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## Editor's Note

*Raymond H. Mikkola\**

As I write this, I am listening to the top news story on the radio, which consists of a dense series of statistics regarding housing starts, sales volume and price figures, which reflect a general picture of economic decline throughout most of the country. A completely unscientific poll of residential and commercial real estate lawyers discloses the emergence of practice reminiscent of the 90's, when deals would be vigorously negotiated at their inception, and then terminated at or near the end of the due diligence period. Assumptions about the availability of purchase financing from lenders with whom long and carefully built relationships have been established are no longer always accurate. And is it just my impression that the "Careers" pages of the *Ontario Reports* are significantly fewer than even a few months ago?

Never mind. As transaction work decreases, mortgage remedy work might fill its place. If it doesn't, then it's a good time to get that LLM, market, write the article or the book for which there never seems to be time in a harried practice, and to spend time with family. Or maybe even join the OBA Real Property Section Executive. There are many interesting issues that challenge us as real estate practitioners and which ultimately make the practice worthwhile.

Some of these issues are considered in these pages. Roger Brennan's article reminds practitioners how the amendments to the *Heritage Act* in 2005 impact particularly on those purchasers who are looking to redevelop properties with older houses or other heritage features. Victoria Stuart's article takes us into the world of international law, highlighting how the legislative framework established by the *Foreign Missions and International Organizations Act* (the what??) yields surprising results for landlords and construction lien claimants, among others. Withholding taxes on cross border loans have been rethought just in time to address the fact that no such loans appear to be taking place in any event(!). And Bill 114, which is intended to address limitations dangers of demand loans, may have some surprising consequences. Read on.

All the best for the Season.

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# Built Heritage in Ontario

*Roger Brennan\**

The public objectives of preserving heritage properties in Ontario are well known, but it is an area that is not without controversy. Real Estate practitioners can assist their clients by advising on the legal framework that is in place where it may have an impact on their client's real property.

The primary legislative means for the protection of heritage properties is found in the Ontario *Heritage Act* (the "Act") and its Regulations. The Act was significantly amended in April 2005 to increase the ability of municipalities and the Province of Ontario to protect heritage properties. Properties can be individually designated as a heritage property or they can be part of a Heritage Conservation District ("HCD").

## Individual Designation of Properties

Individual properties can be designated by municipalities or by the Minister of Culture under Part IV of the Act. It is noteworthy that the designation can go beyond the buildings on a property and can include groups of buildings, structures and natural features.

The process for designation by municipalities is set out in section 29 of the Act and can be initiated by many different stakeholders. Council, after consultation with its Municipal Heritage Committee, passes a motion to proceed to designate and so notifies the owner and the Ontario Heritage Trust. Notice is also published in a local newspaper. If no objections are received within 30 days, council can proceed to pass a designation by-law. Notice of the by-law is given as above and is registered on title to the affected land. The property is also listed on a register kept by the municipal clerk, as well as on the provincial register of heritage properties. The municipal list or register may also include properties that are considered of heritage value or interest, but not formally designated. This can indicate to prospective owners that the property could become recommended by the municipality for designation at some time in the future. The owners of such properties must give the municipality at least 60 day's notice in writing of demolition or removal of a building or structure on the property.

Once a property is formally designated, the owner needs the written consent of Council for alterations to the buildings and structures, as well as landscape or natural features if they have been identified as having heritage attributes. If Council refuses an application by an owner, the owner may apply for a hearing before the Conservation Review Board. The Board makes recommendations to Council; however, the decision of Council is final. With regard to demolition, the consent of Council is required. However, that decision can be appealed by the Owner to the Ontario Municipal Board, which can order the municipality to consent, with terms and conditions in the discretion of the OMB.

The provisions for designation by the Minister are set out in section 34.5 of the Act, with similar provisions for review by the Conservation Review Board and the decision of the Minister also being final. The Minister's Order designating the property is registered against title.

Where a property designated by a municipality or by the Minister changes ownership, section 35 requires the new owner to give notice to the municipality or the Minister respectively. There are also specific provisions in the Act for the execution and registration of heritage easements to assist in the conservation of properties.

