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## Message From the Editor



*Ray Mikkola\**

My daughter, Hilary, recently commented that in her view, a large part of the practice of law seemed to involve entertaining clients with food and drink. It made me reflect on the steady diet of constant change in real estate law that makes practice challenging and interesting.

(As I am writing this, I see that just now the Canada Revenue Agency has released a 22 page notice setting out 89 questions and answers relating to HST and real estate (it's Notice No. 244, which is available at <http://www.cra.gc.ca/gsthstech>). It's hard to get bored).

Still on the food and drink thing, I ask you to consider the offerings in this edition of The Abstract Page:

- The ubiquitous Larry Bremner provides a case comment on a 2009 decision which considers whether an easement is an "encumbrance". I recommend it as good breakfast reading. (You may then wish to peruse *Ridgely v. Nielson* 53 R.P.R. (4th) 1, over a leisurely lunch, a case which has caused some practitioners to worry that the OREA title clause is a minefield when it comes to easements. Jeff Lem's article, "The New 'Present Use' Test": A Case Commentary on *Ridgely v. Nielson*", *Six-Minute Real Estate Lawyer*, November 14, 2007, The Law Society of Upper Canada, is an excellent accompaniment for dinner).
- Mark Heck from the Edmonton office of Fraser Milner Casgrain LLP writes about the prerequisites for an order for specific performance by a vendor against a purchaser. Read it with a glass or two of hearty Amarone.
- William Poulos from Kingston tells us about due diligence respecting well water investigations in purchase transactions. The article is best savoured with a smooth cappuccino.

Editor: [Ray Mikkola](#)  
OBA Editor: [Cheryl Crocker](#)

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- Ray Leclair writes about the prospect of the adoption of standard closing documents in a residential real estate transaction, which goes well with strong cheese, water crackers and a nice tawny port.

Maybe Hilary is right.

All the best for a productive autumn,

*Ray*

Ps. Please also see Stephen Karr's eulogy of Mark Freedman, a great lawyer and contributor to the profession, who passed away last spring.

*\*Ray Mikkola, Partner, Pallett Valo LLP*

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## Specific Performance for Vendors in Real Estate Transactions

*Mark Heck\**

The availability of specific performance in real estate transactions has been the subject of significant consideration in both the academic texts and jurisprudence. While such considerations have generally focused on the availability of specific performance to a purchaser and the resulting discussions of "uniqueness", the availability of specific performance to a vendor is becoming more relevant in the current economic climate. This article will deal with the availability of specific performance to a vendor, the basic requirements that must be met in order to entitle a vendor to such relief, and the general characteristics of the relief if granted.

### **General Availability of Specific Performance**

Specific performance is not simply a legal right afforded under a contract for the purchase and sale of land. It is also an equitable consequence of the principle that parties to a contract are bound in conscience to execute the contracts to which they agree to be bound. Since specific performance contemplates the execution of a contract, the following elements of the contract become relevant: mutuality of obligations, certainty, completeness, conscionability, and the ability of a court to enforce a decree. In the hands of a vendor, specific performance equates to an action for the payment of the purchase price.

Typically, specific performance applies only to executory contracts - contracts which contemplate further acts by the parties before the contract is concluded. This makes contracts for the sale of land particularly suitable for such a remedy. However, specific performance has also applied as a general rule to these contracts because land was considered to have a peculiar value to purchasers and damages alone would not provide an adequate remedy. In 1996, the Supreme Court of Canada reversed this general rule when it ruled in *Semelhago v. Paramadevan* that specific performance should not be granted as a matter of course unless there is evidence to establish that the property is unique to the

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extent that a substitute would not be readily available. The fact that *Semelago* dealt with an action for specific performance by a purchaser may limit its application to specific performance sought by purchasers. However, if an action for the recovery of the purchase price is an equitable proceeding for specific performance governed by the same equitable principles, one could argue that the requirement of uniqueness of consideration should apply equally to both vendors and purchasers. It would seem that for now at least, this argument has not been considered to any great extent.

### **Requirements for a Vendor's Action for Specific Performance**

Unless the parties have an express agreement to the contrary, a vendor cannot hold both the land and the purchase monies. Therefore, the vendor must have conveyed the property to the purchaser. However, simply providing possession of the property to the purchaser is insufficient.

There has been some uncertainty in the case law as how this requirement is applied to an executory contract for the purchase and sale of land where the covenants to pay and convey are dependent though separate. One line of cases states that even if the vendor has tendered a conveyance, it cannot maintain an action for specific performance because success in such an action would leave the vendor with both title and the purchase monies. However, there is also substantial authority that states that action for specific performance can be maintained if the vendor keeps the tender open by placing the conveyance in court to ensure that the conveyance is delivered contemporaneously with the purchase monies.

A vendor seeking specific performance must also show that, as of the date specified for closing under the agreement, it has performed, or was ready, willing and able to perform, all the essential acts required by the agreement. It has been stated that all this requires is for the vendor to show that it has good title to the lands or is at least in a position to deliver title as required under the agreement. However, it is very important to ensure that there are no defects in the title to be delivered as a defendant purchaser can use such defects to its advantage. Significant defects can be raised as a defense against an action for specific performance while minor defects can entitle a defendant purchaser to a reduction in the purchase price.

Establishing that one is ready, willing and able to perform the contract is usually accomplished by a properly drafted statement of claim with full and clear detail supported by a copy of title in jurisdictions where land is registered under a title registration system. The Rules of Court in some jurisdictions require that a plaintiff file with the court a duplicate certificate of title or other such documents establishing his ability to convey title in accordance with the agreement.

While this seems contrary to the usual rule that a general allegation of all conditions precedent is implied in every pleading, the duty of a vendor to be ready willing and able to complete goes to the root of an action for specific performance. Therefore, such ability must be expressly pleaded. The only time the failure of vendor to plead such ability is excused is if the vendor has lost such ability through the fault of the purchaser.

