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THE ABSTRACT PAGE

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In this Issue:

Double Whammy! Tax Harmonization and the New Home Building Industry

Ramsay Redux: The Continuing Saga of Older "Together With" and "Subject To" Easements Referenced in Deeds

What to Consider When Utilizing a Power of Attorney for Property

Mortgage Brokerages, Lenders and Administrators Act, 2006

Right of Survivorship and Dependents Relief

Are Easements and Other Interests in Land Now in Greater Peril?

From NSULCs to LLCs: American Investment Vehicles for Canadian Real Estate

SECTION NEWS

Message from the Chair

Editor's Note

Section Executive 2008-2009

Double Whammy! Tax Harmonization and the New Home Building Industry

*Jeffrey W. Lem**

Ontario's recently proposed sales tax harmonization will render some purchases that had historically been exempt from provincial sales tax, all of a sudden effectively subject thereto under an umbrella 13% harmonized sales tax ("HST"). In many cases, this will be little more than an annoyance. However, in some cases, especially for the new home construction industry, the increased tax burden will be far more onerous.

According to a report on the subject commissioned by the Building Industry and Land Development Association (the "BILD Report"), the present combined GST and PST tax exigible on the purchase of a typical single family detached home in the City of Toronto ranges between 5.3% and 6.9% of the median price of such a new home – a combined sales tax load of just short of $50,000. Although PST is not directly exigible on a new home purchase, there is PST exigible on building supplies purchased by the builder, and this PST gets buried into the purchase price payable by a new home buyer. The PST component varies, of course, with the relative value of the inputs, but industry sources seem to settle on a number of approximately two percent (2%) of the total purchase price (including land) of a new home. After harmonization, however, the total price of the same City of Toronto single-family detached home will attract just over $96,000 in HST, a whopping $46,000 increase in the cost of Toronto home ownership!

Admittedly, the increased sales tax hit is higher in more expensive housing municipalities like Toronto, Ottawa and London, where many homes are priced high enough to eliminate the benefits of the GST rebate. Under the current regime, GST is exigible on a new home or condominium (but not on a re-sale), with a rebate of up to 1/3 of the GST on homes priced below $400,000; a declining rebate on homes priced between $400,000 and $500,000; and no rebate on homes priced above $500,000. The same rebate scheme (including the same price thresholds that have never been indexed to or adjusted for inflation since the inception of the GST) is contemplated to be replicated in the HST. New home builders with units typically below the $400,000 price point do not seem that upset at the prospect of the HST, presumably because their customers will all enjoy the benefit of the maximum HST rebate. However, even on new homes and condominiums below $400,000, the net sales tax burden will still not be revenue neutral and homebuyers even at that price point will still face an increased net sales tax burden as a result of the HST.

Ontario's home buyers are also going to have to grapple with increased incidental costs as a direct result of harmonization. After harmonization, legal fees, long since exempt from

PST, will become subject to the 13% HST. Although the HST can legitimately be passed through to clients, the additional cost cannot help but dampen the demand for real estate lawyers, as clients become that much more reluctant to spend for proper legal fees. Similarly, there will be corresponding increases in surveyors' fees, appraisal and home inspection fees, title insurance premiums, and real estate commissions, all of which, like legal fees, used to be exempt from PST, but will become subject to the HST. All real estate deals will still suffer indirectly because of these increased ancillary costs.

Commercial real estate and re-sale homes will be spared much of the direct impact of the tax harmonization because these two incidents of real estate do not ultimately attract GST (re-sale housing is exempt and purchasers of commercial real estate have offsetting input tax credits available to them). As such, in an HST environment, a huge price differential will soon develop between new homes and condominiums and the same real estate purchased in the re-sale market.

Toronto homebuyers are facing a veritable "double whammy" with sales tax harmonization, given the effectively doubling of the land transfer tax after the implementation of Toronto's own municipal land transfer tax in February of 2008 (the "MLTT"). A number of sources have speculated that the MLTT has already led or at least contributed to the current decline in Toronto housing prices. While it is impossible to isolate the adverse impact of the MLTT on Toronto housing generally, the MLTT did materially increase the cost of acquiring Toronto real estate, as will the proposed HST in the case of new homes and condominiums (especially those over $500,000 in price). In fact, once harmonization is fully implemented, the total tax load payable on the closing of a typical Toronto new home purchase will be a stunning 17% (13% in HST and 4% in combined land transfer taxes)!

The transitional burden of the harmonization will fall heavily on those builders with existing committed projects almost ready for market. There are projects that have already been subdivided and in respect of which development costs have already been incurred, but whose homes will not likely come to market until after the July, 2010 implementation of the HST. There are no transitional grandfathering provisions in the budget to protect such builders with committed projects already in the pipeline.

What's worse, it is not clear in the budget what happens to contracts that may have already entered into prior to the budget, but with closing dates set to occur after the implementation of harmonization in July, 2010 (typically in condominium projects with long lead times). Intuitively, one expects the consumer to bear the brunt of any mid-stream sales tax increase, but the way that new homes and new condominiums are typically sold in Ontario, the burden of unanticipated sales tax increases is actually inverted. Because the purchase price on these existing contracts is usually expressed as "GST included", and presuming that this is subsequently interpreted as meaning "HST included", it will be the builders, not the buyers, who will be eating the increased sales tax component inherent in the HST. In many cases, this additional 8% of sales tax to be absorbed by the builder may make the difference between a profit and a loss for that project.

As leading building industry lawyer, Harry Herskowitz, of Delzotto, Zorzi, succinctly and eloquently concludes, "The government should be severely criticized for introducing harmonization in a way which was not tax revenue neutral on new homes and condominiums. Obviously, the additional tax burden that arises from harmonization and which will be applicable to all new homes and condominiums (especially those priced above $500,000) will have a negative (if not devastating) impact on builders in the GTA, and in other large urban centres in Ontario".

Although the HST has already been introduced in the recent Ontario budget, the details (in which the Devil always resides) from the budget documents are woefully absent. This is usually the case. The real impact of sales tax harmonization won't become fully known until a bill is introduced, at which time there might be any number of measures including, at the very least, more grandfathering of existing projects and contracts. Of course, even if some transitional grandfathering provisions are ultimately included in the implementing bill, such limited grandfathering is unlikely to provide much of a salve in the long run unless revenue neutrality is preserved in the introduction of the HST.

** Jeffrey W. Lem, Davies Ward Phillips & Vineberg LLP.*

Ramsay Redux: The Continuing Saga of Older "Together With" and "Subject To" Easements Referenced in Deed

*Frank Arnone and Matthew Hawkins**

It has been over three years since the Court of Appeal conclusively determined the effect of "together with" and "subject to" references in deeds. Greatly paraphrased, the Court of Appeal's reasons in *1387881 Ontario Inc.* v. *Ramsay* (2005), 77 O.R. (3d) 666, 32 R.P.R. (4th) 161 (C.A.) confirmed that, notwithstanding the literal reading of the then current version of the *Registry Act*, R.S.O. 1990, c. R-20, easements that had been created more than forty years earlier, but never formally renewed with a registered Notice of Claim were not in fact automatically void as the servient tenement owner in *Ramsay* had argued. Instead, such old easements could nonetheless still bind the current owners of the servient tenements thereunder so long as sufficiently detailed references thereto were contained in other instruments registered along the way.