## Heritage Conservation Districts

The process of designating a geographic area as an HCD can be initiated by many stakeholders, including the municipality, owners and heritage organizations. It is municipal council, usually in consultation with its Municipal

Heritage Committee (assuming that it has one) that makes the decision to examine an area for designation. Having decided to examine an area, Council may (but it is not obligated to) pass a by-law under section 40.1(1) of the Act to designate a Heritage Conservation *Study* Area for one year. Doing so alerts owners in the study area to the potential for designation. As well, subsection 40.1(2) of the Act provides council with the ability to also place interim controls with respect to alteration, construction and demolition. Thus, it is worth noting that an area may be under active consideration to become an HCD and be subject to some development restrictions, even if no by-law is in place officially identifying it as an HCD.

Municipalities are required to adopt an HCD Plan when they designate the area an HCD. The required contents of the Plan are provided for in subsection 41.1(5) of the Act and include policies and guidance as to what developments and changes may be acceptable regarding properties in the area, including minor alterations that may be carried out without a permit. The process for municipal council to pass a by-law designating the HCD and adopting the district plan is set out in sections 40 and 41 of the Act. There is an appeal to the OMB, which may repeal or amend the by-law. The designation by-law is registered on the title to the affected properties. Owners of properties within the HCD are then required to obtain a permit from the municipality for development, renovation, etc. of their property. As well, a municipality that has a property standards by-law may include minimum standards for the maintenance of the heritage attributes of properties within the HCD.

## Conflicts

Where a property that is individually designated is also included in an HCD, the provisions of the latter will prevail. However, interior alterations will be governed by the individual designation provisions under Part IV. As well, where properties have been designated by the Minister of Culture under section 34.5 of the Act, that will prevail over the HCD provisions.

## Conclusion

The current economic and financial market uncertainties will probably create additional challenges for efforts to protect heritage properties. For example, currently some municipalities have Heritage Property Tax Relief programs and some also have heritage grant programs. These programs and others may be adversely affected by budget pressures in the coming years.

Key to the success of efforts to conserve heritage properties is that they are purchased and owned by individuals and organizations that can appreciate heritage values and are willing to support efforts to preserve this part of our history for future generations. Real Estate practitioners can play an important role by helping their clients understand the rights and obligations associated with heritage properties.

*\* Roger Brennan, Senior Counsel, Canada Post and member of the Board of Heritage Ottawa.*

# The Position of a Landlord when the Tenant is a Foreign State

Victoria M.F. Stuart\*

Landlords have often been leery of leasing space to foreign missions because of issues concerning security and insurance. However, due to a recent file with which my firm was involved, I became aware that there are serious limitations on remedies with respect to sovereign or diplomatic entities from a landlord's perspective.

In Canada, the legislative framework is established by the *Foreign Missions and International Organizations Act* ("FMIO Act, S.C. 1991, c.41, s.5(1)(b)"). This statute deals with two types of relationships with foreign entities. Part 1 deals with foreign diplomatic missions and consular posts and Part 2 deals with international organizations. Pursuant to Part 1, various articles of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations are adopted as having the force of law in Canada with respect to all foreign states, regardless of whether those states are parties to those Conventions.

In Part 2, the Governor in Council may by order provide that an international organization shall, to the extent specified in the order, have the privileges and immunities set out in Articles 2 and 3 of the Convention on the Privileges and Immunities of the United Nations. The Governor in Council has passed various orders with respect to the Privileges and Immunities of Certain Entities in Canada which are not considered foreign states, such as the European Community and other bodies.

The FMIO Act in section 3(1) adopts Articles 1 and 22 of the Vienna Convention. Those articles provide as follows:

## Vienna Convention on Diplomatic Relations

### Article 1

- (i) The "head of mission" is the person charged by the sending State with the duty of acting in that capacity.
- (ii) The "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

### Article 22

- (i) The premises of the mission shall be inviolable. The Agents of the receiving State may not enter them, except with the consent of the head of the mission.
- (ii) The receiving state is under a special duty to take appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
- (iii) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Section 5(1) of the FMIO Act provides that:

5(1)(b) – an international organization shall, to the extent specified in the order, have the Privileges and Immunities set out in Articles 2 and 3 of the Convention on the Privileges and Immunities of the United Nations as set out in Schedule 3 (the United Nations Convention).

