



# The Abstract Page

REAL PROPERTY SECTION / SECTION DU DROIT IMMOBILIER

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## *FCT Insurance Co v. Law Society of New Brunswick*

In 2001, New Brunswick changed from a land registry system to a land title system. The Law Society of New Brunswick added several new rules to its Standards for the Practice of Real Property to clarify the process for lawyers to follow through the transition and under the new system. Rule 52(1)(h) requires that an application for first registration be accompanied by an affidavit signed by the property owner before a notary public (a lawyer in New Brunswick).

First Canadian Title sued the Law Society of New Brunswick over Rule 52(1)(h) saying that it was creating an unfair barrier to competition. The Law Society counter-claimed, arguing that FCT was undertaking the unauthorized practice of law by completing real estate transactions without working through a lawyer. The case was argued during three weeks in July 2006.

The New Brunswick Court of Queen's Bench rendered its decision in October 2007. The decision examined the jurisdiction of the Law Society to enact a specific standard in the practice of real property law related to the conversion of title from the old registry system to the new land titles system. The Court found the standard in question to be invalid. On a related issue the Law Society had sought a declaration that the Plaintiffs were illegally practicing law. The Court concluded the services offered by the Plaintiffs were not prohibited by the *Law Society Act, 1996* nor constituted the practice of law.

The Law Society of New Brunswick has appealed the decision to the NBCA.



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# Message from the Chair

Jeffrey Schwartz\*



As I put these thoughts together for this issue of *The Abstract Page*, I am amazed at how much is really going on and directly affecting our real estate bar. Our last newsletter went out in the early fall of 2007. Little did we all know what was in store for us as the winter came upon us. Aside from the incredible amount of snow that never seemed to end, we also faced a whole snowfall of new matters to deal with. Fortunately, the snow and winter are receding and a new season is upon us. Hopefully, the same can be said for the changes enveloping us.

I continue to be amazed and invite you to share my appreciation to our Executive members. They are at the forefront of our profession and sacrifice both work day hours, evenings and I dare say, weekends to work tirelessly to promote our Section's requirements. As you will see from this issue, both new and developing protocols are being brought into effect that will affect how we practice over the next many years.

The new rules that have been the topic of long debate and hours of work by members of this Executive to help address concerns and work with our Society, are now being implemented. If you don't already know (in which case you are definitely in trouble), as a result of new fraud prevention rules, Teranet, Land Titles and our Law Society have created new protocols and rules that govern who registers documents and how. Members of this Executive were involved in putting forth proposals and suggestions to revise or tweak the proposed rules with the intent to better assist our members in their practice. As I continually express to lawyers with whom I come into contact, being a part of the OBA, both as a member of our Section or working on our Executive, is an opportunity to help keep real estate lawyers in the forefront of conveyancing. We continue our work to ensure this continues and to educate the public on the positive and value-added role of the real estate lawyer. Stay tuned.

Also, brought in to our practices is the new Metropolitan Toronto Land Transfer Tax. Its implementation requires additional forms and work by our offices. I can tell you that bringing forward the changes was not easy, either for the City, Teranet or the Bar. But it's just another example of how we all work together. We are one of the few law Sections that has a close and positive working relationship with our government counterparts. We are always being consulted or advised of pending changes and the input of our members is continually sought. It's a testament of the many years of work by past and present members.

Our Section has had and continues to plan programs for you that provide timely information. New Tarion rules are coming into force and our Section has and will in the near future feature speakers to provide you with information so that you can better advise and inform.

I was privileged to attend an annual meeting this past February of Chairs of our sister provincial Real Property Sections. It was a fascinating get-together. I learned and shared experiences of what is going on across this great country and it's amazing how similar the experiences really are. We have a lot to offer each other - all to promote the role and function of real estate lawyers.

