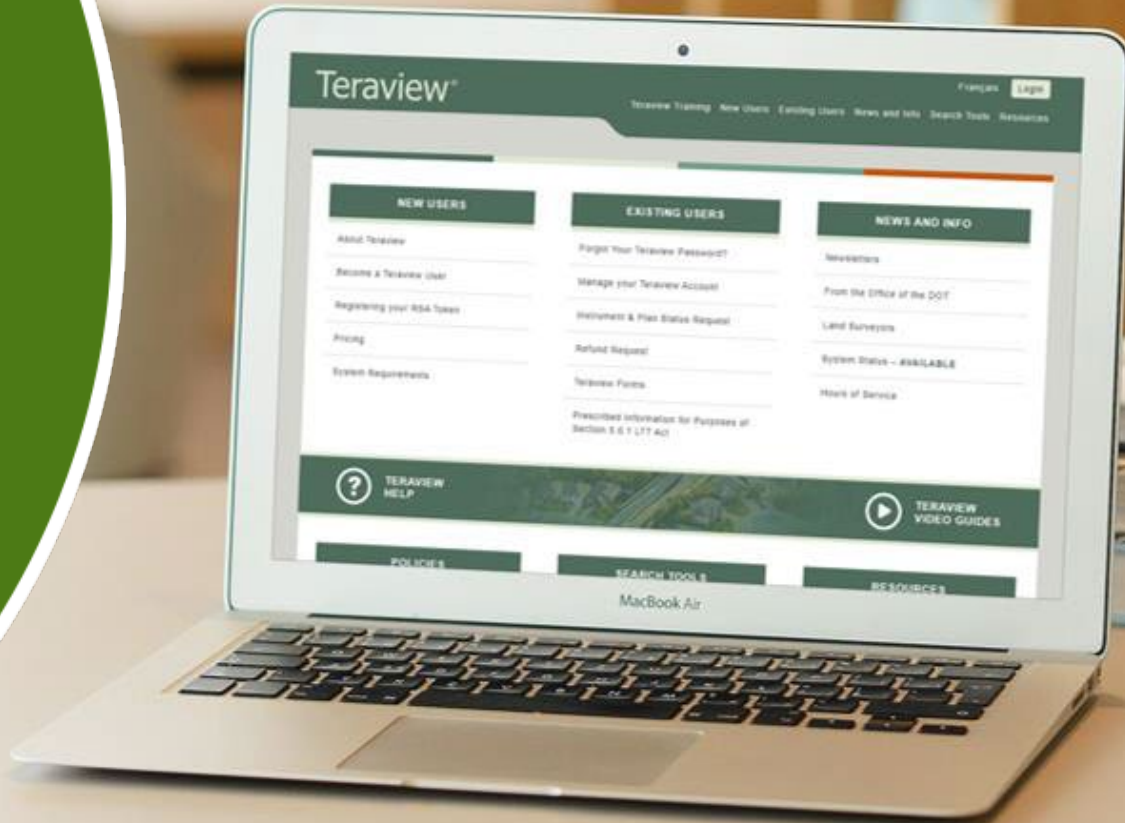


Tera view Tips & Tricks

April 2023

Teraview®

Tip #1
Find it on
teraview.ca





Tip #1 – Find it on www.teraview.ca

Access Search Tools

An extension
of the Teraview
Application

The screenshot shows the Teraview website interface. At the top, there is a dark green header with the 'Teraview' logo on the left and navigation links on the right: 'Teraview Training', 'New Users', 'Existing Users', 'News and Info', 'Search Tools', and 'Resources'. The 'Search Tools' link is circled in red, and a red arrow points to it from a red box labeled 'Access Search Tools'. A dropdown menu is open under 'Search Tools', listing the following options: 'City/Town LRO Cross Reference', 'Instrument Prefix List', 'Condominium Prefix List', 'Plan Prefix List', 'Condominium Cross-Reference', 'Search Dates for Power Of Attorney', 'Enforcement Office List', and 'MAG Search Rules'. Below the header, the main content area is divided into three columns. The first column is titled 'NEW USERS' and contains links for 'About Teraview', 'Become a Teraview User', 'Registering your RSA Token', 'Pricing', and 'System Requirements'. The second column is titled 'EXISTING USERS' and contains links for 'Forgot Your Teraview Password?', 'Manage your Teraview Account', 'Instrument & Plan Status Request', 'Refund Request', 'Teraview Forms', and 'Prescribed Information for Purposes of Section 5.0.1 LTT Act'. The third column is partially visible and contains links for 'Newsletter', 'From the', 'Land Sur', 'System S', and 'Hours of'. At the bottom of the page, there is a dark green footer with two icons: a question mark icon labeled 'TeraVIEW HELP' and a play button icon labeled 'TeraVIEW VIDEO GUIDES'.



Tip #1 – Find it on www.teraview.ca

Teraview®

Teraview Training New Users Existing Users News and Info Search Tools Resources

Français Login

NEW USERS	EXISTING USERS	NEWS AND INFO
About Teraview	Forgot Your Teraview Password?	Newsletters
Become a Teraview User	Manage your Teraview Account	From the Office of the DOT
Registering your RSA Token	Instrument & Plan Status Request	Land Surveyors
Pricing	Refund Request	System Status – AVAILABLE
System Requirements	Teraview Forms	Hours of Service
	Prescribed Information for Purposes of Section 5.0.1 LTT Act	

View Service Hours and Holiday Schedule

TeraView HELP **TeraView VIDEO GUIDES**