The United Nations Convention is Schedule 3 to the FMIO Act. Section 2 and 3 of the United Nations Convention are as follows:

Section 2

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3

The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

The effect of this statutory framework is to grant immunity from every form of legal process to entities that fit appropriately within the framework. As such, the premises of such entities are inviolable and are immune from interference by administrative, judicial or legislative action. The immunities conferred upon diplomats and their missions can have dire consequences for landlords. In particular, the landlord loses the right to recover possession of the premises in a situation of non-payment of rent. The immunities granted by the Vienna Convention upon diplomats and their missions have been extensively commented on in the case of *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295 (2d Cir. 1993) (“Zaire”). I would suggest that the Zaire decision would currently be the law in Canada as well.

Not only does the immunity affect the landlord’s right to gain possession, but it also affects the landlord in respect to other statutes such as the *Construction Lien Act*. In respect of those entities regulated by the United Nations Convention, the *Construction Lien Act* would be a statute constituting “legislative action” by the Government of Ontario. Commencement of an action enforcing sale under judgment is a form of “judicial action” within the meaning of section 3 of the UN Convention. Registration of a lien or certificate of action on title to the property of an owner are forms of “administrative action” within the meaning of section 3 of the UN Convention. All of these processes are “legal processes” within the meaning of section 2 of the UN Convention. In respect of those entities regulated by the Vienna Convention, the exemption from execution and attachment pursuant to Article 22 of the Vienna Convention equally apply to the *Construction Lien Act*.

Most commercial leases provide that if the tenant causes a lien to be registered against the premises, the landlord may, by notice to the tenant, advise the tenant to cause the lien to be vacated within a given timeframe. If the tenant is a body claiming immunity pursuant to either the Vienna Convention or the UN Convention, then the tenant may resist the landlord’s demand on the basis of not wishing to give up the immunity. In such case, the tenant may insist on being allowed the opportunity to get a court order declaring the lien to be invalid. Dependent on whether such application is contested or appealed, the lien might not be quickly vacated.

The ability to enforce a construction lien and the role of sovereign immunity was dealt with in the case of *Croatia v. Ru-Ko Inc.* (1998), 37 O.R. (3d) 133, at 136 (G.D.). In this case, the court upheld the concept of Article 22 of the Vienna Convention; however, it found that the property in question had never been used for the purposes of the mission as defined in Article 1 of the Vienna Convention. Neither had the property been used for the purposes of the residence of the head of the mission. As a result, the special protection and immunity provided by Article 22 of the Vienna Convention did not apply to the lands and building in question. However, it is clear that if the facts had been different, and if the mission had been able to conclusively prove that the lands and buildings had been used for the purposes of the mission, then there would have been immunity in respect of the construction lien. It is therefore necessary at the outset to determine the facts in any case. Status is not

always obvious and should not always be inferred from the fact that a given tenant may appear to represent a foreign government or claim sovereign immunity.

However, if it can be determined that the tenant has valid diplomatic accreditation and that the premises are indeed premises of the mission, then the option of eviction and recovering possession of the premises are not available under Article 22 of the Vienna Convention or Section 3 of the United Nations Convention. The Landlord is limited to an action in damages. If the landlord were to prevail in such action, the collectability of a money judgment against a foreign sovereign entity may be difficult. Therefore, before a landlord enters into a lease with a foreign sovereign diplomatic entity, certain matters should be considered:

1. Attempts should be made to include the waiver of both sovereign and diplomatic immunity. In other words, the express consent of the lawful entry upon the premises of the mission for the purposes of enforcing any legal remedy of the landlord with respect to possession thereof could be granted (the ability to obtain this may be difficult in the bargaining process);
2. Obtain the appointment of an agent for service of process for any action arising from the lease or matters ancillary thereto, which will relieve the landlord from the burden of provision for overseas service on a foreign government; such appointment should expressly provide that it survives the term of the lease;
3. Consider obtaining either a security deposit or letter of credit, which by its terms, would survive the lease term to secure all obligations of the tenant under the lease and/or all liabilities arising therefrom (again, this will depend upon the nature of the negotiation);
4. Require the tenant to acquire property damage and liability insurance naming the landlord as an additional insured.<sup>1</sup>

Although the number of missions are probably largely found in Ottawa and Toronto, and the negotiation of leases in respect of same may involve a relatively few number of practitioners, the impact of the application of diplomatic immunity in respect of rights under the *Construction Lien Act* broadens the number of affected parties and may make this rather esoteric discussion of greater interest to the larger real estate bar.