I am also thrilled that one of our own, Kathleen Waters has been appointed the new President of LawPro. It's a little bitter-sweet since Kathleen has been one of our hardest working Executive members. She has worked tirelessly on CLE programs for our Section (along with others) chaired events and, over the years, presented numerous papers at programs. As a Vice-President of TitlePlus, she worked to continue to promote the role of the real estate lawyer to the public. Kathleen has been on the Executive of the Real Property Section for as long as I have, and I have marvelled at her dedication and devotion to our practice section. She 'gets it'. We can only be better served by having the head of our insurer, someone who understands the challenges of the conveyancing bar. Good luck Kathleen - we and our members will certainly miss you at our Section meetings.

Thanks as always must go out to Ray Mikkola for his efforts in putting this newsletter together. It's not easy chasing busy lawyers to fulfill their commitments to generate articles and materials for our newsletter. Of course, without content, all you would receive is Ray's and my blurbs, so thanks go out to all who have contributed.

\* Jeffrey Schwartz, Schwartz & Schwartz, (416) 636-1949.

# Searching Adjoining Lands for *Planning Act* Compliance: When, and How Often?

Raymond H. Mikkola\*



The sun has erased most of the winter induced depression among real estate lawyers. You can smell the grass, the birds are back, and trilliums are gracing the new-green carpeted floor of hardwood bush lots everywhere. What does this mean to us? It means it's time for another tip toe through the subdivision prohibition provisions of the *Planning Act* ("PA") of Ontario, of course!

We all know that Section 50 of the PA requires us to ensure that a vendor does not own abutting land where we are acting for a purchaser, unless certain conditions (whole of a lot, previous severance of identical land, etc.) save us. Where such saving conditions do not apply, when do you search adjoining properties and how often, and to what extent?

Once again, on a completely no names basis (they are far too modest), the OBA Real Property brain trust provided their thoughts. Many of us can remember the paper system of land registrations. How could you know that in another line at the other end of the office the vendor wasn't registering a deed to the other half lot that abuts the land you are buying? You didn't know, and you really couldn't know. What has changed in the electronic era, where deeds to adjoining properties are registered by the thousands, by solicitors and others who are hundreds (or more) kilometres away, mere fractions of a second before you press the "register" icon? How can you sleep at night?

It seems most search adjoining land twice – on or before the requisition date, and on the day of closing. Others search only once, relying on their first search of adjoining lands and the unlikely prospect of the acquisition of another adjoining parcel by the identical vendor, noting that you would need to search "e second" before you register just to be safe. One lawyer advised that where there are several adjoining parcels, he insists on getting the solicitor's PA statement signed by the vendor's solicitor. Another relies on title insurance to do away with the second search. Interestingly, a number of firms advise that they are in the process of formulating a "policy". It all seems to be based on an acceptable level of risk.

For the next issue, please provide your comments on the following PA related issue: When you search adjoining lands, do you review all of the deeds to all of the adjoining parcels? Please let us know at [rmikkola@pallettvalo.com](mailto:rmikkola@pallettvalo.com).

Please remember to upgrade your software – see the article about this in the Important Notice on the next page. Otherwise, Bob Aaron blows some smoke on an interesting landlord and tenant issue, Jeff Lem tells you everything you ever wanted to know about the "present use" test for easements (but were afraid to ask), Willa Voroney examines the thorny issue of when must the vendor be out of the house, and we provide some "must read" correspondence and guidelines to consider when you are purchasing a gasoline station (or former gas station) or otherwise dealing with "Underground Single-wall Tanks". Please also see the update on the FCT litigation in Atlantic Canada, and the Chair's update on Section activities. Jeff insists that he continues to be "amazed". I am too. Just look at the trilliums. Which is where I began.

A happy and healthy summer to all from your OBA friends!

\* *Raymond H. Mikkola, Pallett Valo LLP, (905) 273-3022 x 276.*

# Important Notice to Real Estate Lawyers

## MLTT and Teraview 5.4: Important Instructions

The latest version of Teraview software, version 5.4, is scheduled to be available for download beginning Tuesday, May 20, 2008. Teraview clients are encouraged to upgrade to version 5.4 at their earliest convenience.