### **Specific Performance with Consequential Relief**

All too often, defaulting purchasers are insolvent and a successful action for specific performance can be a hollow victory where the purchaser is unable to procure the purchase monies. As such, an action for specific performance often includes a request that if the purchaser fails to comply with the order

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directing him to complete the purchase, the contract is then cancelled and the vendor is then free to pursue the defaulting purchaser for costs incurred in enforcing the agreement.

However, it should be noted that such relief is not available where by statute or under the contract, the vendor's remedy is restricted to the land. In these cases, the court will, notwithstanding objections from the vendor, order that the land be sold under a judicial sale with the proceeds going to the vendor. Where a purchaser cannot be found under a judicial sale, a court will often allow the vendor to bid on the property and recover any deficiency from the defaulting purchaser.

When an order for specific performance is granted, the purchaser will be given a period of time in which to complete the contract. This length of this period – known as the redemption period – will vary from case to case. While the primary determining factor is what is reasonable under the circumstances, a court may also take into account factors such as the prospect or ability of the purchaser to pay.

Specific performance has typically been viewed as a purchaser's remedy. However, there is no fundamental legal principle prevent vendors from using it as well. While vendors have usually opted to retain deposits and seek additional damages from defaulting purchasers, specific performance may become a more relevant remedy in the current economic climate where willing purchasers are in short supply.

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## More Efficient Residential Real Estate Closings

*Ray Leclair\**

Most residential real estate transactions today are based on the standard Ontario Real Estate Association (OREA) Agreement of Purchase and Sale. Despite its shortcomings, the Agreement was welcomed by lawyers as it saved them time during any review of the transaction; once reviewed, lawyers only had to seek out the changes or personalization of the Agreement or transaction with which they were dealing.

Although the Agreement has been standardized, in many parts of the province the documents that lawyers use for their closing documents are not standardized. Instead, lawyers negotiate every document in every closing. That's not efficient at the best of times, but in today's economy, when the need to reduce time demands is more important than ever, starting from scratch every time benefits no one.

So the question becomes: Why not use standard closing documents?

Standard closing documents allow lawyers to maintain a high standard of practice with efficiency and cost-savings built-in.

In fact, many Ontario jurisdictions, including Barrie, Cambridge, Hamilton, Lincoln & Welland, Ottawa and Windsor have adopted their version of standard closing documents to a greater or lesser degree. Their experience with these standard closing documents has been positive. As more lawyers adopt this

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approach, and to ensure that we do not see competing standard forms, we need to act now to proactively create and adopt province- wide standard closing documents.

The fact that all purchasers and vendors rights and obligations are the same throughout the province, as they all stem from the same Agreement, lends itself to one set of province-wide standard closing documents.

It is with this premise that the Working Group on Lawyers and Real Estate (comprising representatives from the County and District Law Presidents Association, the Ontario Bar Association and the Ontario Real Estate Lawyers Association) created the Ontario Standard Document Committee. The committee includes 21 real estate practitioners across Ontario, from 14 cities. Its goal was to review all known, existing standard closing documents, and draft a set of province-wide standard closing documents based on the rights and obligations of the parties in the Agreement. The committee worked from the premise that no new obligations should be created, and no rights or obligations provided for in the Agreement should be modified by the closing documents.

Throughout February, the following draft documents were presented for consultation to the Ontario Bar:

- Vendor's Closing Certificate;
- Purchaser's Undertaking and Direction re: Title;
- Lawyer's Direction re: Funds;
- Lawyer's Undertaking; and
- Lawyer's Escrow Closing Agreement.

All comments were reviewed and the committee reconsidered the documents before finalizing them. The final standard closing documents are available at <http://www.lawyersworkinggroup.com>, together with a User Guide and a Rationale Document.

The User Guide sets out some rules and tips on how to use the documents. It also confirms that the standard documents delivered on closing are deemed to be in their original version unless changes are clearly identified in the document. In this fashion, the recipient can easily confirm by the heading that the document received is the approved version and quickly scan the document to visually see any changes to the original text. Once a lawyer has familiarized him/herself with the original version, the review of the document is much less time consuming, without lessening the client's rights and obligations in accordance with the Agreement. Lawyers are cautioned to review the Agreement to ensure that all terms specific for that client or transaction are properly reflected in the closing documents.

The Rationale Document deals with the issues addressed by the Committee and set out the Committee's reasoning for the matters included or not included in the documents. It also sets out the members of the committee.

The committee will ask suppliers of document production software, such as LawyerDoneDeal's RealtiWeb and Teranet's Conveyancer, to add the standard closing documents to their software. This

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will allow lawyers to easily transition to the standard closing documents by simply opting to use them in their chosen software application.

The committee is confident that the new standard closing documents fully address all concerns for transactions based on the standard Agreement. We encourage all real estate lawyers to adopt the standard closing documents as part of their next closing and to spread the word to other lawyers with whom they deal. The sooner everyone adopts the standard documents, the sooner all real estate lawyers can increase their efficiency while also protecting their clients' rights and obligations in the transaction.

*\*Ray Leclair provided this article in his capacity as volunteer Chair of the Ontario Standard Documents Committee. He is also Vice-President TitlePLUS.*

*This article originally appeared in the April 24, 2009, issue of The Lawyers Weekly published by LexisNexis Canada Inc.*

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## An Easement Is an "Encumbrance"

*\*Larry Bremner*

A common undertaking provided by buyers' lawyers for signing by the sellers includes an undertaking "To pay off and discharge all existing mortgages, liens, executions and other encumbrances affecting the subject property which are not being assumed by the purchaser. Black's Law Dictionary defines "encumbrance" as "any right to, or interest in, land which may subsist in another to diminution of its value... [and includes] a claim, lien, charge, or liability attached to and binding real estate property; eg. A mortgage; judgment lien; mechanics lien; lease; security interest; easement or right of way...". Unfortunately sellers rarely have the ability to obtain a release of an easement and, accordingly, would be unable to fulfil such an undertaking.