More specifically, the Court of Appeal in *Ramsay* achieved this holding, by relying on the then-current (pre-*Ramsay*) definition of Notice Period in the *Registry Act* (i.e., the period during which a Notice of Claim could be registered) being "the period ending on the day forty years after the day of the registration of an instrument or a notice of claim, as the case may be", together with the definition of Instrument which includes "every instrument whereby title to land in Ontario may be transferred, disposed of, charged, encumbered or affected in any other way…". The Court then concluded that "an instrument is not only one that initially created or asserted an interest, but includes an instrument that transfers title or affects title". The cumulative effect of the foregoing allowed the Court of Appeal to conclude that a deed transferring title that included reference to an otherwise expired easement was sufficient to preserve that easement for 40 years from the date of the deed. Although the Court of Appeal fell short of deeming the Instrument in which the easement is referenced as a *defacto* Notice of Claim, it did validate as duly preserved, the many thousands, maybe tens of thousands, of easements across the province that have been created over forty years ago and preserved by "subject to" and "together with" references thereto in duly registered deeds along the way.

The academic literature surrounding *Ramsay* was unprecedented. For a sampling of just some the available case comments, see the annotations by Jeffrey W. Lem and Craig R. Carter on the trial decision ((2004) 24 R.P.R. (4th) at p. 37*ff*) and by Jeffrey W. Lem, Craig R. Carter, Izaak de Rijcke, Jeremy Johnston and John R. Wood on the appellate decision (32 R.P.R. (4th) at p. 161*ff*)).

The impact of the *Ramsay* case on titles in Ontario cannot be understated. Although the *Ramsay* holding was probably neutral under the *Registry Act* (the Court of Appeal affirmed what was then the overwhelming *Registry Act* practice anyway), its impact on conversions under the *Land Titles Act* may have been quite significant, perhaps even overwhelming. *Ramsay* was decided at a time of rapid title conversions in Ontario into *Land Titles Conversion Qualified* title, a process which continues to this day. It is possible that various land registry offices in Ontario may have been converting titles right up until *Ramsay* was finally disposed of by the Supreme Court of Canada (leave to appeal denied on 41 R.P.R. (4th) 208, 353 N.R. 197 (note), 217 O.A.C. 400 (note), [2005] S.C.C.A. No. 482.) as if all such old easements could *only* be preserved by Notice of Claim and *not* by reference in other Instruments. This would be entirely consistent with the servient tenement owner's interpretation of law as set forth in the trial version of *Ramsay* ((2004) 24 R.P.R. (4th) 37), and was clearly the Ministry's preferred construction of the law (the Ministry actually intervened in the *Ramsay* litigation on such a basis). As such, there might have been some inconsistencies in LTCQ titles in the province, with some reflecting the Ministry's pre-*Ramsay* interpretation of the law, and some reflecting the law as set forth by the Court of Appeal – all possibly

correct at the time of their respective conversions, but inconsistent nonetheless. Without some form of legislative amendment to address this issue, this could have exposed the Land Titles Assurance Fund to a potentially large number of claims.

The answer presented itself several months later in *The Ministry of Government Services Consumer Protection and Service Modernization Act, 2006* (S.O. 2006, c.34) (the "Act"). This piece of legislation, the infamous Bill 152, better known for legislating a version of deferred in defeasance into Ontario law, received the assent of the Lieutenant Governor on December 20, 2006. Lost amongst the title fraud fixes, in Section 22 thereof, were several amendments to the *Registry Act* designed to effectively reverse the Court of Appeal's ratio in *Ramsay*, many of which seemed to go relatively unnoticed by the practicing bar (for an exception, see John Wood, *Valid Title under the Ontario Registry System: How the Forty-Year Rule Works, 2006 Changes Rule Still Protects Rights*, 49 R.P.R. (4th) 7).

Section 22 of the Act changes the definition of the Notice Period under the *Registry Act* to:

> "…the period ending on the day 40 years after the later of (a) the day of the registration of an instrument that first creates a claim, or (b) the day of the registration of a notice of claim for a claim".

The definition of Notice of Claim was amended slightly to specify that the only valid Notice of Claim is the one that is "in the prescribed form" (presumably to preclude arguments of references in other instruments as being *deemed* Notices of Claim or *defacto* Notices of Claim). By its own words, the Ministry of Government Services has indicated (in Bulletin 2007-02) that the effect of the 2006 amendments is to clarify that a Notice of Claim under the *Registry Act* may only be in the prescribed form and not any other form.

Rather than simply undoing the Court of Appeal's *ratio* in *Ramsay*, the 2006 amendments also changed certain aspects of title preservation. The 2006 amendments provide that an otherwise expired easement can still be preserved by a registration of a Notice of Claim, so long as no prior conflicting claim of "a purchaser in good faith for valuable consideration" is registered (see Section 113(2)(b) of the *Registry Act*, as amended). Prior to the 2006 amendments, subsection 113(2)(b) permitted late registration "at any time after the expiration of the notice period but before the registration of *any* conflicting claim" [emphasis added] (i.e., without any requirement that the conflicting claim had to be that of a purchaser in good faith for valuable consideration). As a result, prior to the 2006 amendments, a servient tenement owner could, as soon as he or she realized that the Notice Period had expired, register a deed to himself or herself in order to forever preclude a late registration of a Notice of Claim. Now, the same self-serving deed to oneself would not be sufficient.

A plain reading of the amended Section 113(2)(b) suggests that the very first transfer of the servient tenement after the date of the instrument creating the easement to any purchaser in good faith for valuable consideration would forever thereafter disentitle any dominant tenement holder from ever registering a Notice of Claim outside of the Notice Period. The 2006 amendments have the effect of ensuring that the original grantor of an easement can never resile from the servitude he or she created by the mere effluxion of time, but any successor to the servient tenement will be free and clear of that easement if the dominant tenement holder fails, for whatever reason, to register the prescribed form of Notice of Claim within the first forty years after the instrument creating the easement.

To ensure the consistency of Ontario's titles, the 2006 amendments are subject to Section 115(2) of the *Registry Act*, which provides that Part III of the *Registry Act* (including the 2006 amendments) is retroactive and applies to "every claim and notice of claim coming either before or after August 1, 1981". Admittedly, it seems rather odd to legislate retroactivity by citing a specific date on the time continuum and then deeming the revised provisions to be effective both before and after that fixed point in time. The reason, however, for the August 1, 1981 date

reference is because that was the effective date of prior amendments to the *Registry Act,* which originally attempted to do away with the ability to preserve a claim that had been "acknowledged or specifically referred to or contained in an instrument or a notice", and brought into force the provisions ultimately at issue in *Ramsay*.