During the transition from Teraview versions 5.3.3 to 5.4, it is important to confirm the versions of Teraview software both solicitors are using to create and register documents. The MLTT procedures to be followed will depend on which version of Teraview software is in use by both parties.

Following the instructions below will avoid issues that may prevent documents from being registered.

1. For deals where the document is created and submitted for registration in different Teraview versions, (for instance a document that is created using Teraview 5.3.3 and submitted for registration using Teraview 5.4) please continue to follow the current MLTT rebate and exemption procedures.
2. For deals where the document is created and submitted for registration in Teraview 5.4, please use the appropriate MLTT statements in the new MLTT branch available only this version.

We recognize that additional attention is needed during the time that both versions of Teraview software are in use. Once all users have transitioned to creating and registering documents in Teraview 5.4, all MLTT and PLTT situations can be addressed by the appropriate statements available in Teraview software.

For more information about the City of Toronto Municipal Land Transfer Tax and Teraview software, please log on to [www.teraview.ca/mltt](http://www.teraview.ca/mltt).

Your continued support of Teraview software is appreciated.

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# Landlord Can Keep Property Smoke-free

*Bob Aaron\**

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A decision of the Ontario Landlord and Tenant Board last month underscores the right of a landlord to insert a non-smoking clause in a residential lease, and shows that the clauses are enforceable in the event of breach by a tenant.

The decision is relevant to non-smoking tenants who live within breathing distance of smokers in condominiums, apartment buildings, multiplexes or even homes with basement apartments. It will also resonate with the landlords of those units.

Christine Cebula owns a unit in a highrise condo building in Yorkville. She rents it out as a luxury, furnished apartment to executives and others who need short-term, upscale accommodation for periods of three months to one year.

Some time ago, the unit was leased to a tenant named John Davidson. The lease clearly stated that no smoking was allowed in the unit.

Despite the prohibition, it became apparent that some smoking occurred. The landlord delivered a termination notice to the tenant, and when he failed to move out, she brought an application before the Landlord and Tenant Board to terminate the tenancy. In the wake of the difficulties with the tenant, she also listed the rental unit for sale.

Among the grounds for evicting the tenant, Cebula claimed that the smoking in the unit created undue damage, causing it to smell of cigarette smoke. Her application to the board also argued that the smoking in the unit substantially interfered with her lawful right, privilege or interest as the landlord.

Cebula's agent, Allistair Trent, asked the board for damages exceeding \$10,000 to repair the unit and replace the smoke-damaged furniture.

The hearing before board member Egya Sangmuah took place over the course of four days last June, October and November.

One of the issues argued before the board was whether the smell of smoke constitutes damage within the meaning of the *Residential Tenancies Act*.

The board found that cigarette smoke contains contaminants that are absorbed by the furnishings and broadloom, and are difficult to remove.

The tenant argued – unsuccessfully – that the breach of a non-smoking clause could not result in termination of the tenancy unless it interfered with the enjoyment of the unit by the landlord – which did not apply in this case.

But Sangmuah found that the tenant or his guests permitted smoking in the unit, and that the landlord had incurred or will incur costs of \$10,958.85 to repair the damage or replace property that was damaged and cannot reasonably be repaired.

The tenancy was terminated and the tenant was ordered to pay damages of \$10,000 (the monetary limit of the board's jurisdiction), plus costs, interest and compensation for rent after the termination date.

The board ruled that the tenant's smoking did, in fact, interfere with the landlord's business of renting furnished luxury accommodation to a clientele of non-smokers.

The landlord's target market was individuals seeking short-term, smoke-free accommodation, and the board found that smoking in the unit reduced its marketability until the "remnants of smoke" could be permanently eradicated.

The lesson is that it is lawful to include a non-smoking clause in a residential lease.

If the smoking causes damage to the unit or interferes with the rights of the landlord or another tenant, the tenancy agreement will be terminated and the tenant may be held liable in damages.