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<sup>1</sup> Nativ Winiarsky & Abner T. Zelman, "Obstacles Arise When Tenant is a Foreign State" [2002] *New York Law Journal*, September 30.

# Goodbye "5/25": Withholding Tax Repealed on Mortgage Loans into Canada

*Jeffrey W. Lem\**

Take a look at "Main Street, Anywhere, Ontario". What do you see? Well, most Ontario municipalities of any size whatsoever will sport a local WalMart, Sears and Home Depot (and as of this year, Lowe's as well). After shopping at these U.S.-based retail behemoths, Ontarians will then drive their Chevys, Fords and Chryslers (well, maybe not for much longer) over for a spot of lunch at Arby's, Burger King, McDonald's, Domino's, Pizza Hut, KFC or maybe Wendy's. Indeed, in many ways, "Main Street, Anywhere, Ontario" is not that different commercially than "Main Street, Anywhere, U.S.A." This is not to say that there are no areas of Ontario's economy that have not been dominated by U.S.-based commerce. For instance, while Starbucks and other U.S. coffee chains have a presence in many Ontario cities, the term "coffee" is still spelled "Tim Horton's" for many an Ontarian. Similarly, while the Blue Jays enjoy good support in Toronto and the Buffalo Bills have now started playing some of their "home" games in Toronto, professional sports in Ontario is and always will start and end with the Leafs. The point, of course, that we are trying to make is that American retail and commercial interests have had a long and largely successful history in Ontario, and indeed, across most of Canada.

Against such a conclusion, it is very curious that, with the exception of some U.S. insurance companies that have historically funded many long-term mortgage loans in Canada, there is a genuine dearth of American-based mortgage lenders actively lending in Canada. Of course, it would be easy (and far too overly simplistic) to blame this absence of U.S. mortgage lenders on the apocalyptic meltdown of the U.S. mortgage lending industry, since this curious anomaly has been occurring long before "sub-prime" and "bailout" ever became household words.

Part of the reason for the absence of American and other foreign lenders probably lies in an arguably antiquated tax regime that required Canadian borrowers making interest payments to U.S. lenders to remit a 10% withholding tax on top of the interest otherwise payable. Under this regime, Canadian borrowers were required to prepay an amount towards their U.S. lenders' Canadian income tax burden on any interest earned on Canadian mortgage loans (not unlike a purchaser would have to withhold and remit income tax on a purchase from a vendor who cannot satisfy Section 116 of the *Income Tax Act*). Of course, there are some domestic policy reasons for a withholding tax regime - unchecked outflows to any foreign lenders can make tax collection on such interest income both inefficient and ultimately ineffective. That said, by turning Canadian mortgage borrowers into tax collectors for the Canadian government, Canadians have, for decades now, been largely shut out from freely available capital pools south of the border.

Of course, the withholding tax did not apply to all forms of U.S. financing in Canada. In fact, the withholding tax was only ever intended to apply to short-term debt. In turn, the litmus test for whether any given loan was "short-term" became commonly known as the "5/25 Exemption". If any aspect of the loan required the borrower (or potentially required the borrower) to repay more than twenty-five percent (25%) of the principal within the first five (5) years of the term (other than by default or illegality), then that loan was deemed to be a short-term loan and subject to the withholding tax. If, however, the borrower could not be required under any circumstances to prepay more than twenty-five percent (25%) of the principal within the first five (5) years of the term (other than by default or illegality), then such mortgage loan would be exempt from withholding taxes.

One exception to this general dearth of U.S. lenders in Canada has been the U.S. insurance companies. Although their collective presence in Canada has never been overwhelming, their reticence to lend north of the border is not related to the withholding tax. Most U.S. insurance companies lending in Canada have been blissfully

unaffected by the withholding tax because their typical mortgage loans are for long-terms with gradual amortization schedules. As such, U.S. life insurance companies, with their appetite for low-risk, long-term mortgages, would generally have met the 5/25 Exemption requirements with regularity. Other U.S. mortgage lenders with “less than life” underwriting criteria were, however, generally not so lucky.