What then of easements brought forward into LTCQ parcels before the enactment of the 2006 amendments and that are now contrary to the 2006 amendments? In other words, if the impugned easements are already on the LTCQ parcel register but would not, if properly converted today, have carried forward into LTCQ because of the 2006 amendments, should such LTCQ parcel registers have the offending easements expunged? The plain reading of the 2006 amendments seems to require that all such LTCQ parcels be expunged of the offending easements, even though they might have been legal (à la *Ramsay*) at the time of conversion.

The Ministry's Bulletin 2007-02 describes the intended effect of 2006 amendments. Curiously, that 2007-02 Bulletin only provides a protocol to permit the *addition* of easements onto already converted LTCQ parcels where such easements should have been brought forward on the conversion because of the retroactive effect of the 2006 amendments but, for whatever reason, were not. Unfortunately, Bulletin 2007-02 does not provide the reciprocal protocol to permit the *deletion* of easements from already converted LTCQ parcels where expired easements that should not have been brought forward on the conversion because of the retroactive application of the 2006 amendments were, for whatever reason, nonetheless carried forward.

So, for instance, consider an easement under the *Registry Act* in respect of which the forty-year Notice Period has already expired. Presume further that there have been multiple conflicting claims (i.e., deeds of the servient tenement to a purchaser in good faith for valuable consideration) since the creation of that easement. Presume further that, for whatever reason, the servient tenement gets converted into LTCQ still showing that easement. If we are reading the 2006 amendments correctly, that easement has expired and is no longer capable of preservation by a late Notice of Claim, and has no legal right to be reflected as a "subject to" on the servient tenement LTCQ parcel or as a "together with" on the corresponding dominant tenement parcel, and should logically be deleted from both.

Presumably, future editions of the Ministry's Bulletin 2007-02 will clarify the Ministry's position, although this would seem to be in-line with the approach that the Ministry took throughout the *Ramsay* litigation. Time will tell.

** Frank Arnone and Matthew Hawkins, Davies Ward Phillips & Vineberg LLP.*

What to Consider When Utilizing a Power of Attorney for Property

*Rosemary Grenside**

To be valid, a Power of Attorney (POA) for property must have been prepared in accordance with the *Powers of Attorney Act*, R.S.O. 1990, Chapter P.20 or in accordance with the *Substitute Decisions Act, 1992*, S.O. 1992, Chapter 30. The latter Act specifically deals with continuing POAs (those which survive the subsequent incapacity of the donor); however, a POA made in pursuance of the former Act remains valid (even if it is intended to be a continuing POA) provided the continuing nature is explicitly stated and two witnesses subscribed at the time. This article deals with the technical and due diligence requirements to be considered when selling, purchasing or mortgaging property using a POA.

Selling property where the client is the attorney under a POA

1. Review the original or notarial copy of the POA for both observance of formalities and indicia of fraud and be prepared to provide an original or notarial copy to the purchaser's solicitor.
2. Review the POA with the attorney to confirm with him/her that the POA is still in full force and effect, that the donor had the capacity to give the POA when giving it and was at least 18 years of age when the POA was executed.
3. Complete an application to register the POA, by "imaging" a copy and selecting the following non-law statement:

   (a) 2912 The Power of Attorney is attached hereto as an image in electronic format, is still in full force and effect, and has not been revoked. (*import image*)

   plus one of the following non-law statements:

   (b) 2927 The power of attorney is for a limited purpose; or
   (c) 2928 The power of attorney is for a general purpose.

   If the donor is a company, the non-law statement (I, *name*, have the authority to bind…) is also selected.

4. Complete the Transfer to the purchaser with the following non-law statement:
   (a) 2907, 2904 I, *name* say that to the best of my knowledge and belief, the power of attorney is still in full force and effect and the principal had the capacity to give the power of attorney when giving it and was at least 18 years of age when the power of attorney was executed. The power of attorney was registered as number *number*.

   plus the following law statements:

   (b) **2917, 2922** I, name of solicitor, confirm that I have reviewed the power of attorney with the attorney, and the attorney has confirmed that:

      1. The attorney is the lawful party named in the power of attorney,
      2. The attorney is acting within the scope of the authority granted under the power of attorney,
      3. To the best of the attorney's knowledge, information and belief, the power of attorney was lawfully given, and the power of attorney has not been revoked.

   If the attorney is a company, the same three law statements are made plus the following:

2918, **2923**

4. At the time this document was executed, *name* was the *position* of *company/bank (donee)*, and had the authority to bind the attorney.

If the POA has been granted by a corporation or bank, the applicable non-law statement must be selected (see 2912, 2924, 2920, 2924 and 2921, 2926).

Purchasing and/or mortgaging property where the vendor proposes to use a POA

1. Requisition and review an original or notarial copy of the POA (the failure to take this step by the solicitor for the purchaser and lender was noted by the court in *Reviczky v. Meleknia; Caplan (Intervenor)* 2007 CanLII 56494 (ON S.C.)) – review for observance of formalities, applicability for the given transaction and any indicia of fraud.

2. Keep sufficient notes on review and investigations in the file.

Formalities under the *Substitute Decisions Act*, 1992

- The donor must be at least 18 years of age (Subsection 2(1)) and have capacity (Subsection 8(1)) which is presumed unless reasonable grounds to consider otherwise.
- If it is a continuing POA (most are), it must explicitly state so (Subsection 7(a)) and two witnesses are required (Subsection 10(1)).
- Witnesses must not be the attorney's spouse or partner, the donor's spouse or partner, a child of the donor, a person connected by guardianship, or under 18 years of age (Subsection 10(2)).

Capacity under the *Substitute Decisions Act,* 1992

Mental capacity for purposes of giving a continuing POA is determined in accordance with the provisions of Subsection 8(1) of this Act. To execute a valid POA, the donor must demonstrate the following:

- A knowledge of the nature of the assets owned – and approximate value;
- An awareness of legal and moral obligations to dependants;
- An appreciation of the consequences of granting the power to a substitute decision maker who can abuse the power and/or deplete the assets.

Indicia of fraud

- Is there any appearance of tampering?
- Do the pages match up? Are signatures on a page separate from the rest of the document?
- Was the POA recently executed or was it prepared and witnessed outside Ontario?
- Is the donor of the POA elderly?
- Will the vendor benefit personally from using the POA?

Other general considerations for real estate practitioners

The following is not intended to be an exhaustive list, nor will each consideration apply in every circumstance.