Regular readers of this column may recall that I am on the boards of a landlord association and the Non-Smokers' Rights Association. In my view, the marketplace has room for rental accommodations that appeal exclusively to either smokers or non-smokers, or those with no preference.

\* *Bob Aaron is a Toronto real estate lawyer. Visit his website at [aaron.ca](http://aaron.ca).*

# The Perfect Storm: A New “Present Use” Test from the Ontario Superior Court?

Jeffrey W. Lem\*

A common lament amongst the circle of more mature real estate lawyers with whom I occasionally travel is that there is an entire generation of young real estate lawyers who have never seen recessionary real estate times. Depending on when one thinks we actually emerged from the dark days of the early nineties, by most estimates, any real estate lawyer with less than a dozen years of experience under his or her belt would qualify as such a Pollyanna-esque neophyte practitioner. Of course, this inexperience reflects itself mainly in the area of remedies – the dearth of power of sale skills come immediately to mind, but there is significant law involving time of the essence, tender, and specific performance that seem to be, at best, academic esoterica for today’s younger real estate lawyers weaned on a diet of ever-rising markets.

Changing economic times are now threatening to bring back recessionary practice. While residential real estate pundits out there are still advocating “get rich quick” schemes through “no money down” real estate investing, all but the bravest real estate lawyers are now dusting off (or trying to find) the old CLE materials on real estate remedies preparing for the coming storm.

The onset of the last recession was heralded by a pile of broken agreements of purchase and sale. In the aftermath of overheated run-up in real estate prices in the late eighties, and the subsequent collapse in prices once it became generally agreed that the economy had slipped into recession by 1991-92, putative purchasers sought ever more creative ways to get out of their agreements of purchase and sale, hopefully with their deposits refunded. As the litigation from these unclosed deals worked their way through the courts, we saw a surge of “recession” jurisprudence that ultimately shaped our current laws in a variety of areas such as good faith in contract performance, automatic specific performance for real estate, and the calculation of damages.

The recent Ontario Superior Court decision in *Ridgely v. Nielson*<sup>1</sup> joins the list of those cases where purchasers have resiled from existing agreements of purchase and sale, seeking both to avoid damages and to recover their deposits. It is a decision which has caught most of the real estate bar by surprise because the purchaser succeeded, against a backdrop of circumstances that seemed to conspire against the putative purchaser, and on the strength of an argument that most real estate practitioners had believed to be long since spent.

If we believe ourselves to be on the leading edge of a market storm, and if this coming recession behaves like recessions past (and all of the other indicia have already presented themselves), then the sheer versatility of the holding in *Ridgely v. Nielson*, coupled with large numbers of purchasers willing to break existing contracts and looking for new arguments with which to do so, means that we might be facing a “perfect storm” of sorts – lots of plaintiffs, an innovative<sup>2</sup> and, so far, winning argument, and market deterioration sufficient to make the decision to litigate economic.

Hyperbole aside, *Ridgely v. Nielson* is just an easement case, requiring the court to assess whether or not an existing easement is properly permitted under the agreement of purchase and sale. If it was, then the purchaser could not resile. If the easement was not permitted under the terms of the contract, then the purchaser could withdraw and recover its deposit without further penalty (but at least without damages against the vendor). The problem as to scale arises because the impugned easement in *Ridgely v. Nielson* (and other easements similar in size and scope) are very common in residential development and not easily moveable, the contract that gives rise to the test is almost universal (using OREA/TREB wording), and if *Ridgely v. Nielson* really becomes the law, there are greater potential applications of the doctrine than just easements.