Tip #1 – Find it on www.teraview.ca

The screenshot shows the Teraview website interface with a dark green header. The header contains a question mark icon and 'TERAVIEW HELP' on the left, and a play button icon and 'TERAVIEW VIDEO GUIDES' on the right. Below the header, there are three main columns: POLICIES, SEARCH TOOLS, and RESOURCES. The POLICIES column lists: Teraview Terms & Conditions, PORTAS® Personal Security License & RSA Token Terms & Conditions, Anti-Spam Policy, and Accessibility Policy. The SEARCH TOOLS column lists: City/Town LRO Cross Reference, Instrument Prefix List, Condominium Prefix List, Plan Prefix List, Condominium Cross-Reference, Search Dates for Power Of Attorney, Enforcement Office List, and MAG Search Rules. The RESOURCES column lists: ServiceOntario Electronic Registration Procedures Guide (circled in red), MLTT Calculator, PLTT Calculator, ServiceOntario Website, City of Toronto Website, Mortgage Schedules, MOF Land Transfer Tax Information, and Municipal User Group Practice Circulars. A red arrow points from the circled link to a red box on the right containing the text 'Access to the Ministry's Guides'. The Teranet logo is in the bottom right corner of the page.

POLICIES	SEARCH TOOLS	RESOURCES
Teraview Terms & Conditions	City/Town LRO Cross Reference	ServiceOntario Electronic Registration Procedures Guide
PORTAS® Personal Security License & RSA Token Terms & Conditions	Instrument Prefix List	MLTT Calculator
Anti-Spam Policy	Condominium Prefix List	PLTT Calculator
Accessibility Policy	Plan Prefix List	ServiceOntario Website
	Condominium Cross-Reference	City of Toronto Website
	Search Dates for Power Of Attorney	Mortgage Schedules
	Enforcement Office List	MOF Land Transfer Tax Information
	MAG Search Rules	Municipal User Group Practice Circulars

Access to
the Ministry's
Guides

Teraview®

Tip #2

Account Housekeeping -
Maintain Your Information





Tip #2 – Teraview Account Housekeeping

Maintain your user information for improved communications

- ☑ Does your Teraview Account Holder Representative have **own Teraview Account**? They should!
- ☑ Maintain your **mailing address** in Teraview
- ☑ View your **list of Teraview Users**
- ☑ Ensure your Teraview Users have **appropriate access** for their role in your firm

Hot Tip!



Add your **email address** and keep it up to date!