In *Hallinan v. Coughlin*, [2009] O.J. No. 1313 the Buyer agreed to purchase one of five row houses. All five lots were subject to an easement over all of the rear yards, for no specified purpose, in favour of each of the five unit owners. The Seller's backyard was entirely taken up by a deck. The Buyer's real estate agent, after inquiry, advised the buyer that she could not erect a fence to enclose the backyard because other homeowners had to have access across the back of the property. Paragraph 10 of the Agreement of Purchase and Sale provided, in part, that closing by the buyer is conditional upon "the title of the property [being] good and free from all restrictions, charges, liens, and encumbrances except as otherwise specifically provided in this agreement." Upon learning of the easement the Buyer refused to close and sued for the return of her \$15,000.00 deposit.

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The Court found that the easement was an “encumbrance” as contemplated by the Agreement of Purchase and Sale. The Seller argued that the Buyer should have been able to deduce that the easement existed because she had been advised that she had to permit access to her neighbours to pass through her backyard. The court rejected this argument “that sort of informal information acquired in such a fashion is insufficient to put the [buyer] on notice that there is a registered encumbrance of which she should be concerned. Furthermore, paragraph 10 of the agreement provides, in plain terms, that the title to the property is good and free from all registered encumbrances”. The Seller also argued that the easement would not adversely affect the Buyer’s use and enjoyment of the property so she would receive substantially what she contracted for. The court rejected this argument: “it is clear that the use and enjoyment of the property in this case would be adversely affected by the easement. The owner of the property would always be subject to the possibility that the entire backyard can be accessed by any one of four neighbours, who may require use of the backyard for unspecified purposes. It is unclear as to what sort of equipment and over what period, might be required to be moved through the backyard. The owner would never be certain as to whether it would be necessary to dismantle the deck in the back in order to permit such access”.

*\*Larry Bremner is an associate with Gowlings in Hamilton, Ontario.*

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## Scarce Well Water: A Breeding Ground for Litigation

*William Poulos\**

Due diligence<sup>1</sup> is absolutely necessary when purchasing a country property that relies on well water. One may spend hundreds of thousands of dollars on a country property with surrounding lands and swimming pool. However if there is insufficient water yield from the well for laundry, dishes, taking showers, the reasonable enjoyment of the property will decline significantly. Many things can go wrong with existing wells. Although water is usually plentiful in cities, in the country without a proper functioning well, living conditions begin to resemble third world conditions<sup>2</sup> with reliable water becoming scarce and yet needed badly for everyday life. This article highlights some difficulties property owners have experienced with wells and how some of those difficulties have translated into court battles. Scarce resources like water can be a breeding ground for real estate litigation.

There are a number of things that can go wrong which can interfere with the proper functioning of a well. Components such as pumps, screens, casings and caps can wear out and well production can drop. Wells can become contaminated by fuel and pesticide spills, bacteria, livestock manure, improperly applied fertilizers, household hazardous waste, road salt runoff and by animal feces from pets and wildlife. Contamination can be costly to clean up. Unhealthy levels of bacteria, nitrate and changes in the odor and taste of well water can quickly dampen an owner’s enjoyment of their country property. Beautiful plumbing fixtures may take on rusty or black stains. Your beautiful house or cottage may contain a “rotten egg” smell from the quality of the water in the well. At the heart of your country investment must be a proper producing well that does not threaten your family’s health and enjoyment of your property.

In many parts of the world we often see, read and hear about wars and battles raged over limited resources. However, closer to home, Ontario has been a litigation battleground for fights arising from

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the limited resource of water. For example, in 1987, the Divisional Court heard an appeal from a judgment finding that a warranty in an Agreement of Purchase and Sale required that a water system produce sufficient quantity of water for normal household use. The subject decision, *Graham v. Owen*,<sup>3</sup> was heard by Justices White, Bowlby and McKinlay (as she then was). Justice White writing for the court noted that the learned lower court judge found that the quantity of water by the system was not sufficient for normal household use. That finding was not disturbed. The court allowed the appeal in part to lower the damages slightly to take into account a betterment (a deeper and wider well was constructed to remedy the problem) but otherwise the award of damages was left intact. The warranty helped the purchaser in this case in providing compensation for the costs of rectifying the matter. A scarce resource situation was corrected by the construction of a deeper and wider well with a new pump. Luckily sufficient water could be found nearby and the purchaser received damages to cover his losses to make the situation right. It is not always the case that sufficient water is nearby. For example, an entire legal article has been devoted to water conflict in Alberta noting that although Canada is known for its abundance of water, in some areas of Alberta, water is in short supply.<sup>4</sup> In the *Graham* case, care and foresight exercised by the drafter of the warranty helped the purchaser deal with the initial scarce water situation.

Scarce water bred further litigation a few years later in *Clarke v. Listro*.<sup>5</sup> Presiding in Newmarket, Ontario, Justice MacFarland (as she then was) allowed the plaintiff's action for breach of a warranty regarding well water. The Plaintiff bought a house and moved in with her family. The Agreement of Purchase and Sale provided that the subject house's well water was potable, its water supply was adequate and that the well and related equipment were in good working order on closing. However the court found long-standing problems with the house's water supply which were known to the defendant vendors at the time the Agreement was signed. The Plaintiff had to dig a new well to provide adequate water because the old well did not provide sufficient water to allow proper and regular flushing of toilets and to meet the household needs regarding showers and laundry. Once again a proper warranty provision helped to cushion the inconvenience of a shortage of water. Once again, luckily the purchaser was able to tap into an alternate water supply that would allow for the reasonable enjoyment of the purchased house.