More specifically, *Ridgely v. Nielson* is a case arising under the *Vendors and Purchasers Act*,<sup>3</sup> dealing with what is commonly referred to as the “present use” test under a typical agreement of purchase and sale – the test which determines whether an existing easement can qualify as a permitted encumbrance notwithstanding that it may be

registered on title. For well over a decade now, Ontario practitioners using modern form agreements of purchase and sale issued by either the Ontario Real Estate Association or the Toronto Real Estate Board, are accustomed to language that deems any easements on title to be permitted (and hence immune from requisition) so long as it “[does] not materially affect the present use of the property.” The Ontario Superior Court of Justice decision in the *Ridgely v. Nielson* case has surprised most practitioners with what appears to be an altogether unintuitive and expanded construction of what “present use” might really mean.

Although this article will adopt a seemingly pro-vendor bent, this apparent bias merely tracks what this author believes to be the true reading of the OREA/TREB form and this author’s ardent view of the *stare decisis* value of motions under the *Vendors and Purchasers Act*. That said, practitioners representing purchasers should also be keeping an eye on the case – it has not been appealed or distinguished in over a year now and could be a very useful tool to add to the arsenal of remedies that will be needed in the near future.

This article has been divided into the following sections for ease of analysis:

- I. Facts in *Ridgely v. Nielson*
- II. The Purchaser’s Argument
- III. The Vendor’s First Reply: The Grammatical Exclusion
- IV. Fixing the Grammatical Flaw
- V. The Vendor’s Second Reply: The “Present Use” Test
- VI. The Court’s Order: *Dennis v. Hockin* Followed
- VII. Why *Dennis v. Hockin* Should Not Have Been Followed
- VIII. The “Present Use” Test and the “Reasonably Intended Use” Test Distinguished
- IX. Intent in the “Reasonably Intended Use” Test
- X. Impact on Commercial Real Estate of a “Reasonably Intended Use” Test
- XI. *Ridgely v. Nielson* as a Vendors and Purchasers Motion
- XII. The Future After *Ridgely v. Nielson*

## I. Facts in *Ridgely v. Nielson*

In *Ridgely v. Nielson*, a prospective purchaser discovered, after the signing of the agreement of purchase and sale but before the scheduled closing of his house deal, that a sizeable portion of the backyard of the property was subject to an easement for a subsurface storm and sanitary sewer (the “Storm Sewer Easement”). The purchaser promptly resiled from closing on the basis that: (i) the agreement of purchase and sale did not obligate a prospective purchaser to accept title to a property subject to any encumbrance unless such encumbrance was a “permitted encumbrance” within the meaning of the agreement of purchase and sale; and (ii) the Storm Sewer Easement was not a “permitted encumbrance” under the agreement of purchase and sale.

The agreement of purchase and sale in *Ridgely v. Nielson* did in fact generally operate in such a manner, requiring the vendor to deliver, and the purchaser to accept, title to the property:

... [p]rovided that the title to the property is good and free from all registered restrictions, charges, liens, and encumbrances ... except for [permitted encumbrances]...<sup>4</sup>

In turn, Section 10 of the agreement of purchase and sale (which appears to have been the ubiquitous current version of the Toronto Real Estate Board (TREB) standard form) enumerated certain very specific types of permitted encumbrances including, *inter alia*:

...(c) any minor easements for the supply of domestic utility or telephone services to the property or adjacent properties; and (d) any easements for drainage, *storm or sanitary sewers*, *public utility* lines, telephone lines, cable television lines or other services which do not materially affect the *present use* of the property [emphasis added] ...<sup>5</sup>

As a storm and sanitary sewer, the Storm Sewer Easement was, as of right, a permitted encumbrance within the terms of the TREB form agreement of purchase and sale *unless* it materially<sup>6</sup> affected the then *present use* of

property. Alternatively expressed, the purchaser under the *Ridgely v. Nielson* agreement of purchase and sale could not have objected to, and should have accepted title subject to, any sewer easement that does "...not materially affect the *present use* of the property..."<sup>7</sup> [emphasis added].