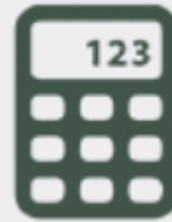


Tip #2 – Tera view Account Housekeeping

HOW TO?

Go to: Account Management

Select: Account Administration



ACCOUNT MANAGEMENT

Deposit Account Balance

Maintain Deposit Account

Deposit Account Maintenance Report

Account Summary Statement

Account Administration

Detailed Activity Reports

Hot Tip!



Go to: Preferences

Select: Email



PREFERENCES

Map Preferences

Email

Notification Preferences

Teraview®

Tip #3

Switch to a Soft Token





Tip #3 – Hard Tokens are so 2017

Make the move to a Soft Token for convenient authentication

- ✓ Free and easy to use
- ✓ Easy to access smartphone app
- ✓ Long expiry date (14 years vs. 5 years for a hard token)
- ✓ Less waste and no need for safe battery disposal
- ✓ Keep your email address up to date!



Visit www.teraview.ca for instructions

Teraview®

Trick #1

Reprints





Trick #1 – Reprints

Did you know? Extra Reprints are Free of Charge

- ☑ Parcel Registers
- ☑ Writ Searches

HOW TO?

Go to: **Administration**

Go to: **Dockets**

Select: **Reprint Items**

Administration

(Underlined Links lead outside of application - Opens in new window)



DOCKETS

Docket Summary Report

Docket Tax/Fee Summary Report

Reprint Items

Teraview®

Trick #2

eNotifications





Trick #2 – eNotifications keep you on track

Get notifications on key Teraview events delivered right to your email

- ☒ Return for Correction
- ☒ Courier Tracking
- ☒ Document/Plan Request Status
- ☒ Low Deposit Account Balance

HOW TO?

Go to: Preferences

Select: Notification Preferences



PREFERENCES

Map Preferences

Email

Notification Preferences

Tip #4

Companion Applications

ONLAND | Ontario
Land Registry Access

Portas[®] PASS





Tip #4 – www.OnLand.ca Virtual LRO

Access Service Request
submission forms

ONLAND | Ontario
Land Registry Access

(0 Items) Login / Register Help Français

Property | Documents | Writs | Historical Books | **LRO Services**

Ontario Land Property Records Portal

OnLand is your online information source from the Ontario Land Registration and Writs system.
This channel gives you access to official, property-related information and Documents.

Find your Land Registry Office

LRO Location ⓘ

Select from LRO List ▼

📍 Start typing a city, town or Land Registry Office

News

March 21, 2023
[Plan Filing Update](#)
[All News and Announcements >](#)

Search Hours (EST)

Monday through Thursday - 4 a.m. to 12 a.m.
Friday - 4 a.m. to 9 p.m.
Saturday - 9 a.m. to 6 p.m.
Sunday - 9 a.m. to 9 p.m.



Tip #4 – www.portaspass.ca

Portas® PASS

[Français](#) [Help](#)

Log into Portas PASS


Required fields are indicated with *

Account *

User Name *

Login


Reset/Change
your Password




Portas PASS is a product of Teranet
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[Security](#) • [Personal Information](#) • [Accessibility](#)

Contact Us:

 1-800-208-5263

 info@teranet.ca

Teraview®

Tip #5

Give us your feedback





Tip #5 – Opportunities to Give Feedback

We listen! Three ways to help us help you:

1

Customer
Experience Surveys
twice a year

2

Call or Email at
any time:



1-800-208-5263



info@teraview.ca

3

Join
Teranet
Insighters!

Teranet Insighters

What is an Insider?

We've combined the words **Insight** and **Insider** to create a unique name for our community members. As a part of our community, you have inside access to our roadmaps, our goals, our objectives and our innovation journey. As part of our inner circle, you are a trusted advisor and a virtual extension of our team. You also bring a level of insight and expertise that only our valued customers can offer, and we do not take that for granted. After all, you are the ones we build all our solutions for. As an Insider you aren't afraid to share your opinion, positive or negative, in order to ensure we're on the right track. Thank you for becoming an Insider and joining our journey.