Although Ontario has an abundance of water in comparison to other areas, caution must prevail especially in rural settings with some regions being more of a challenge than others. For example in a recent article it has been noted that the community of Maxville, in Glengarry County Village, has had a shortage of clean water. Residents of Maxville have petitioned and the municipality has paid for dozens of test wells, all of which have come up dry or at least showing insufficient capacity to provide for reliable service for the village.<sup>6</sup>

With increasing challenges to our water supply, due diligence regarding water supply for household needs will probably be an increasingly relevant and material real estate matter. It has been documented, by Professor of Law Sanford Gaines, that there is an increasing scarcity of fresh water in the world at large.<sup>7</sup> Professor Gaines further noted that for the last 100 years, there have been and continue to be substantial diversions of water out of the Great Lakes Basin with the Chicago diversion the largest example.<sup>8</sup> Scarcity of water resources is clearly a global ongoing material issue but also one that can strike locally in rural parts of Ontario and leave disgruntled purchasing clients with losses and significant inconvenience to their families unless adequately protected. The increasing scarcity of fresh clean water is likely to make these due diligence concerns all the more important in the years to come.

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In Real Estate law, the courts have not only applied the law to assist purchasers faced with problems of water shortage, but also have applied the law to convey the clear message that excess use of the water resource will come with a price. For example in *York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) Inc.*,<sup>9</sup> the court heard an appeal from an order requiring the owner of a commercial condominium unit to pay for excessive water consumption and dismissed the appeal. The setting for the latter case was a mixed-use condominium consisting of 58 residential and 45 commercial units contained in two buildings. The Appellant had bought Unit 1 in the Condominium complex from the developer for restaurant use. The Appellant during a one year period had used 190 per cent of the amount budgeted for water for the entire corporation use. The court considered a note in the budget which indicated to all proposed unit purchasers that excess water usage in retail premises would not be a common expense as set forth in the proposed declaration but would be the responsibility of the user of the excess amount.<sup>10</sup> Provisions in the Condominium's declarations were also referred to by the court in arriving at its conclusion that the excess water usage does not form part of the common expenses. The court noted that the appellant obtained the benefit of the use of water; a benefit for which it had not paid.<sup>11</sup> There was no juristic basis for the appellant to use that much water without payment.

Sometimes an abundance of water can lead to scarce clean water. This situation occurred in *Bullock v. Hayes*.<sup>12</sup> In *Bullock*, Justice McKay found that the defendant's actions, namely the damming up of a watercourse, led to a build-up of water on the Plaintiff's property. The back up of water onto the Plaintiff's property saturated the Plaintiff's septic system, filled and contaminated his dug well and caused a flood in his basement to a depth of one and a half feet. Not even the Plaintiff's horses would drink the water on his property after the flooding. The septic tank had to be pumped every 2 weeks. Groundwater seeping into a dug well can contaminate the well water creating a scarce clean water situation. Regardless of how the scarce water situation comes about, it can create a strong breeding ground for real estate litigation given the enormous importance of well water supply to country real estate properties. The Defendant, for his efforts, had to pay special damages to the Plaintiff, part of which included a portion of the Plaintiff's proposed costs to drill a new well.

Litigation surrounding the resource of water can vary on a spectrum from a small claims court cases to very complex cases with a number of experts and documents. For example, Jonathan Harr's book "A Civil Action"<sup>13</sup> documented a true story in the United States involving chemical plants and the complexity of proving the relationship between contaminated water and leukemia.<sup>14</sup> The subject case took almost eight years to get to trial and by the end of discovery had amassed 159 bound volumes of transcripts totaling 23,300 pages. The setting for this case was Woburn Massachusetts which had two chemical plants. A large number of children were dying of acute lymphocytic leukemia. Water in the area derived from two wells in the east part of Woburn between an old tannery property and chemical plants.

Vendors, purchasers and their neighbours should maintain and protect water wells not only for their uses but for the uses of our children and grandchildren. This obligation should apply not only to the quantity of the water but also its quality. However, laws can only go so far and there will be times where the purchaser will be met with the application of caveat emptor if the well does not meet the purchaser's expectations. That happened in Thunder Bay, Ontario before Justice Platana in *Vallelonga v. Smallwood*.<sup>15</sup> In the *Smallwood* case, the purchasers sued for damages resulting from having bought a property with insufficient well water, requiring the drilling of a new well with attendant costs. The Purchasers concerns were with respect to both the quality and quantity of water in the subject well. However, the agreement of purchase and sale included a condition in the schedule attached to the agreement that the offer was conditional upon the purchaser determining at his own expense that there

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was an adequate and potable water supply and that the pump and pressure system serving the house is in proper operating condition.<sup>16</sup> The court found that the caveat emptor principle, which applies where an inspection by a reasonably competent person would have revealed the defect, applied in Smallwood.<sup>17</sup> The action was dismissed.

The conditional clauses similar to those used in the Smallwood case are likely to increase in importance in the years to come, with increasing populations and pressures on our limited water resources. The Maxville, and Alberta situations might be considered extremes but also consider California's water crisis. It has recently been reported that hundreds of thousands of acres have been idled in California's Central Valley due to the water crisis.<sup>18</sup> There have been three consecutive years of drought. California has a population close to 37 million and it has been documented that this State consumes more fresh water than any other state.<sup>19</sup> However California also produces more than half the fruits and vegetables in the U.S. and is the top dairy-producing state.<sup>20</sup>

Sometimes the scarcity of water can bring out the creative side of people but also events that can breed litigation. In *Frost v. Stewart*,<sup>21</sup> Justice Hogg heard an action by a purchaser against a vendor for the cost of drilling a new well arising out of a latent defect. The subject property was a Cottage in the County of Simcoe. The description in the cottage sale listing referred to a new well. The defendant did not disclose to the purchaser that he had installed an underground water line to his neighbour's well in order to obtain water and that the neighbour disconnected the water line and had advised the defendant that he would not allow him to reconnect the line to his well. A couple of days after the plaintiff took possession of the property the well went dry. The court found that "suppressing the truth and the telling of falsehoods are first cousins".<sup>22</sup> The court found that the Vendor was silent about a known major latent defect involving the water supply on the property. The Plaintiff, a retired farmer who was not a sophisticated individual, was reasonable on relying on the representation regarding the "new well" in the listing and in not asking for a warranty, nor testing the output of the well.