- If acting for an attorney/client wishing to rely on a previously-prepared POA, consider whether your firm also acts for the donor of the POA (conflict, duty of care);

- Whether your firm prepared the POA or it was prepared by other counsel, in which case consider whether to obtain an opinion from that solicitor - that he/she reviewed it with the donor, that the donor was competent at the time it was signed, valid at the time executed and solicitor not aware of any revocation;

- If acting for an attorney/client, advise as to his/her fiduciary responsibilities including the obligation to keep the donor's funds separate from his/her own and to account to the donor (and, after the donor's death, to the donor's beneficiaries);

- Review only an original POA (or properly notarized copy) - if the POA is limited, consider whether it gives sufficient powers to complete the given transaction; whether it continues in the event of incapacity; whether the donor is still alive; whether the POA has been revoked;

- Obtain photo ID from the attorney/client to confirm age (18 years) and compare name to that stated in the POA;

- Contact the donor so as to determine that the POA is not revoked and that donor still has capacity unless the POA is a "continuing" POA (if your client is the attorney, first seek his/her permission before making this inquiry);

- Ask another solicitor in your office to review the POA as well;

- Some banks and title insurance companies will not allow the use of a POA or, if so, require detailed due diligence – get written instructions from all clients if proceeding under a POA;

- Be cognizant of Bill 152, which has amended the *Land Titles Act* to provide that an instrument is fraudulent (and therefore null and void) if it is given under a forged POA - a purchaser/client's Transfer (or lender client's Charge) will be deleted and they will be limited to seeking compensation under the Assurance Fund (which is only available provided specific conditions have been met) - if title insurance is not obtained, consider whether to include a fraud qualification in your title opinion.

Conclusion

Using POAs can be a convenient tool for many good reasons; however, care must be exercised so that practitioners are not the dupe of a fraudster or inappropriate dealing. Even if a practitioner is of the view that an enquiry ought to be made of the donor, there may be limits as to the extent of the due diligence able to be performed. Perhaps the donor is out of the country, having surgery or otherwise unavailable (often the reason a POA is given in the first place). Perhaps the continuing POA was prepared some time ago by an unknown or deceased counsel and the donor is now mentally incapable. If the formalities appear to have been met and there is no one but the attorney/client to confirm the arrangement, that may be the reasonable extent of one's due diligence.

The Law Statements do not require a solicitor to make enquiries beyond those of the attorney/client. A solicitor's review of the POA with his/her attorney/client must be sufficient that the attorney/client can confirm that he/she is acting within the scope of the authority granted, that the POA was lawfully given and is not revoked.

Section 2(1) of the *Substitute Decisions Act, 1992* states that a person who is 18 years of age or more is presumed to be capable of entering into a contract. Section 2(3) states a person may rely upon the presumption of capacity unless he/she has reasonable grounds to believe that the other person is incapable of entering into the contract.

Absent indicia of fraud (or evidence of incapacity when the donor signed), I believe it is sufficient for a legal practitioner to presume the POA is valid. Does it pass the "smell" test? If not, consider what inquiries can and ought to be made.

** Rosemary Grenside, Torkin Manes Cohen Arbus LLP.*

Mortgage Brokerages, Lenders and Administrators Act, 2006

*Cameron Paulikot and Ben Wong**

On July 1, 2008, the Provincial Government passed and proclaimed into force a new mortgage brokerage act which will effectively alter the existing regime and replace the *Mortgage Brokers Act* (the "Former Act"). The new act, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* ("MBLA 2006") sets out a much broader regulatory regime and widens the definition of "mortgage brokerage." This more ambitious legislation was created with the stated goal of increasing the level of consumer protection in the Province.

Notably, MBLA 2006 states that you must have a brokerage license granted from the Financial Services Commission of Ontario before carrying on the business of dealing in mortgages, trading in mortgages, mortgage lending or administering mortgages.[1]

Are You "Dealing in Mortgages"?

Subsection 2(1) of MBLA 2006 states that a person is "dealing in mortgages" by doing any one of the following:

(a) soliciting another person to borrow or lend money on the security of real property;

(b) providing information to a prospective borrower or mortgage lender;

(c) assessing a prospective borrower on behalf of a prospective lender; or

(d) negotiating or arranging a mortgage on behalf of another person or attempting to do so.

Are You "Trading in Mortgages"?

Subsection 3(1) of MBLA 2006 states that a person is "trading in mortgages" by doing any one of the following:

(a) soliciting another person or entity to buy, sell or exchange mortgages;

(b) buying, selling or exchanging mortgages on behalf of another person or entity; and

(c) buying, selling or exchanging mortgages on the person's or entity's own behalf.

Are You "Administering Mortgages"?

Subsection 5(1) of MBLA 2006 states that a person is "administering mortgages" by doing any one of the following which requires the issuance of a Mortgage Administrators License:[2]

(a) receiving payments from a borrower under a mortgage on behalf of another person or entity, and remitting them to or on behalf of that person or entity; or

(b) taking steps on behalf of another person or entity to enforce payment by a borrower under a mortgage.

Are You "Mortgage Lending"?

Subsection 4(1) of MBLA 2006 states that a person is "mortgage lending" when lending money on the security of real property or holding themselves out as doing so. The effect of this regulated activity will be to limit private lenders from making mortgage loans unless they (a) qualify as a lending Institution under MBLA 2006 or (b) obtain a brokerage licence.

The application of subsection 4(1) of MBLA 2006 presents an interesting problem for vendors who agree to take-back a mortgage ("VTB"). A literal interpretation of subsection 4(1) of MBLA 2006 suggests that the use of a VTB will not exempt a vendor from the mortgage brokerage license requirements subject to certain exemptions. The exemptions are as follows:

(a) the vendor qualifies as a lending institution as defined under MBLA 2006;

(b) the vendor obtains the services of a real estate brokerage (in this case, the brokerage would not be required to have a mortgage brokerage licence under MBLA 2006), a broker or salesperson employed by a real estate brokerage or a licenced mortgage brokerage is used to make the appropriate VTB arrangements.

Additionally, there is also a strong argument to suggest that under the new regime, as under the Former Act, a person who is lending money on their own behalf for "investment purposes" and who is "not carrying on a business" will not be required to have a mortgage brokerage licence.

Exemptions

MBLA 2006 contains a number of exempt entities and individuals. Without limitation, lawyers, simple referrals, financial institutions and the Crown are each exempt, subject to certain express conditions within MBLA 2006.

Penalties

MBLA 2006 has expanded the offence provisions. Under the previous regime, it was an offence to furnish any false information or statement with respect to any application under the former Act. With the MBLA, this type of offence is relabeled as a prohibition. Moreover, the Act provides greater clarity by redefining false information to cover a wider gamut of prohibited activity.

MBLA 2006 also broadens the scope of liability for directors and officers of a corporation. For example, under the Former Act, individuals had to have "knowledge" to be guilty of offences. The new regime seems to expand and clearly define what constitutes "knowledge" when defining the scope of liability for directors and officers of a corporation and partnership. For individuals, this element seems to be eliminated entirely. Provided that the individual or person contravenes or fails to comply with orders under the Act or conditions vis-à-vis their license, they are guilty of an offence.

** Cameron Paulikot is an Associate in the Commercial Real Estate Group at Pallett Valo LLP. Ben Wong is an Articling Student at Aird & Berlis LLP.*

[1] Both "Mortgage Lending" and "Administering Mortgages" had not been defined in the previous legislation, the *Mortgage Brokers Act*.

[2] An exemption exists for collection agencies registered under the *Collection Agencies Act*, but is limited to prescribed activities.

Right of Survivorship and Dependents Relief

*Craig Ross**

It may come as a surprise to many real estate lawyers that dependent's support claims against estates can affect the rights of third-party surviving joint owners of real property.