The 5/25 Exemption was always intended to provide certainty for U.S. mortgage lenders and their Canadian customers in respect of withholding tax exigibility. In theory, by applying the tests for the 5/25 Exemption, both borrowers and lenders could tell, before signing the commitment, whether taxes would have to be withheld by the borrower. In reality, however, the 5/25 Exemption gave no such comfort, creating instead great uncertainty in Canadian mortgage markets. The intricacies, complications and technicalities of the 5/25 Exemption, and the hefty consequences for failing to meet its requirements, gave rise to an entire new practice area as even the simplest loan involving a U.S. lender eventually required sophisticated structuring and equally sophisticated tax opinions to complete.

Even those U.S. mortgage lenders that did venture into the Canadian mortgage market had to make substantial adjustments to their normal repayment conditions in order to exclude any possibility that their loans might break the 5/25 Exemption. For instance, standard mortgage provisions that would not raise an eyebrow on purely domestic mortgage loans on either side of the border (such as cash sweeps, material adverse change clauses and insurance proceed scoops) have historically been considered off-side of the 5/25 Exemption because they all could result in a mandatory prepayment of more than 25% of the principal within five years, even if the borrower was not in default. Also, the ubiquitous gross-up provisions in most cross-border loan agreements (indeed, now more sophisticated domestic loan agreements as well) trace their origins to this withholding tax. The 5/25 Exemption proved so complex that U.S. mortgage lenders with deals in Canada routinely had to get legal opinions specifically dealing with 5/25 Exemption compliance before closing even the most routine financings. Although it can probably never be authoritatively established with existing statistical information, these increased transaction costs and hurdles probably ensured that many Canadian borrowers never looked south to U.S. credit sources for short to medium-term mortgage loans, and fewer U.S. lenders still, ever looked north to Canada for better lending opportunities.

In its March 2007 budget, the Canadian federal government proposed to eliminate withholding taxes on interest paid to any U.S. arm's length lenders, and in November 2007, the Canadian government tabled legislation to do just that with effect from January 1, 2008, all in keeping with the amendments proposed in the Fifth Protocol to the U.S.-Canada Tax Treaty. The Fifth Protocol had been signed by both Canada and the United States on September 21, 2007, but was not ratified by the U.S. Senate until recently on September 23, 2008. As of the date of this article, the Fifth Protocol was still waiting signature by the President and the Secretary of State, although this is expected to happen before the inauguration of the new President-elect.

As history would have it, of course, the Canadian government's pre-emptive repeal of the withholding tax could not have been more ill-timed, opening the Canadian mortgage market to greater U.S. mortgage short and medium-term participation in the middle of the worst credit freeze in the past 40 years, and just ahead of the most cataclysmic market meltdown since the Great Depression. The resulting economic turmoil has all but eliminated any immediate benefits to be seen by the relaxation of the withholding tax, with almost no new U.S. mortgage loans having been booked in Canada recently even with the repeal the withholding tax.

The seemingly unfortunate timing of these changes to the U.S.-Canada Tax Treaty notwithstanding, the benefits of eliminating withholding taxes on U.S. mortgage loans into Canada cannot be understated. When Australia eliminated its withholding taxes in 2006 on similar cross-border loans, it experienced a huge influx of foreign financing, and there is no reason why the repeal of Canadian withholding taxes will not eventually expand the attractiveness of Canadian mortgages for American and other foreign lenders – especially in Canadian residential

markets, none of which has yet to suffer quite the steep value collapse that many American residential markets seem to have suffered. It will just be a matter of time before the Canadian residential and short-term commercial mortgage markets see increased U.S. mortgage lending. In due course, once the world's economies return to normal, Canadian borrowers and American lenders will look back at the repeal of the withholding tax as a "win-win" development, with only Canadian domestic lenders lamenting the beginning of the end of what had been a near-monopoly on the Canadian short and medium-term mortgage markets.

Even real estate lawyers who have never before seen a file with a U.S. mortgagee will soon be staring at a host of U.S. mortgage forms. While nothing seems further from reality in these current times, real estate lawyers should be getting ready now. The Americans are coming.