Scarcity of water was also a factor in *McNichol v. Campbell*<sup>23</sup> but the combination of a warranty and undertaking worked to the purchaser's advantage to obtain justice. The *McNichol* case involved the sale of a rural residence in the County of Oxford. The Agreement of Purchase and sale contained a warranty that "The Vendor warrants that during the term of his occupancy, the well, septic and all equipment for same have been and are in good working order at time of closing".<sup>24</sup> This warranty was repeated in an undertaking given by the vendors at the time of closing. When the purchasers took possession they found that the well contained very little water and had to transport water to their home. A new drilled well was necessary. The court found that the well did not contain sufficient water to supply the reasonable needs of the residence and was not in good working order. Damages were awarded in favour of the purchasers towards the costs of drilling a new well and setting up a new pump and pressure system subject to an adjustment for betterment.

It has been forecasted that the Great Lakes/St. Lawrence Basin will account for one-half of the total population growth in Canada over approximately the next 20 years and the result of this population growth will be a higher demand for water.<sup>25</sup> It is also predicted that the Basin will become warmer, and water supplies and lake levels will decline.<sup>26</sup> Also without appropriate action, the Basin may see greater competition for water supply.<sup>2</sup>

Scarcity of water is one thing but scarcity of evidence on behalf of a purchaser suing a Vendor for breach of warranty, in an agreement of purchase and sale, relating to the adequacy of the water well supply, is another. Fortunately in *Chinn v. Cameron*,<sup>28</sup> Justice Ferguson did not have any problem granting

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judgment for the purchasers against the Vendor for damages for breach of warranty pertaining to the adequacy of water for normal household use in a well on the subject property. The court noted that before the purchasers bought the property, the property had been rented to tenants for some time. The tenants experienced water shortages from the well and had to purchase water on a number of occasions. The vendor confirmed in evidence that he paid for the water deliveries recorded in the water hauler's records which established that between September 1994 and July 1998, water was delivered to the property on 31 occasions.<sup>29</sup> It also did not help the Vendor's cause that he admitted that he agreed to include a warranty in the Agreement of Purchase and Sale even though he knew it falsely stated that the well provided an adequate supply of water.<sup>30</sup> In this case, although the water was initially scarce, with further digging the purchasers had an abundance of evidence in their favour to assist the court and obtain judgment. Scarcity of reliable evidence to establish the case was not present.

Part of the due diligence in this area is the careful drafting of the warranty in the Agreement of Purchase and Sale. One should not undertake or agree to something that one can't or is unwilling to fulfill. The courts will give significant weight to clearly worded clauses negotiated by the parties. For example, in 2003, the British Columbia Court of Appeal in *Zaenker v. Kirk*<sup>31</sup> allowed an appeal by a purchaser from a finding that a clause in the agreement of purchase and sale dealing with water was ambiguous and unenforceable. Justice Thackray writing for the court found the subject clause straightforward. The clause stated: "In the event the water service from the existing system is terminated, the vendors will be responsible for installation of a replacement water system and will ensure the continuous supply of water in the interim".<sup>32</sup> The well and water system in the *Zaenker* case were not located on the subject property but on a neighboring property owned by Faridi. Faridi sought to impose terms on the purchaser, *Zaenker*, for the provision of water that *Zaenker* was not prepared to meet. These terms had not been imposed on the Vendor when she owned the property. Justice Thackray having found the aforementioned clause straightforward, concluded that the purchaser was entitled to rely on the clause and look to the Vendors to fulfill their contractual obligation.

Approximately a few weeks after the British Columbia decision in *Zaenker*, Justice Donnelly of the Ontario Superior Court of Justice rendered judgment in *Cyr v. Stewart*.<sup>33</sup> In *Cyr*, the purchasers sued for negligent misrepresentation after they bought a rural property and promptly encountered a water shortage in their well. The recovery rate for the subject well was ½ to ¾ gallons per minute and a knowledgeable witness for the purchasers testified that a flow of 4-5 gallons per minute is accepted as a minimum rate for ordinary domestic purposes.<sup>34</sup> It did not help the vendors that they represented and warranted "that during their occupancy the well has supplied adequate supply of water and has never run dry"<sup>35</sup> and this representation survived closing. Although the court found that the Vendors never pumped their well dry, the court noted this was accomplished only by scheduling and postponing water uses.<sup>36</sup> Justice Donnelly found that the water supply was far less adequate for ordinary domestic purposes and the purchasers unqualified representation as to the adequacy of the water supply was knowingly misleading and intended to induce reliance.<sup>37</sup> It also did not help the Vendors case that in the Property Information statement provided to the Purchasers, they answered "No" in response to the question "Are you aware of any problem re quantity of water?". The Purchasers action was allowed and damages awarded including the costs for a new 350 foot deep well into a more reliable aquifer.

In many of the cases involving scarcity of water in Ontario, the problem is ultimately solved by finding another nearby reliable water source, for example drilling a new well. In this sense as Ontarians we are very fortunate to have this type of Plan B available when Plan A does not pan out. This is not to minimize or downplay the stress associated with purchasing a dream home in the country or a cottage only to discover an inadequate existing water supply. However it has been documented that beyond the

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industrialized world, 2.6 billion people live without access to basic sanitation, leading directly to disease and there are more than 1.5 million child deaths every year.<sup>38</sup> This is not just a quantity of water problem but a real issue regarding the quantity of reliable water supplies. You can't blame purchasers for pursuing their rights to reliable water supplies in court where their reasonable expectations have not been met. Water is such an important resource to our well being that its scarcity will breed litigation under the right circumstances.