3 Key Benefits of Participating in an Insight Community

As a member of Teranet Insight community, you'll be invited to participate in regular surveys and online activities, but what are the other benefits of joining?

- 01 Provide feedback that will help us improve our offering to you
- Help us create content that's relevant to you
- Engage with your peers

[Join Today](#)

<https://www.teranet.ca/about-teranet/teranet-insighters/>



Insighters
Our community for your voice

Questions?



Thank you

Jennifer Connell



Law Society
of Ontario

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de l'Ontario

TAB 19

20th Real Estate Law Summit - Day 2

63 Years and Still Scared

Reuben Rosenblatt, LLD, KC, LSM
TMinden Gross LLP

April 20, 2023



63 Years and Still Scared

20th Real Estate Law Summit The Law Society of Ontario April 19 & 20, 2023

By: Reuben M. Rosenblatt, LLD, KC, LSM
Partner, Minden Gross LLP

***Tercon Contractors Ltd. v. British Columbia (Minister of Transportation)*¹**

In *Tercon Contractors Ltd.* the Supreme Court of Canada considered a contractual limitation of liability clause. The Court held that an exclusion or limitation clause will apply unless the parties seeking to avoid the enforcement of the clause proves either unconscionability or an overriding public policy. The Court held that the party who seeks to avoid the enforcement of the clause must meet the burden of proof which “outweighs the very strong public interest in the enforcement of contracts”.

***Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*²**

The Plaintiff, *Fraser Jewellers*, operated a jewellery store in Cornwall, Ontario. *Dominion Electric* operated a security protection business under the name ADT. *Fraser Jewellers* and *Dominion Electric* entered into an agreement which provided that ADT was to furnish and install a new protective signalling system for which *Fraser Jewellers* would pay an annual fee of \$890.00. Pursuant to this agreement, ADT was to furnish and install a new protective signalling system and provide *Fraser Jewellers* with a monitoring service that was to be affected by way of signal recognition and notification by ADT Central Station in Ottawa to the Cornwall Municipal Police.

¹ 1 SCR 69.

² 148 D.L.R. (4th) 496.

Approximately two years after the agreement was entered into, two men wearing balaclavas and brandishing guns entered into *Fraser Jewellers'* store and robbed the store of jewellery items of approximately \$50,000.00. While the robbers were in the premises, the owner and another employee each surreptitiously pressed a hidden hold-up alarm button that had been installed and was monitored by ADT. The ADT employee in charge of the system for some unknown reason failed to respond to the signal. By the time the owner called the police, the robbers were gone with the stolen jewellery, which was never recovered.

The Plaintiff brought this action to recover the loss it had sustained, contending that the jewellery could have been recouped had ADT properly responded to the alarm signal. The Court found that there was no question but that ADT's inaction over the 9-to-10-minute period while the robbers were in the store and after the holdup alarm button had been pressed constituted a breach of ADT's contractual duty to *Fraser Jewellers*.

The written agreement included an exclusionary provision that limited liability of the Defendant to the lesser of 100 per cent of the annual service charge or \$10,000. The exclusionary provision applied to any loss, damage, or injury irrespective of cause or origin resulting directly or indirectly to a person or property from the performance or non-performance of obligations imposed by the contract or from negligence of the Defendants, its agents or employees.

Following a 5-day trial, the trial judge awarded *Fraser Jewellers* the full amount of the loss, which he assessed at \$50,000. ADT appealed to the Court of Appeal from that judgement. The Ontario Court of Appeal upheld the exclusionary provision and awarded the plaintiff \$890, the annual service charge. Justice Robins stated:

As a general proposition, in the absence of fraud or misinterpretation, a person is bound by an agreement to which he has put his signature whether he has read its contents or has chosen to leave them unread. Failure to read a contract before signing is not a legally acceptable basis for refusing to abide by it. A businessman executing an agreement on behalf of a company must be presumed to be aware of its terms and to have intended that the company would be bound by them. The fact that Mr.