Pursuant to Part V of the *Succession Law Reform Act* (*SLRA*), individuals have a duty to make adequate provision out of their estate for their dependents. If a deceased fails to make adequate provision for their dependents by the terms of their Will, or fails to make a Will and adequate provision is not provided to a dependent pursuant to intestate succession under Part II of the *SLRA*, the dependent may, by application, apply for an order that adequate provision be made out of the estate for their proper support.

Moreover, "any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants… shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment" of an order that adequate support be made out of the estate.[1]

I will illustrate the significance of the relevant provisions by way of example below, but first, it is important to state the definition of "dependent" and "spouse" for the purposes of Part V of the *SLRA*, which is:

Definitions, Part V

> 57. In this Part,
>
> "dependant" means the spouse of the deceased, a parent of the deceased, a child of the deceased, or a brother or sister of the deceased, to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death; and
>
> "spouse" means a spouse as defined in subsection 1 (1) (*a married spouse*) and in addition includes either of two persons who,
>
> (a) were married to each other by a marriage that was terminated or declared a nullity, or
>
> (b) are not married to each other and have cohabited continuously for a period of not less than three years, or in a relationship of some permanence, if they are the natural or adoptive parents of a child.

By this definition, a "dependent" must be a married spouse, common-law spouse, divorced spouse, child, parent or sibling *who was receiving support from the deceased immediately before the deceased's death*. Support includes monetary and non-monetary support. It is also important to note that common-law spouses do not have any statutory rights in estate succession except as dependents, and the case law is full of common-law spouses unfairly excluded from their partner's estate.

Now, take the example of Mark and James. Mark and James are brothers who own a single family residential dwelling as an investment rental property and they hold title together as joint owners with right of survivorship. Mark has been unlucky in love – he is separated from his wife Maggie and has ongoing support obligations under their separation agreement. Mark originally owned the rental property in his own name, but added James as a joint owner following his separation 10 years ago, and since then James has taken on full responsibility for the maintenance of the property.

Mark has been living with his girlfriend, Jenny, for around seven years. Mark and Jenny have no plans to marry. Mark owns the house he and Jenny live in, but has no significant savings or insurance. Mark and Jenny share household expenses as a normal couple and Jenny takes care of almost all domestic responsibilities. Mark also has two adult children who he has good relationships with.

Mark dies without a Will. Had anyone asked Mark how he would like to distribute his estate on his death, he would have described making modest but fair provision for Jenny, likely by way of a trust, with the remainder of the residue, and Jenny's trust on Jenny's death, being divided among his children equally. He definitely did not want anything to go to Maggie, despite the fact that her support payments were a charge against his estate under their agreement.

One month after Mark's death, James walks into your office with a death certificate and an offer he has received from the tenants to purchase the rental property. You check that title is clean, register the survivorship application to remove Mark from title and advise James to accept the offer. When you receive the requisition letter a month later you notice a term demanding that two section 71 notices in favour of Maggie and Jenny be removed prior to closing. On contacting counsel for Maggie and Jenny, in order to remove the notices, they require your personal undertaking that the proceeds of the sale be paid into court pending the determination of their support claims. James is furious and is unwilling to agree. The tenants have found a better house for cheaper in a falling market and refuse to close.

While some facts in this scenario are for dramatic effect, dependent support claims are certainly common in estate administration. Faced with this scenario, both Maggie and Jenny have valid claims to dependents support, and while factors relevant to calculating the support owed is beyond this article, it is quite possible that these claims exceed the estate's assets without including the rental property. This is especially true because on dealing with the support claim, the judge is entitled to consider Mark's moral obligations to Maggie and Jenny as dependents, but also his moral obligation to consider his children in the distribution of his estate.[2]

Going back to the provisions of the *SLRA*, section 72(1)(d) will include a "disposition" of property whereby the deceased owned the property jointly with another person at his death as part of the deceased's estate and available to satisfy the claims for dependents support. "Disposition" in this section has been interpreted to apply only when a deceased has held title in his own name and "disposed" of his interest by adding a joint owner, and does not apply when title was taken originally by the joint owners, even if only one joint owner contributed the consideration.[3]

Section 72(1) also limits the application of the inclusions and potential charge under section 63(2)(f) against the rental property to "the capital value of the… transactions". On its face, the capital value of the disposition that occurred when Mark added James as joint owner will make the whole value of the rental property part of the estate and available to satisfy Maggie's and Jenny's claims. On the other hand, how does James' contributions and maintenance affect this analysis, if at all? Does it matter if James' was getting a portion of the rents? I leave these questions to the consideration of the reader.

Finally, it is important to note that section 61(1) of the *SLRA* requires that dependents support claims be filed within six months of the grant of letters probate of the will or of letters of administration. This limitation period can be extended by the court if it considers proper, but if a dependent misses the limitation period, the value of property included under section 72(1), including jointly held property that has passed by right of survivorship, cannot be included as an estate asset subject to a dependents support claim.[4] The problem that remains is, if no one applies for a Certificate of Appointment of Estate Trustee, the limitation period has never started to run.

Hopefully the discussion above has given some pause to consider whether further inquiry is necessary when faced with a simple survivorship application following the death of an owner. The next time a James walks into your office with a death certificate, it might be prudent to ask a few questions about the estate before advising the client that he is free to deal with the property as he sees fit.

* *Craig Ross, Pallett Valo LLP.*

[1] *Succession Law Reform Act* (*SLRA*), R.S.O. 1990, c. S.26, section 72(1)(d) with edits.
[2] See *Perilli v. Foley Estate,* 2006 CarswellOnt 719, Ontario Superior Court of Justice at 70.
[3] *Modopoulos v. Breen Estate*, 1996 CarswellOnt 2863 Ontario Court of Justice (General Division), 1996; *Lamb (Litigation Guardian of) v. Lamb* (1998), 22 E.T.R. (2d) 294 (Ont. Gen. Div.); *Skilton v. Petley Estate*, 2000 CarswellOnt 2365 (Ont. S.C.J.) and *Caughell (Litigation Guardian of) v. Caughell Estate (Trustee of)*, 2000 CarswellOnt 2910 (Ont. S.C.J.).
[4] *Dolan, Re*, 1983 CarswellOnt 618.

Are Easements and Other Interests in Land Now in Greater Peril?

*Lawrence Bremner**

Back in 2005, the *Ramsay* case (*1387881 Ontario Inc. v. Ramsay*, 2005 Canadian Law Institute 23211 (ON C.A.)) caused great relief amongst the Ontario Real Estate Bar. In *Ramsay*, one neighbour (the “dominant owner”) had an easement over the other neighbour’s land. The easement had been created more than 40 years earlier, but had been referred to in the deeds throughout the servient tenement owner’s (“servient owner’s”) title. The servient owner registered a deed from itself to itself without referring to the easement and took the position that its deed constituted a conflicting claim because the dominant owner had not registered a Notice of Claim before his easement rights had expired. In 1981, Section 113 of the *Registry Act* was amended to provide that a claim to some interest in land, that is still in existence on the day which is 40 years after the day of the registration of the instrument creating the interest, or Notice of Claim of that interest was registered, expires at the end of that day unless a Notice of Claim has been registered in the prescribed form (Form 32 of Regulation 995) at any time within that 40 year notice period or at any time after the expiration of the notice period, but before the registration of any conflicting claim. The Court of Appeal had to decide whether registering the Form 32 Notice was the only way that an interest in land could be preserved. The Court held that the Section 113 Notice of Claim provisions were permissive and not mandatory. Notice of an interest in land can be given either by registration of an instrument referring to the interest or the registration of a Notice of Claim (Form 32).