In 2007, the court rendered its decision in *Williams v. Roberge*,<sup>39</sup> another scarcity of water case but one in which the purchaser's action against the Vendor was dismissed. In *Williams*, the plaintiffs purchased a property from the defendants in Lindsay, Ontario. The Plaintiffs after closing discovered that the well on the property did not have sufficient water to meet their household needs. Once again the court zeroed-in on the warranty with respect to well water in the Agreement of Purchase and Sale. The warranty in *Williams* however was not absolute but qualified. It stated in part "The Seller represents and warrants, to the best of the Seller's knowledge and belief, that, during the Seller's occupancy of the property, the pump and all the related equipment serving the said property have performed adequately, and will be in good working order on closing and the well is currently capable of delivering sufficient water for normal household use...".<sup>40</sup> Shortly after purchasing the property the Plaintiffs attempted to fill the Jacuzzi on their newly acquired property but had problems with the water pressure and the pump. The Plaintiffs claimed that they subsequently had to be careful about the use of the water and could not use water for two things at the same time.<sup>41</sup> In analyzing the subject warranty clause the court noted that the clause does not expressly state that the well will be capable of delivering sufficient water for normal household use on closing and that the warranty was not absolute having been qualified by the phrase "to the best of the Sellers' knowledge and belief". The court noted that what the defendants believed was normal household use for them was not necessarily normal household use for the Plaintiffs and in dismissing the action, indicated the case may have been decided differently if the warranty was absolute.<sup>42</sup> The Defendants were an elderly couple with no children living in the home. The Plaintiffs were a younger couple who moved into the subject property with their 11 year old daughter.

Recently, the Ontario Court of Appeal heard an appeal by the plaintiffs from the dismissal of their application regarding the supply of water from a well. The subject case is *Lohse v. Fleming*.<sup>43</sup> The Plaintiffs sought a declaration that they had obtained an easement or covenant which entitled them to the supply of domestic water from a well located on the Respondents' property. The water was supplied to the appellants' property through underground pipes. The deeds covering the respondents' lot and other lots receiving water from the well contained a water supply covenant which contemplated that the recipients of the water would pay a fee. When the Respondents' bought their property, they initially continued to supply the appellants with water but then ceased to do so. The trial judge ruled that the water covenant was a positive covenant which did not run with the land. The Ontario Court of Appeal dismissed the appeal finding that the trial judge was correct in finding that the positive nature of the subject obligation prevented the appellants from obtaining an easement as the positive covenant did not run with the land. The appellant as a successor in title who had not purchased directly from the original owners of the subject lot did not have the appropriate evidentiary basis for a claim for easement.

## **Conclusion**

It is most tempting when purchasing a beautiful country estate or cottage to focus on those things that look beautiful on the surface of the property. The landscaping, the swimming pool, the colour of the brick, the nicely renovated kitchen and bathroom, the hardwood flooring, the view of the lake from the

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Cottage's living room. However the reasonable enjoyment of properties which rely on well water will be dependent on what lies below the surface of the property. Absent adequate protection in an Agreement of Purchase and Sale or other properly drafted documents, a scarcity of water situation may arise. When it does, given the enormous importance of water, a litigation breeding ground may be formed. With the increasing challenges on our water resources, it becomes increasingly important to do due diligence in transactions involving water wells. Maxville, Thunder Bay, Lindsay, Oxford County, Alberta, California are just a few examples of scarcity of water situations. However they can crop up anywhere in our Ontario rural settings and when they do and a dispute arises that can't be solved, the courts will zero in on the warranties or other terms negotiated by the parties. Properly drafted negotiated warranty provisions will be given significant consideration by our courts. Given the predicted strains on our water resources, ongoing due diligence will be very important.

*\*William Poulos, Barrister, William Poulos Law Office, Kingston, Ontario*

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<sup>1</sup> For a useful discussion of diligence regarding wells, see "Best Management Practices Water Wells", Revised Edition, 2003, Agriculture and Agri-Food Canada

<sup>2</sup> Recently the High Court of South Africa ruled Johannesburg's system for providing water in Phiri, Soweto is unconstitutional and unlawful and ordered the city to provide the applicants (5 residents of the Township of Phiri, supported by the Centre for Applied Legal Studies, and other residents) with free basic water supply of 50 litres per person per day. Clearly the availability of water is more plentiful in certain parts of our planet, while in others it is much more scarce. See A. Symington "South African High Court defends the right to water" HIV/AIDS Policy & Law Review (Vol.13, No. 1, July 2008)

<sup>3</sup> (1987) O.J. No. 805 (Q.L.) (Ont.Div.Ct.) ; see also *Lix v. Erickson* (1995) O.J. No. 4573 (Q.L.) (Ont.Div.Ct.)

<sup>4</sup> R. Block and J. Forrest, "A Gathering Storm: Water Conflict in Alberta" (2005) 43 Alta.L.Rev. 31-50 (para.1)

<sup>5</sup> (1992) 23 R.P.R. (2d) 232 (Ont.Gen.Div.)

<sup>6</sup> T. Van Dusen, "Village left High and Dry", Ontario Farmer, Vol. 42, No. 38

<sup>7</sup> S. Gaines, "Fresh Water: Environment or Trade?" (2002) 28 Can.-U.S. L.J. 157(para.10)

<sup>8</sup> *Ibid*, at para. 14.

<sup>9</sup> (1993), 12 O.R. (3d) 641 (Ont.CA)

<sup>10</sup> *Ibid*, at page 643

<sup>11</sup> *Ibid*, at page 646

<sup>12</sup> (1994) O.J. No. 594 (Q.L.) (Ont.Gen.Div.)

<sup>13</sup> New York: Random House, 1995, 492 pages

<sup>14</sup> See D. Wingfield, "A Lawyer's nightmare", (March 1997) 16 Advocates' Soc. J. No. 1, 21-23

<sup>15</sup> (1997) O.J. No. 1923 (Q.L.) (Ont.Gen.Div.)