Gordon chose not to read the contract can place him in no better position than a person who has. Nor is that fact that the clause is in a standard pre-printed form and was not a subject of negotiations sufficient in itself to vitiate the clause.³

Justice Robins concluded by stating the legal principle that governs the effect of such provisions:

28. An exclusionary clause of this kind, in my opinion, should, *prima facie*, be enforced according to its true meaning. Relief should be granted only if the clause, seen in the light of the entire agreement, can be said on Dickson's C.J.C.'s test, to be "unconscionable" or, on Wilson J's test, to be "unfair or unreasonable".⁴

Suhaag Jewellers Ltd. v. Alarm Factory Inc.⁵

In 2010, nearly 9 years after the *Fraser Jewellers* case, in *Suhaag Jewellers Ltd. v. Alarm Factory Inc.*, the Plaintiff operated a jewellery store and contracted with the defendant for the installation of a security and alarm monitoring system. Unlike the *Fraser Jewellers* case, the liability was not limited to a nominal amount, but excluded liability entirely. The contract read,

14. The Alarm Factory Inc. [the "defendant"] shall not be liable in any way for any claim, loss, damage, or expense, including without limitation claim, loss, damage or expense relating to personal injury of the Customer or any employee, agent or independent contractor of or with the Customer, on whose behalf the Customer hereby contracts as agent, arising, either directly or indirectly, from the provision of products and services.⁶

The alarm system failed during a robbery and the Plaintiff sought relief against the Defendant. The Court held that the exclusionary clause applied to the circumstances and it was neither unconscionable nor contrary to public policy.

The trial Judge, who was upheld by the Court of Appeal held that it is the onus upon the Plaintiff attempting to enforce the agreement to review the document and satisfy itself of its advantages and disadvantages before signing it.

³ Ibid at para 30

⁴ *Ibid*.

⁵ 2016 ONCA 33.

⁶ *Ibid*

Presumption of Resulting Trust

When a person transfers his or her property gratuitously into another person's name, including the name of an adult child, a resulting trust arises whereby the gratuitous transferee is deemed to hold his or her interest in trust for the transferor.

Too often, transfers from parents to child lead to litigation and at least in one case the failure of a parent to transfer to his child led to litigation.

Here are some cases. You judge whether they are "scary" or not.

Danicki v. Danicki⁷

In this case a 96-year old mother transferred her home to her 65-year old son who lived with her. The transfer was subject to a life interest in the mother's favour. Two years later the mother had second thoughts and felt she had made a mistake. Mrs. Danicki decided that she wanted to have the property divided three ways so that her three children (and their families) would be treated equally. This was very important to her and was the reason for her lawsuit. Mrs. Danicki testified that she wanted to clear her conscience and set things right with herself before she died by undoing the transfer to her and transferring the property to her children equally.

The deed for the transfer of property was prepared by the solicitor who acted on behalf of the mother.

After considering the totality of the evidence, including the evidence of Mrs. Danicki and her lawyer, Cumming J. in concluding that Mrs. Danicki wanted to make a gift of her home to her son simply stated, "A gift is a gift." In not awarding costs to either party, Cumming J. commented:

Mr. Danicki has not transgressed to any secular law.

⁷ [1995] O.J. No. 3995.

One can say only, at most, that Mr. Danicki has chosen to ignore the fifth commandment, “Honour thy father and they mother”, which unfortunately is not a law within the jurisdiction of this court.⁸

Gift of Loan – The Gift Letter

In *Crepau v. Crapau*⁹ Scotiabank issued a Commitment Letter to the plaintiff’s son and daughter-in-law for a mortgage loan for \$368,910. The Commitment contained a condition that the mortgagors would provide a gift letter for \$30,000 from the mother representing part of the balance due on closing.

The mother, Kathleen, provided the \$30,000; the gift letter was delivered to the Bank; the mortgage money was advanced; the transaction closed.