Subsection 22(4) of Bill 152, the *Consumer Protection and Service Modernization Act, 2006*, received Royal Assent on December 20, 2006, amending s.s.113(2) of the *Registry Act* to provide that only a Notice of Claim in the prescribed form can revive an otherwise expired claim. Merely referring to an easement (or other interest in land) will no longer be sufficient. Thus, this amendment overturns the Court of Appeal’s decision in the *Ramsay* case. A claim to an interest in land will expire 40 years from the date that the instrument that created that claim was registered. Only registration of Form 32 will preserve a claim regardless of how many times that interest was mentioned in deeds registered during the past 40 years. However, if a claim has expired, it can be revived by registering a Notice of Claim, provided that there has not been an intervening conflicting claim by a purchaser **in good faith** for valuable consideration of the property.

But what does "a purchaser in good faith" mean? Some suggest that the purchaser must not have knowledge of the claim in order to qualify as a "good faith" purchaser. But it is certainly arguable that a purchaser, who does have knowledge of a claim which has expired, is proceeding in "good faith" simply because the purchaser knows that the claim has expired – otherwise, why have a 40 year rule? If the legislature had intended "in good faith" to mean "without actual knowledge", then it could have used those exact words which are already contained in s.26 (2) of the *Registry Act*. Did the legislature intend something different by not using that phrase in the revised s.113(2)? We will have to wait for the courts or the legislature to make the meaning clear.

If an easement (or other right) has expired, then it is no longer registered – does this mean that it is exempt from the effect of s.113 by s.s.113(5)iv as an unregistered easement or other right that the person is openly enjoying and using? Alternatively, will the *Road Access Act* allow passageway for all those owners in cottage country (or elsewhere) to reach their landlocked properties once their easements have expired?

All persons owning property or having an easement (see Registrar's Bulletin 2007-02) or any other interest in land that is still registered in the Registry System where the instrument that created the interest is approaching 40 years old (or more), should register a Notice of Claim to protect those interests.

** Lawrence Bremner, Gowlings, Hamilton.*

From NSULCs to LLCs: American Investment Vehicles for Canadian Real Estate

*Jeffrey W. Lem**

Imagine, if you will, a Canadian-made product designed and built exclusively for export to Americans and for which no Canadian could ever have any use. As peculiar as this may sound, Canada "produces", for want of a better term, a special kind of corporate vehicle that is only used by Americans. These specialty corporations, known throughout Canada as "Unlimited Liability Companies" ("ULCs"), have been an increasingly popular choice with Americans since the introduction of the "check-the-box" regulations by the U.S. Treasury in 1997. ULCs are easy-to-use corporate entities that, unlike regular corporations, actually expose shareholders to unlimited liability for debts and other financial obligations incurred by the company. Until recently, Canadian ULCs could only be formed out of the Province of Nova Scotia, but recently other provinces have joined the bandwagon. However, at the very same time that Canadian provinces have dramatically increased the availability and convenience of ULCs for American investors, U.S. and Canadian lawmakers have made concurrent tax treaty amendments which could seriously eviscerate the continued viability of the Canadian ULC.

Up until now, the ULC has been an attractive vehicle for American investors because of its unique hybrid tax treatment back in the United States. In Canada, the ULC is treated exactly as any other Canadian corporation for tax purposes. However, in the United States, a Canadian ULC qualifies as an "eligible entity" according to the U.S. Treasury's "check-the-box" regulations. The fact that a ULC's shareholders have unlimited liability for the debts and obligations of the ULC makes the ULC, for U.S. tax purposes, not a corporation at all, but rather, a "flow-through" entity. As such, the ULC pays U.S. taxes on a Canadian-source income not at a corporate level, but rather, at the shareholder level. All of the income, losses and foreign tax credits generated by the ULC in Canada are considered to be the U.S. investor's income, losses and foreign tax credits. Domestic Canadian income taxes remain payable in Canada in the ordinary course and are then claimed as foreign tax credits against any U.S. income taxes owing. In effect, a wholly-owned Canadian ULC becomes a tax "nothing" in the eyes of the IRS, such that the U.S. parent is treated as if it is directly owning the assets in Canada, without actually having to do

so. The end result of using the ULC structure for Canadian investments is the creation of a vehicle that can flow its source profits and losses from Canadian real estate investments through to its U.S. stockholders.
ULCs are rarely if ever owned by Canadian shareholders. For Canadian taxpayers, a ULC is taxed like any other corporation, yet provides none of the liability protection that other corporations provide.

Prior to 2005, Canadian ULCs could only be formed in the Province of Nova Scotia (the "NSULC"). In 2005, the Province of Alberta cracked the Nova Scotia monopoly with its own unique version of the ULC (the "AULC"). British Columbia then joined the ULC bandwagon in 2007 (the "BCULC"), bringing to three the total number of Canadian provinces currently providing ULCs for American investors. Up until the end of 2008, the prevalence of ULCs in the Canadian corporate landscape was a direct reflection of the breadth and depth of American direct investment in the Canadian economy.

There are slight differences in the costs, formation procedures and shareholder liability features of the traditional NSULC, and the newer AULC and BCULC. The fees involved in incorporating and maintaining a Canadian ULC have fallen substantially in recent years. Along with Alberta's introduction of its version of the ULC in 2005 came a much more competitive pricing structure for Canadian ULCs. Initially, NSULC incorporation fees were exponentially greater than those in Alberta, to the tune of at least $5,500 *more* per ULC! Presumably in direct response to the price competition introduced by the AULC, Nova Scotia has recently lowered its NSULC incorporation fees to far more palatable levels. For a current NSULC, there is a $1,000 incorporation/registration fee (significantly less than the previous $6,000 incorporation fee), which is also, co-incidentally, the price of ULC registration for a BCULC. Alberta remains the runaway price leader with AULCs costing only a nominal $100 corporate filing fee. Although incorporation fees are now largely harmonized, NSULCs continue to be the most expensive ULCs to maintain, as they are subject to an annual fee of $2,750, compared with relatively negligible annual fees for both BCULCs ($45) and AULCs (none).

Canadian ULCs can also be distinguished from one another by the slight nuances in how shareholders get exposed to unlimited liability. For instance, the unlimited liability of the shareholders of an NSULC may only be enforced by its creditors upon a winding-up of the NSULC. In other words, day-to-day liability does not accrue to NSULC shareholders until dissolution. It is only after the NSULC is wound up that any residual liability is assumed by its shareholders. Likewise, BCULC shareholders attract liability only after the BCULC liquidates or is dissolved. In contrast, AULC's shareholders do not enjoy the luxury of deferring liability until the end of the ULC's existence. Instead, AULC shareholders become immediately jointly and severally liable for all obligations of the AULC as and when such liabilities arise. Of course, the differences in these risk profiles is probably moot, since single purpose ULCs are usually structured with deliberately impecunious intermediary stockholders in any event, and, besides, practically speaking, creditors rarely find it worthwhile to pursue litigation against American ULC stockholders before first exhausting recourse against the ULC's assets.