<sup>16</sup> *Ibid*, para. 2

<sup>17</sup> *Ibid*, paragraphs 48-50

<sup>18</sup> J. Carter, "California drought proves costly", Ontario Farmer, Vol. 43, No. 11, London, Ontario May 19/09, page 8

<sup>19</sup> *Ibid*

<sup>20</sup> *Ibid*

<sup>21</sup> (1998) 19 R.P.R. (3d) 281 (Ont.Gen.Div.)

<sup>22</sup> *Ibid*, at page 284

<sup>23</sup> (1999) O.J. No. 3631 (Q.L.) (Ont.Small Claims Ct.)

<sup>24</sup> *Ibid*, at para. 4

<sup>25</sup> J. Mills, "The Great Lakes: A Report Card" (2002) 28 Can.-U.S.L.J. 465 (paras 32-33)

<sup>26</sup> *Ibid*, para. 34

<sup>27</sup> *Ibid*, para. 35

<sup>28</sup> (1999) O.J. No. 5024 (Q.L.) (S.C.J.)

<sup>29</sup> *Ibid* at para. 10

<sup>30</sup> *Ibid* at para. 6

<sup>31</sup> (2003) B.C.J. No. 2382 (Q.L.) (B.C.C.A.); see also *Zaenker v. Kirk* (2007) B.C.J. No. 2120 (B.C.S.C.); affirmed (2008) B.C.J. No. 1853 (B.C.C.A.)

<sup>32</sup> *Ibid*, at para. 2

<sup>33</sup> (2003) O.J. No. 5879 (Q.L.) (S.C.J.)

<sup>34</sup> *Ibid*, at para. 11

<sup>35</sup> *Ibid*, at para. 6

<sup>36</sup> *Ibid*, at para 20

<sup>37</sup> *Ibid*

<sup>38</sup> M. Valiante, Book review of "The Culture of Flushing: A Social and Legal History of Sewage"

(Vancouver: UBC Press, 2007), Author Professor Jamie Benidickson, (2007) 45 Osgoode Hall L.J. 629- 636, at para.15.

<sup>39</sup> (2007) O.J. No. 1713 (Q.L.) (Ont.Small Claims.Ct.)

<sup>40</sup> *Ibid*, at para. 2

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<sup>41</sup> *Ibid*, at para.5

<sup>42</sup> *Ibid*, at para. 29

<sup>43</sup> (2008) 66 R.P.R. (4th) 1 (Ont.CA)

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## OBA Award Dinner for Mark Freedman, June 25, 2009

*Speech Delivered by: Stephen Karr*

Good evening and thank you.

Once in a great while, an individual actually becomes a foundation, a pillar, an icon, a vital part of our legal community, a person who embodies the very ideals that the legal community holds dear. If ever there was an individual deserving of the Ontario Bar Association's Award for Excellence in Real Estate, it is Mark Freedman, my friend, my partner and my mentor. Mark clearly possessed the award's stated characteristics of leadership and professionalism, teaching, lecturing and the enhancement of the practice of real estate law. He embodied everything it stands for and everything a lawyer should be proud to emulate.

Tonight we celebrate Mark Freedman for this truly deserving achievement. Tonight unfortunately, is also bittersweet. Tonight, we remember a dear friend, a brilliant lawyer, a decent man, a true inspiration and a wonderful partner and colleague.

Mark was very happy when he first heard that he was to receive this award. He was also very pleased to receive this award together with Jeff Lem, his co-recipient for this evening's award. But he was also humbled. How could he not be, looking at the list of past recipients and recognizing whom both Mark and Jeff would be joining. The list of legal luminaries is astounding: Rubin Rosenblatt, Donald Lamont, Brian Bucknall, The Honourable Hilda McKinlay, Sid Troister, Albert Strauss, Craig Carter, Garth Manning, the Honourable Paul Perrell, Miriam Kelly, Laird Rasmussen, Harry Herskowitz and Audrey Loeb. Mark wanted so much to be here, not just to receive this exceptional award, but also to share this moment with friends and colleagues whom he respected and admired so much.

As so many of you know, Mark was an exceptional lawyer. He possessed a tremendous wealth of legal knowledge, business acumen and common sense. He was solution-oriented and used his legal skills and creativity to achieve the best possible results for his clients. He was never afraid to push the limits regarding the intricacies of the *Condominium Act* and the numerous possibilities it offered developers for creative solutions to complex problems. In this regard, Mark was a visionary and raised the bar for all of us. But where he truly excelled, was in his ability to convey that knowledge in a clear, confident and convincing manner. Mark was a skilled, animated and very persuasive communicator. Whether he was testifying as an expert witness on condominium matters, or addressing Planning and Legal Departments in various municipalities about his client's unique and creative projects, his charismatic personality and his way of explaining the most complicated processes in plain, simple terms, delivered with his confident demeanour, more often than not, got the results he was seeking. And he used this communication skill with integrity, decency and civility, and always with a dose of humour.

Mark was, throughout his career, a great teacher and mentor to so many. His door was always open to all of us and no one ever hesitated to walk right in and be welcomed by him. His office phone, not to

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mention his Blackberry, was always ringing off the hook for mentoring and countless lawyers would call him seeking his advice on their specific condominium issues, which he would always deliver professionally and without hesitation.

Mark began his legal career at Macauley, Lipson and Joseph, moving to Gordon, Traub and Rotenberg in 1982, where he established himself as a leading expert in condominium matters and quickly became one of the primary “go to” condominium lawyers in the City of Toronto. In 1992, Mark was instrumental in founding our law firm, Harris, Sheaffer, and had the good sense to do what good lawyers do, that is, to surround himself with “really great people”. Mark was not shy to acknowledge this and recognized how the success of our firm was built on hard work, dedication, trust and friendship. Mark, together with his partners and staff, helped establish Harris, Sheaffer as one of the leading, boutique law firms specializing in condominium development and condominium law.