Kathleen told her common law spouse, Andy, about the gift letter. Andy did not approve of Kathleen providing those monies to her son. Andy began showing up and calling the son, Nickolas, about the money owing, until Nickolas and his wife requested that police direct Andy to cease calling Nickolas or to show up at his place of work. Police did so.

Kathleen wrote a demand letter to her son Nickolas requesting repayment of the \$30,000 loan. Nickolas told his mother he would not pay her any money because he had been laid off.

The mother sued her son and daughter-in-law.

⁸ Ibid at para. 49, 50.

⁹ [2012] ONSC 418.

Nickolas left a number of telephone messages on Kathleen and Andy's answering machine which the Court reproduced certain excerpts.

After reviewing the evidence of the parties, the trial Judge accepted the mother's evidence that she signed the gift letter to facilitate her son and daughter-in-law obtaining the Scotiabank mortgage but she did not have the intention to gift the \$30,000. The trial Judge held that both the son and daughter-in-law were liable to the plaintiff for the \$30,000 plus costs.

Jasmins v. Morris¹⁰

In the opening paragraph, Mulligan J. set out the issue and dispute between a mother and her adult daughter.

Over a two-year period, the plaintiff mother, Lorraine Jasmins, advanced over \$1,000,000 to her daughter. When a parent advances funds to an adult child, there is a presumption of resulting trust, so if the adult child claims that these advances were a gift, the onus falls on that adult child to prove the advance or advances were a gift.

Lorraine Jasmins was seriously ill with what was thought to be a terminal illness. She spent several months in the hospital. At that point, she had not spoken to Melissa for 12 years. For 12 years, neither party made any effort to contact the other.¹¹

While she was in the hospital, Lorraine Jasmins decided to reach out to her daughter.

¹⁰ 2016 ONSC 800

¹¹ Ibid at para 15

Her daughter Melissa contacted her. Lorraine and her daughter reconciled. Lorraine moved into the house with her daughter and son-in-law. At first, life was, as Mulligan J. described, blissful. Lorraine advanced to her daughter, over a period of two years, money and shares having a value of \$1,000,000. Unfortunately, the relationship turned toxic. According to the evidence Lorraine told her daughter “I’m moving out and I want my money back.”¹²

Lorraine took some of her own furniture to furnish her accommodations in Mississauga, but there remained substantial amount that she did not want. Rather than leaving it in the home for the benefit of Melissa and John, she called a junk dealer and had all of her remaining furniture scrapped.¹³

After examining all the evidence relating to each of the 5 advances, Mulligan J. satisfied himself that the daughter met the onus upon her that all the advances made were in fact gifts.

Lorraine’s claim was dismissed.

Mulholland v. Mulholland Estate¹⁴

In his overview, S.J. Woodley J. described this action by a son against his deceased father’s estate as follows:

“Few proceedings are as complicated, contentious, or costly, as an estate dispute amongst family members. This proceeding is no exception.”¹⁵

¹² Ibid at para 31

¹³ Ibid at para 32

¹⁴ 2019 ONSC 5785

¹⁵ Ibid at para 1

David Mulholland was the former President and Chairman of the Bank of Montreal who died and was survived by his wife of over 50 years, Nancy, their 9 children, and his son, the Applicant, James.

At the request of his father, James became the farm manager of the Property owned by his father which was a 100-acre horse farm known as Windswept Farm, while his father continued to work full time as an executive with the Bank of Montreal.

James' evidence is that he arrived on the farm in the fall of 1983 and began working to build the farm and infrastructure as directed by his father. James swore that his father did not pay him regular wages but instead promised James that he would receive an ownership interest in the farm that would include severance of a portion of the property (1.4 acres).

James' further evidence is that he (James) provided work and services to the betterment of the Property from 1983 to 2010 (a period of 27 years). James asserted that his sweat equity and 27 years built the Property into one of the largest Hanoverian Breeding Farms in North America.

The father died. He left his son nothing. James' mother Nancy evicted James. He was left destitute and homeless.