Despite their surge in popularity in recent years (or perhaps, because of it), the use of ULCs by American investors may have already crested. The adoption of the Fifth Protocol to the 1980 Canada-U.S. Tax Convention in the waning days of the Bush Administration made tremendous strides in simplifying and clarifying the income tax cross-border transactions between the two countries, but it also sounded the death knell for Canadian ULCs. The Fifth Protocol contained certain "anti-hybrid" tax rules which purport to curb what was seen by U.S. federal authorities as abusive cross-border tax schemes. For quite some time after the initial release of the draft Fifth Protocol, there was some optimism in the cross-border tax community that ULCs would be exempted from the "anti-hybrid" withholding tax rules contained in the Fifth Protocol, but the Technical Explanation published by the U.S. Treasury Department in July of 2008 (the governing document explaining the U.S. government's official interpretation of the Fifth Protocol) offered no relief whatsoever to ULCs from the proposed new withholding taxes, now set to come into effect in 2010.

It is hard to imagine that Canadian ULCs of any jurisdiction will be created now that the Fifth Protocol has been ratified in its current form with no hint of administrative lenience in the Treasury Department's Technical Report. That said, very few American investors will be losing sleep over the loss of this particular flow-through structure because the very same tax treaty amendments that will arguably prove lethal to the popularity of Canadian ULCs also permit, for the first time, the tax efficient use of U.S. limited liability companies ("LLCs") in the holding of Canadian property. Before the passage of the Fifth Protocol, members of U.S. LLCs were routinely denied the benefit of the U.S.-Canada Tax Treaty because LLCs were not domestically recognized as tax-paying entities. From a practical perspective, that meant that very few US LLCs were ever used to hold Canadian properties directly. With the adoption and ratification of the Fifth Protocol, however, all of that is about to change, with U.S. LLC members being now fully entitled to treat LLC income from Canada as directly earned by their constituent American members.

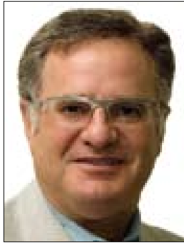
This article is not an ideal venue for a detailed treatment of the use of U.S. LLCs for the holding of Canadian real estate. Suffice it to say that U.S. LLCs are curious statutory creatures that do not mix well with Ontario's land registration statutes and in fact pose significant conveyancing problems for Ontario real estate practitioners. Readers are commended to "When is a Corporation not a Corporation?" by leading Toronto practitioner, Victoria M.F. Stuart at Gardiner Roberts LLP (*The Abstract Page,* Volume 32, No. 1 at p. 36), an excellent article (and the only one to date that is directly on point) addressing the logistical complications in putatively using U.S. LLCs to directly hold Ontario real property.

From NSULCs to LLCs, the vehicles that Americans use to hold Canadian real estate continues to evolve, and we can expect the transition to LLCs to begin in earnest and whether we represent such investors or are representing buyers from or lenders to such American investors, we had best familiarize ourselves with the structures that they use.

** Jeffrey W. Lem, Davies Ward Phillips & Vineberg LLP.*

SECTION NEWS

Message from the Chair



*Jeffrey Schwartz**

I can say with absolute certainty that very few know and understand the work that goes into producing our newsletter. I marvel at the efforts of our Editor, Ray Mikkola, our volunteers and writers and even the OBA staff. It's a long and labour intensive task.

This issue of *The Abstract Page* started as soon as the last issue was delivered to you, our readers and members. We try hard to be timely in the articles, information and updates provided. We try hard to ensure that the issue is delivered at times when you can make the maximum use of its contents, including planning for upcoming events.

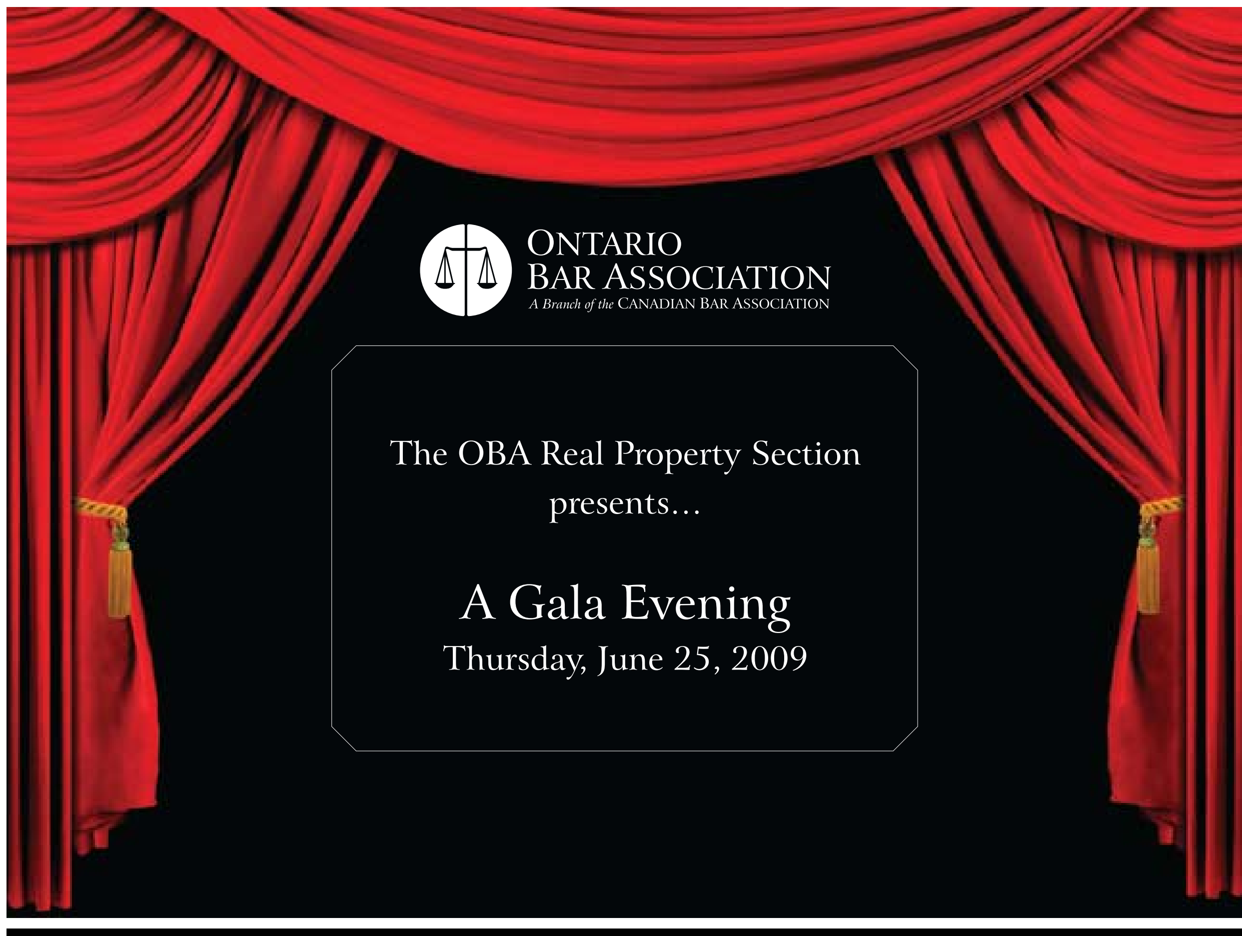
Sometimes, events occur that impact on Ray's efforts to be timely. I know that my comments for this issue were prepared back in late March and here it is now May and you are just now receiving this. Tragically, events that have overshadowed our issue have forced us to step back and reconsider presentation of this publication.