## II. The Purchaser's Argument

In testimony (but not, apparently, anywhere in the purchase and sale agreement), the purchaser suggested that he planned some day to build a pool on the property and, perhaps, even add a modest extension to the house currently situated on the property.<sup>8</sup> The purchaser argued that all such potential future uses of the property were "reasonably intended uses" of the property. As such, the Storm Sewer Easement, occupying such a large swath of the backyard (the easement affected over a quarter of the overall area of the property), would materially and adversely affect the purchaser's reasonably intended alternative future uses for the property. The purchaser argued, therefore, that the Storm Sewer Easement could not be a permitted encumbrance within the meaning of the agreement of purchase and sale, and the purchaser was not therefore obliged to accept title subject to such easement. Since the vendor had no practical way to re-route the storm sewer plumbing prior to closing, the purchaser argued that he was entitled to withdraw from the transaction with his deposit refunded intact.

## III. The Vendor's First Reply: The Grammatical Exclusion

The initial response from the vendor was unintuitive at best and absurd at worst. Instead of challenging the purchaser's attempt to expand the *status quo* interpretation of what constituted a *present use*, the vendor apparently argued that the present use qualification did not in fact modify "any easements for...drainage, storm or sanitary sewers, public utility lines or cable television lines" but, rather, as a matter of proper construction, only modified "any easements for...other services". In other words, the vendor argued that the relevant provision in the agreement of purchase and sale should, in effect, have been interpreted as follows:

- ...(d) any easements for:
  - (i) drainage;
  - (ii) storm or sanitary sewers;
  - (iii) public utility lines;
  - (iv) telephone lines;
  - (v) cable television lines; or
  - (vi) other services which do not materially affect the present use of the property.

Under such an interpretative approach, the first five types of easements enumerated in Subsection 10(d) of the agreement of purchase and sale (i.e., easements for: drainage; storm or sanitary sewers; public utility lines; telephone lines; and cable television lines) would not have been subject to the qualification of "not materially affect[ing] the present use of the property", and would, therefore, qualify as a permitted encumbrance even if such easements materially affected the present use of the property. Only the easements enumerated in Subsection 10(d) (i.e., easements for "other services") would have to also "not materially [affect] the present use of the property" before being a permitted encumbrance. Using this logic, it followed therefore, that, since the impugned easement in *Ridgely v. Nielson* was a storm and sewer easement, one of the easements expressly enumerated as a permitted encumbrance without qualification and, therefore, automatically a permitted encumbrance whether or not it affected the present use of the property. Alternatively put, since the impugned easement, not being one of the "other services" that are qualified by the *present use* test, the precise definition or scope of the *present use* test was irrelevant because the impugned easement was permitted no matter how little or how much it affected the property.

Madam Justice Forestell quite rightly rejected this argument as absurd and inconsistent with what must have been the intent of the parties. The construction advocated by the vendor would have meant that, for instance, a utility easement for a live, uninsulated, extra-high voltage, hydro-electricity bulk transmission wire running right through the living room and bedrooms of the house would still qualify as a prescribed "permitted encumbrance" because it was an easement for a "public utility line" and was not an easement for "other services", notwithstanding the fact that the existence of such a utility easement would, for all intents and purposes, have effectively rendered the entire house uninhabitable and practically worthless. The argument is, simply, absurd.

#### IV. Fixing the Grammatical Flaw

That said, and in fairness to the vendor, the vendor's construction of the impugned permitted encumbrance definition was not necessarily inconsistent with the plain grammatical meaning of the words in the TREB agreement of purchase and sale. That is, the placement of the "present use" qualifier at the end of the enumerated list of potential easements, not separated from the list with at least a comma, does not always automatically attract, as a function of plain meaning, application to each of the items in the list (instead of just affecting the last item which it follows). But for an understanding of the context in which such qualifiers arise, it is even arguable that the more intuitive object of the qualifier is the last enumerated item rather than the whole list. Indeed, if the resulting meaning were not so patently absurd in *Ridgely v. Nielson*, the bench may indeed have gone the other way based solely on the plain construction of the English language.<sup>9</sup>

If nothing else, *Ridgely v. Nielson* should serve as a drafting warning to the bar. In *Ridgely v. Nielson*, the court had no difficulty determining, quite rightly, that all of the enumerated easements were to be qualified by the *present use* test, but such a reading could have been achieved with greater certainty in any number of ways simply by greater rigour in the drafting.<sup>10</sup> While Madam Justice Forestell certainly got this aspect of *Ridgely v. Nielson* right, there is no reason to leave such basic contract matters to the vagaries of judicial interpretation. One can only wonder whether the absurd alternative position advanced by the vendor coloured or mitigated the vendor's likelihood of success on the far more meritorious substantive argument subsequently addressed in the reasons.