Mark had numerous legal achievements. He was certified as a specialist in real estate law by the Law Society of Upper Canada and was qualified as an expert witness in the area of condominium law in proceedings before the Ontario courts. He was qualified as an arbitrator and mediator and was involved in the registration of over 500 Condominium Corporations. He, along with others, contributed greatly to the legislative process amending the Condominium Act. Mark co-authored with his friend and colleague, Harry Herskowitz, the seminal textbook on the Condominium Act, in Ontario, entitled Condominiums in Ontario – A Practical Analysis of the New Legislation.

Mark believed strongly in the role that continuing legal education plays in the development and enhancement of legal practitioners and our profession generally. He wrote numerous articles, presented papers and was a frequent and popular lecturer, having lectured extensively in various programs for lawyers organized by the Ontario Bar Association and the Law Society of Upper Canada, Insight Educational Services, the Canadian Institute and many other private organizations. He also authored numerous articles and papers published by The Toronto Star, The Toronto Sun, Homes Magazine and Condominium Magazine. He lectured at George Brown College on condominium matters and proudly served as an instructor for the real estate section of the Bar Admission Course for many years. He also served as chairman of numerous condominium development conferences and was a well-known and highly regarded speaker and panelist at numerous CCI / ACMO conferences, including chairing numerous case-law sessions on Saturday mornings, with equal doses of humour and gems of legal knowledge.

While Mark was well known for his role as a condominium development lawyer, many of you may not realize that he was also a founding member of the Canadian Condominium Institute and served on its National Board of Directors from 1986 to 1997. He also served as Chairman of the National Board of Directors of the Canadian Condominium Institute from 1993 to 1997 and was awarded its highest designation, the F.C.C.I designation in 1998 for his contribution to the Condominium industry.

His endeavours were not limited solely to professional pursuits. He proudly served on the Board of Directors of his synagogue and held the position of Chairman of the Board for numerous years. He was also very active in his role as President and Chairman of the Board of the National Gaucher Foundation of Canada, an organization which he founded.

Many of you know that Mark loved his electronic gadgets and everything “techie”. Many more of you know that he loved to travel, and he travelled often, with his wife Judy. Mark and Judy, or should I say Judy, planned exotic cruises and adventures, which everyone had to hear about, in minute detail upon

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his return, whether we wanted to or not. Everyone always gently kidded Mark about the trips he and Judy took, but Mark understood the fragility of life and he wasn't going to put off his passion for travel, or technical gadgets, until some later time.

Soon after their return from a month-long trip to Australia and China last year, Mark was diagnosed with a form of Non-Hodgkin's Lymphoma. Like the true fighter that Mark was, he faced this challenge head on, with the fierce determination and positive spirit with which he faced every challenge in his life, both legal and personal. In the early stages of his illness last summer and last autumn, Mark was still able to work a few hours a day until fatigue set in. He loved staying involved with his clients and with the office, and in turn, his clients appreciated the enormous efforts that he was making to continue to serve them.

During the last few difficult months, Mark was in a great deal of pain and was bed-ridden unable to move his arms and legs freely. But even so, whenever he was able, and when Judy was there to push the Blackberry buttons to dial the phone numbers, Mark was eager to speak with his clients and colleagues.

We are all diminished by his departure, but his legacy will be enduring. He has left his imprint on all of us and on our profession, through his enormous body of work, through a style of condominium documents, the form and content of which have been copied and become the precedent for so many throughout the province, and through hundreds upon hundreds of condominium buildings throughout the GTA and the province, with which Mark was involved.

I know I speak for everyone at Harris, Sheaffer when I say that we are enormously proud of Mark and of the Ontario Bar Association's recognition of Mark as one of the leading lights in real estate and the condominium development industry. This evening is a wonderful tribute that honours Mark's immense contributions over the years to the Real Estate Bar and the legal profession and the lasting imprint that he has left on it.

Thank you all so much.

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## Message From the Chair

*Jeffrey Schwartz\**

Fall has arrived, Summer has passed and it seems many of us are noticing a positive shift in our work load (I even think the weather improved!). Let's hope that interest rates continue to remain historically low and steady. Clients have a sense that the worst is over and a renewed confidence of trading in real estate has returned.

Once again, I am obliged to acknowledge and hope you too recognize the ongoing hard work of our editor, Ray Mikkola in cajoling and prodding members to contribute timely articles and information of value to our membership. Not an easy task. We hope we can continue to rely on Ray and our membership for contributions. Everyone to whom I speak about our newsletter is always asking for more. We'll try to deliver.

This past June, we had our first annual evening dinner event where the Teranet Award of Excellence was presented. It was a great success and a moving evening. Sadly, we had to pay posthumous praise to the

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late Mark Freedman. The tributes expressed were heart-felt and meaningful. The presentation of the award to his wife Judy was a moment of true emotion. Mark's loss to our profession will be a mighty hole that will forever remain unfilled.

The Award of Excellence was also awarded to Jeffrey Lem, a frequent and multiple contributor to this publication and to our section's CLE programs. Jeffrey also suffered a significant loss, so to him, the award was also an emotional presentation.

We also used the evening as an opportunity to thank our friends at LawPro. They have, over the years, regularly used their resources to promote real estate lawyers to the public. A presentation was made to Kathleen Waters, one of our own and a former member of the Real Property Executive. We recognized LawPro and thanked them for their concern and efforts to maintain and help us grow our practice area and importance to the public and those whom we act for.

Based on the response by everyone present, we appear to have a recipe for success and this year we will try to achieve another wonderful evening. Stay tuned.

I want to take this opportunity to personally thank all of the members of the executive who serve with me. I might have the title of Chair but I have never considered myself the head of the table (even if that's where they tend to seat me). Rather, we are all participating and working. I do not think I can say it enough, I am amazed at the extraordinary amount of time and effort each person on the executive gives to our Section. Thank you all on behalf of our members.

I hope you all have a healthy, safe and busy Fall and your only complaint should be finding the time to get it all done.

*\*Jeffrey Schwartz , Schwartz & Schwartz*

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