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

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## Hare be Gone: Bill 114 on Demand Mortgages

*Jeffrey W. Lem and Andrea Harrington\**

In *Hare v. Hare* (2006), 83 O.R. (3d) 766 (C.A.) Gillese JA, of our Court of Appeal held that the limitation period in respect of a demand promissory note runs from the date of advance of the loan (typically, the date of the demand promissory note itself) – *not*, as one might have intuitively assumed, from the date on which the creditor first demands payment thereunder. For an excellent analysis of *Hare* and the theoretical underpinnings of the case, see Harry Herskowitz, "Is the Law Regarding Demand Loans too Demanding? – A Comment on the Ontario Court of Appeal Decision in *Hare v. Hare*", *The Six-Minute Real Estate Lawyer 2007*, Law Society of Upper Canada, November 14, 2007, 12-1.

Although considered by many as a dramatic (and to some even quite shocking) new development in the law, *Hare* was really no more than the most recent in a series of cases following and applying an old common law doctrine tracing its roots over "hundreds of years of jurisprudence" back to the English Exchequer case of *Norton v. Ellam* (1837), 2 M&W 461 (and probably earlier, although *Norton* is widely cited as the seminal progenitor case on point). In *Norton*, the court held that, where a promissory note is payable on demand, no demand is necessary in order to bring a suit claiming payment. The limitations period therefore ran from the date that the promissory note was issued.

Real estate lawyers are particularly sensitive to the Rule in *Hare*. Although *Hare* and *Norton* were both determined under relevant limitations legislation, the theoretical underpinning of these cases applies to real estate and, in fact, resonates most acutely with real estate and mortgage lending lawyers. This is because any legal theory that posits that a demand debt is essentially due the moment that it is advanced (whether or not there is a demand thereunder) gives rise to a somewhat startling corollary: a demand mortgage must therefore be re-payable at any time, at the unilateral instance of the borrower. In his article, "The Sanctity of the Closed Mortgage – Does it Still Exist?", *3<sup>rd</sup> Annual Real Estate Law Summit*, Law Society of Upper Canada, April 5-6 2006 5-1 at 5-14, Walter Traub insightfully and succinctly concludes that "...a mortgage payable on demand may never be considered closed and thus may be repaid by the mortgagor at any time."

That was then. This is now. Bill 114 (which passed third reading on November 19, 2008) seeks to reverse the Rule in *Hare*, at least as it applies to the *Limitations Act*. Schedule L of the Bill amends the relevant triggering events under the *Limitations Act, 2002* as follows:

1. Section 5 of the Limitations Act, 2002 is amended by adding the following subsections:

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, *once a demand for the performance is made*. [emphasis added]

2. (1) Clause 15 (6) (c) of the Act is repealed and the following substituted:

(c) in the case of an act or omission in respect of a demand obligation, the first day on which there is a failure to perform the obligation, *once a demand for the performance is made*. [emphasis added]

The intent and effect of the Bill 114 revisions are fairly self-evident, at least for determining when the recovery of demand obligations becomes statute barred. Furthermore, most commentators would argue that these revisions bring the law in Ontario further away from the common law position reflected in *Hare and Norton*, but closer to what most practitioners and lay people would intuitively anticipate. Query, however, what effect these revisions have on the redemption of demand mortgages.

On the one hand, one could argue that the ability of demand mortgages to be redeemed by the borrower at any time (i.e., totally open) turns on the common law and is not a function of the *Limitations Act*, no matter how the *Limitations Act* is amended from time to time. Proponents of this argument will no doubt conclude that Bill 114 has no impact at all on the inherent “open” prepayment privileges under any demand mortgage.

On the other hand, if Bill 114 can be extrapolated to mean that a demand loan really only becomes payable *once a demand for the performance is made*, then it begs the question as to when a mortgagor can redeem a demand mortgage. If it can be argued that the amended limitations period somehow amends the common law (or that the underlying common law principles of demand obligations are really a function of the relevant statutory limitations regime), then after Bill 114 passes into law, a mortgagor might only be able to redeem a demand mortgage if and when the mortgagee actually makes a demand thereunder. In theory, this would mean that very same demand mortgage transforms from an “open” mortgage under the pre-Bill 114 regime, to an essentially “closed” mortgage under a post-Bill 114 regime – a dramatic reversal indeed.