As many of you know, recently, we lost one of the shining stars of our profession. Mark Freedman was known as one of the pre-eminent lawyers in the condominium development world. This is not the place for me to extol his qualities. Others have and will do a much better job in this publication. Mark will be missed by all of us and we send our heartfelt wishes of condolence to his wife, his partners and colleagues.

Sadly, there was a further blow to our real estate family. Jeffrey Lem, one of the most prolific writers to our publication, adviser and staunch supporter of our organization and stalwart resource to the profession generally, has lost his beloved wife Susan. I had the privilege of meeting Susan once, and found her to be a lovely and genuine person. Her loss has been felt by all of us who know and care about Jeffrey.

As a result of these difficult and untimely events, our planned evening to honour Mark and Jeffrey had to be postponed. Both families were consulted and the Award dinner is now (with the extraordinary efforts of the committee) postponed to June 25th. The night promises to be very special and will be a celebration of all that is good about who we are and the accomplishments of our honourees. I look forward to seeing you there. Please reserve early as we are expecting an early sell out.

** Jeffrey Schwartz, Schwartz & Schwartz.*



The Ontario Bar Association Real Property Section Executive is pleased to honour the 2009 recipients of the Award for Excellence in Real Estate. The gala evening will be honouring Jeffrey W. Lem and the late Mark Freedman.

Join us at the Granite Club on Thursday, June 25, 2009 as we celebrate and honour the winners of the 2009 Award for Excellence in Real Estate. The evening will have tribute speeches honouring both recipients as well as live entertainment.

Reception – 6:00 p.m.
Dinner – 7:00 p.m.

Granite Club
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(Located on the Westside of Bayview Avenue, between Lawrence Avenue and York Mills Road)
Toronto, Ontario
M2L 1E4
(Business Attire)

This event is graciously sponsored by:

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Editor's Note

*Raymond H. Mikkola**

Welcome to the Spring 2009 edition of *The Abstract Page*. Or, perhaps more appropriately put, in view of the long and snowy winter most of us have just endured, the "End of Winter 2008-2009 edition".

Interesting real property legal issues have continued to emerge, notwithstanding the heavy layer of snow. For example, in yet another adverse possession case (*Elliott et.al. v. Woodstock Agricultural Society*, reported at 92 O.R. (3d) at 711), the Court of Appeal put its seal of approval on the suspicions of many of us that it is very difficult to satisfy the so called "inconsistent use test" where the subject land is being held for "future development". The Court supported the view that in this regard, "[t]he same act or acts of trespass may be highly significant to the owner of a house and garden, yet utterly trivial to a property developer or an industrialist who has no immediate use for the land affected". But doesn't that mean that the more particular your use of your land, the easier it is for a "trespasser" to claim successfully an adverse claim over it? Put another way, if your "present" intended use of land to which you enjoy legal (paper) title is "future development", can you safely ignore most incursions by squatters? So it would appear. But the Court says this is reasonable because "the interests of justice are not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is, for good reason, being deferred". Of course, the House of Lords in *Pye v. Graham* [2002 UKHL 30], takes a completely different view of the requirement for inconsistency of use, as follows (at paragraph 45): "The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong."

The current edition of *The Abstract Page*, dear reader, includes a blow by blow description of the "double whammy" resulting from the new proposed harmonization of the GST and PST announced by the provincial government scan days ago (by Jeff Lem); the rise in popularity of Unlimited Liability Companies in a number of jurisdictions in Canada (not just Nova Scotia any more) just in time to correspond with income tax modifications south of the border that likely make such corporations serve no practical purpose (also by Jeff Lem); Frank Arnone and Matthew Hawkins ask the vexing question "So how can you get easements off title that shouldn't have been there in the first place?"; and Rosemary Grenside provides an article that deals with the technical and due diligence requirements to be considered when selling, purchasing or mortgaging property using a POA.

But wait, that's not all! Cameron Paulikot and Ben Wong tell us about the *Mortgage Brokerages, Lenders and Administrators Act, 2006*; and Craig Ross scares us with an article about joint tenancies and dependent's relief. Finally, our Chair, Jeffrey Schwartz tries to make some sense about what we do, how we got here, and where we are going.

That brings me to you. That's right, you! Please write to me. Send me an article. Call me (loneliness is a terrible thing). I will (probably) arrange to have anything you care to write published in an upcoming edition. I suggest an article that compares the *ratio* in Elliott with the *ratio* in Pye.

And let's be careful out there.

* *Raymond H. Mikkola, Pallett Valo LLP,* (905) 273-3300, rmikkola@pallettvalo.com.

Real Property - Commercial Leasing in Tumultuous Times Part 2 of 3 (5/7/2009) MP3 is ready for Download

Topics Discussed

This second session focuses on what to do in the event that there is a default under the lease-from the perspective of both the landlord and the tenant and taking into consideration the nature of the tenancy, the nature of the tenant, and landlord's obligations to its mortgagee. Specifically, review of standard lease provisions and how they deal with default, with a focus on landlords dealing with tenant default. Also discussed was the tenant's options in the event that it is about to go into default. Some of the topics to be canvassed may include: duties of good faith; breach of the covenant for quiet enjoyment; available remedies on tenant default; available remedies on landlord default; landlord or tenant entitlement to fixtures on the premises; construction liens; piercing the corporate veil; landlord waiver; distress; fundamental breach; environmental default; and relief from forfeiture.

Speaker: **Lisa A. Borsook,** Managing Partner, WeirFoulds LLP Program
Chair: **Rod Davidge,** Osler, Hoskin & Harcourt LLP

Member Access

To access the recording and for further details on how to download please click here.
Access to the recordings does require a login and password.

The Abstract Page is published by the Real Property Section of the Ontario Bar Association. Members are encouraged to submit articles or suggest story ideas.

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Staff Liaison-AGR&CC: **Jonathan Clancy,**
Ontario Bar Association
(416) 869-1047

Coordinator, Sections: **Blossom Pangowish,**
Ontario Bar Association
(416) 869-1047 x399

Editor:
Raymond H. Mikkola

OBA Editor:
Vickie Rose
Graphic Designer:
Simon Bluestein