#### V. The Vendor's Second Reply: The "Present Use" Test

The vendor's substantive (and much better) argument was simply that the Storm Sewer Easement, while admittedly subject to the *present use* qualification, did not in fact materially affect the *present use* of the property. The court succinctly summarizes the vendor's presentation of this argument as follows:

The vendor argues that the easement and the encroachment [of a backyard gazebo onto the easement] do not materially affect the present use of the property. The property is a residential property with a rear garden or backyard and a deck and gazebo. The backyard, it is submitted, may continue to be used and enjoyed with little or not (*sic*) impact from the easement. The municipal authorities could require alterations to the encroaching gazebo, but this fact does not mean that the use of the property is materially affected. The vendor concedes that future building in the backyard is affected by the easement but argues that the purchaser is entitled only to rely on present use (*sic*) and not "reasonable intended use".

Most Ontario real estate practitioners prior to *Ridgely v. Nielson* would have considered the purchaser's plans for a pool and house extension as *future uses* to which the property might be put rather than the *present use* to which the property was then actually being put. Under this pre-*Ridgely v. Nielson* paradigm, the Storm Sewer Easement, which was entirely subsurface and would not have materially interfered with the property's day-to-day use for ordinary or typical backyard activities, would very much have been considered a "permitted encumbrance" within Subsection 10(d) of the agreement of purchase and sale in *Ridgely v. Nielson*.

#### VI. The Court's Order: *Dennis v. Hockin* Followed

The court does *not*, however, adopt the view of the practising bar. Instead, the court cites with approval the earlier Ontario Court of Justice (General Division) decision in *Dennis v. Hockin*,<sup>11</sup> a decision involving a similar easement, but under significantly different circumstances. In *Dennis v. Hockin*, Mr. Justice Hoilett concluded that an underground easement "significantly compromises the use that the purchaser *could* make of the backyard" [emphasis added], and released the purchaser from his obligations to close and returned to the purchaser all of the deposits. For all relevant intents and purposes, the easement complained of in *Dennis v. Hockin* was comparable to the Storm Sewer Easement in *Ridgely v. Nielson*, and the court in *Ridgely v. Nielson* followed the *ratio* in *Dennis v. Hockin* by also releasing the putative purchaser in *Ridgely v. Nielson* from his obligations under his agreement of purchase and sale, and returned to him his deposits.

## VII. Why *Dennis v. Hockin* Should Not Have Been Followed

There is at least one substantive difference between the two cases, however, that seems to have been overlooked in *Ridgely v. Nielson*. In *Dennis v. Hockin*, there was no *present use* qualification at all. In *Dennis v. Hockin*, the equivalent to Subsections 10(c) and 10(d) from *Ridgely v. Nielson* called for the court only to determine whether the easement in dispute was a “minor [easement] for the supply of domestic utility or telephone services to the property or adjacent properties”. This is a significantly different test than the “storm or sanitary sewers... which do not materially affect the *present use* of the property” from *Ridgely v. Nielson*. Indeed, the Toronto Real Estate Board standard form of agreement of purchase and sale was amended shortly after *Dennis v. Hockin*, quite probably to introduce the more precise formulation of the *present use* test permitted for easements.