Woodley J. decided the case on the basis of proprietary estoppel and concluded:

1. During the Deceased lifetime the Deceased assured James that James would receive a home and a proprietary interest in a portion of the farm property;
3. James reasonably relied on the expectation that he would be provided with a home and obtain proprietary interest in the property and continued to dedicate his work and services to the betterment of the Property.¹⁶

¹⁶ Ibid at para 42

Woodley J. decided that the value to which James was entitled was a one third proprietary interest in the property valued at approximately \$850,000 to \$860,000.

Fiduciary Duty, Duty to Disclose Breach, Damages

***Hodgkinson v. Simms*¹⁷**

The plaintiff was, a 30 year old stockbroker who, after leaving his former conservative blue-chip securities job joined an aggressive firm dealing in speculative undertakings in oil, gas and mining trades. His gross income increased from \$50,000-\$70,000 per year to \$650,000 in 1980 and \$1.2 million in 1981. He retained the defendant accountant for professional assistance in accounting and investing tax shelters. The defendant, whom he retained, was a chartered accountant who specialized in tax and business advise to businessmen and professionals.

The plaintiff, on the advice of his accountant, made substantial investments in four MURBs which the defendant recommended as ideal investments for the plaintiff in realizing his investments goals and to minimize his exposure to income tax.

Unknown to the plaintiff was that the defendant was acting for and assisting the developers in “structuring” these MURB projects. The defendant billed the developers for his financial services which included a fee or bonus for MURB units which were purchased by the defendant’s clients. He did not disclose this to the plaintiff.

¹⁷ Hodgkinson v. Simms, (1994) CarswellBC 438.

There was a collapse of the real estate market. The plaintiff's investments lost virtually all of their value. The plaintiff took the position that if the defendant had disclosed his affiliation with the developers he would not have made these investments.

The plaintiff sought to recover all his losses on the investments recommended by the defendant for breach of fiduciary duty by failing to disclose the nature and extent of his relationships with the developers and that he was receiving payment by the developers for work on the tax shelters.

The trial Judge, with whom the majority of the Supreme Court of Canada agreed, held that the defendant accountant breached his fiduciary duty to the plaintiff by not ensuring that the plaintiff clearly understood that the defendant was representing both interests and the nature and extent of his relationship with the developers.

The Court held that the remedy of disgorgement of the fees paid to the defendant by the developers was simply insufficient to guard against the type of behavior engaged in by the defendant. In approaching damages for breach of a fiduciary duty the Supreme Court held that the proper approach was restitutionary.

The damages awarded was the return of all the plaintiff's capital plus all consequential losses, including legal and accounting fees an amount much greater than any fees earned by the defendants.

Hogar Estates Ltd. v. Shebron Holdings Ltd.¹⁸

This action involved a 25-acre parcel of land referred to as the Hurricane Hazel Lands. *Hogar Estates Ltd.* and *Shebron Holdings Ltd.* signed a letter of intent with respect to the Hurricane Hazel Lands. The letter of intent provided a formula for the division of profits, contribution of funds, and decision making.

The principal of Shebron received an opinion from a professor at the University of Toronto Law School that a by-law restricting the development of Hurricane Hazel Lands could be amended or set aside and therefore allow for greater development.

Rather than share this information with Hogar, Shebron offered to buy Hogar out by returning the money that Hogar had invested describing the Hurricane Hazel potential development situation as “it’s a bad situation.”

A written settlement agreement was entered into, the funds returned to Hogar, and Hogar signed complete releases (the “Release Agreement”).

Hogar found out that Shebron made a very substantial profit by developing the lands without the Hurricane Hazel by-law restrictions.

Hogar brought an action to set aside the Release Agreement.

¹⁸ 1979 CarswellOnt 1499

The Court held that it was clear that the relationship between Shebron and Hogar was a fiduciary relationship which required Shebron to make full and fair disclosure of all material facts known to it and its principal.

The Court set aside the Release Agreement and held that the initial agreement between *Shebron Holdings Ltd.* and *Hogar Estates Ltd.* which provided for an equal division of profits continued in full force and was binding on the parties.