An even more interesting question might be, what if the mortgagee under a demand mortgage decides never to call the loan? (and if that sounds ridiculous, consider the position of a demand mortgage lender under such a scenario if he or she was sitting today with one of those 20+% first mortgage loans from the early eighties – remember those?!). It might very well follow that the mortgage actually becomes permanently closed (not until maturity, since there is no maturity *per se*, but forever irredeemably closed). Expressing it this way, of course, just screams “clog on the equity of redemption” to mortgage practitioners and begs the question of what impact, if any, such potential clog might have on the analysis.

It is unlikely that the legislative drafters ever intend Bill 114 to have such far reaching consequences, but, depending upon how the courts ultimately interpret the Bill 114 amendments in the context of demand mortgages, we could be in for more interesting times indeed.

\* *Jeffrey W. Lem and Andrea Harrington, Davies Ward Phillips & Vineberg LLP.*

# Message from the Chair

*Jeffrey Schwartz\**



My last communication to you as Chair was April 2008. Wow, has the world changed in just over six months. The global economy has suffered a significant downturn and credit availability has tightened considerably. As if the challenges facing real estate lawyers wasn't difficult enough. Now, we are confronted by a slowing economy and a real drop in the trading of real estate.

For those with a residential practice, you have no doubt seen a decrease in volume. Those who deal in commercial and industrial properties have had a real significant change in transactional work. Much of the development work and new condominium projects are on hold or delayed. Today, making the deal is almost the easy piece. Watching and working with clients to negotiate and obtain financing is far more problematic and slower.

Sounds like things are really tough. Yet for most of us, we have seen this before. It too shall pass. All the doom and gloom can get to you, but keep in mind that better times will return.

Perhaps with the current climate, we have more time to review our practices and what we do for our clients. It's an opportunity to have greater contact with our clients and advise them through these turbulent times. Just another opportunity to show the value we add to their transactions. We can and will be called upon to assist clients who are experiencing financial difficulties - how to deal with potential or real default under their mortgages. We all have a lot to offer and our experience is needed now, maybe more than ever.

Other external changes are afoot in our practices. New rules governing client identification, new rules governing our use of Teraview and new applications have occurred or are making their way down the pipeline to your desktop. It's fair to say that our practice area is one of the most active in changes and issues that affect us.

There are positive developments that are making their way to us. Your Executive is actively watching and participating in reviewing in these developments and you will hear and see more over the next year. As we hopefully move out of a negative global atmosphere to an early return to a robust and healthy economy, practice changes will hopefully continue to keep you as the client's important link in their transactions.

We are looking forward to continuing to provide timely and relevant CLE and you will be reading about a very special event planned for the early Spring.

On behalf of the Executive, I want to wish all of our members and friends the very best for the holiday season and the new year with the hope of the return to better times.

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## Upcoming Program

### OBA Institute – February 2, 2008

The Real Property Section is presenting a half day program this year with an emphasis on condominium law entitled “THE GOOD, THE BAD and THE UGLY – CONDOMINIUM LAW FOR LAWYERS”. The program includes some of Ontario’s best known condominium lawyers and will also include the launch of Ontario-wide closing documents for residential resale transactions.

Please reserve the date and plan to attend to hear from condo legal experts about the essentials in any condo transaction and the latest developments in the law across Canada.

Be among the first to get a copy of the draft Ontario-wide standard closing documents which are being released for consultation. Feedback will be assessed and incorporated where appropriate and the documents will be released for use in May, 2008 for this summer’s closings. We encourage everyone to review and comment on the proposed documents and then to use them as this will increase your efficiency in every transaction.

Watch for further information and plan to be part of the largest continuing legal education program in Canada.

*Timothy P. Kennedy, Chair 2009 OBA Institute, Real Property.*

## Save the Date!

Times are busy and calendars are getting full...

Join the Real Property Section Executive on **April 23, 2009** at the Granite Club for a fun-filled evening, which will include the presentation of the Award of Excellence in Real Property. Reserve the date in your calendar NOW and we will provide you with further details soon.

**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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