As such, the holding in *Dennis v. Hockin* (i.e., that the easement at issue was not minor and therefore not a permitted encumbrance), is not really relevant to *Ridgely v. Nielson* unless it could be argued that the reasons in *Dennis v. Hockin* also established that the easement therein was not minor because it interfered with the then *present use* of the property by the vendor. The court in *Dennis v. Hockin* does not expressly couch its *ratio* in such terms, and in fact concludes that the easement is not minor because it “significantly compromises the use that the purchaser *could* make of the backyard... [h]e had no immediate plans for building a swimming pool, but the existence of the easement rendered unreasonable any such *contemplation*” [emphasis added], a clear reference to *future, alternative, potential or reasonably intended uses*, not actual *present uses* of the property. Of course, the test for a “minor” versus a “major” easement called for in *Dennis v. Hockin* can still be relevant as a reasonable proxy for the “materially affect” aspect of the test in *Ridgely v. Nielson*, but only if strictly applied to the *present use* of the property. The introduction of the *present use* test in the revised Toronto Real Estate Board and Ontario Real Estate Association standard form agreements has to be given some meaning, and the proper meaning is to ascribe to them a distinction for the *present use*, which a vendor and purchaser can readily ascertain on an objective basis, from the more amorphous and subjective concepts of a “future”, “alternative”, “potential” or “reasonably intended use”. *Ridgely v. Nielson* fails to make this distinction.

## VIII. The “Present Use” Test vs. the “Reasonably Intended Use” Test

Instead, the court in *Ridgely v. Nielson* effectively interprets the *present use* of the property as being one and the same as (or at least as including) any *future or alternative potential use* of the property, so long as such *future or alternative potential use* is a use of the property that the property can *reasonably expect* to be put. To recap, the *present use* qualification was introduced to limit the scope of what easements can “materially affect” the property, which in turn increases the number of easements that can be permitted encumbrances and decreases the number of justifications available to the putative purchaser hoping to escape his or her bargain. By including “reasonably expected future uses” or “alternative potential uses” amongst those uses that can be legitimately interpreted as a *present use* of the property, *Ridgely v. Nielson* increases the number of potential easements that can “materially affect” the property, decreases the number of easements that can be “permitted encumbrances”, and increases the number of justifications available to the putative purchaser hoping to escape his or her bargain.

If the reasoning in *Ridgely v. Nielson* becomes widely adopted, the impact on real estate practice can be significant. After *Ridgely v. Nielson*, easements might no longer be “permitted encumbrances” if they materially affect any potential alternative or future uses of the property, so long as these alternative or future uses can be said to be “reasonably expected” aspects of property ownership, and notwithstanding that the agreement of purchase and sale purports to adopt a *present use* test. As a preliminary observation, even if *Ridgely v. Nielson* is to be followed, the outside envelope of what alternative or future uses can be “reasonably expected” applications of residential real estate has not yet nearly been tested by the courts (although, if *Ridgely v. Nielson* is followed, the term “present use” probably now includes, at the very least, future modest additions to the building, landscaping and swimming pools).

## IX. Intent in the “Reasonably Intended Use” Test

What is worse from a vendor’s perspective (but not theoretically inappropriate) is the fact that purchasers in cases following *Ridgely v. Nielson* need not specify in advance what uses they reasonably expect to make of the property, nor do they even need to have a *bona fide* intention to actually use the property for any such reasonably

expected future or alternative uses. In *Ridgely v. Nielson*, the court had evidence before it of potential prospective pool installation and landscaping, but expressly declined to review same. The only reasonable inference that can be drawn from this is that the mere prospect that an easement interfering with a reasonably expected future or alternative use of the property, whether or not the purchaser has any *bona fide* intention of ever putting the property to such uses, allows the purchaser to escape his obligations under the agreement of purchase and sale with his deposit refunded. The same refusal to require intent on the part of the purchaser is also evident in *Dennis v. Hockin*, and, while it will be difficult to convince vendors who lose deals when renegeing purchasers allege material interference with potential uses for which such purchasers have absolutely no intention of ever putting the property to, it is difficult to justify a subjective intent test in determining future or alternative uses where the court has already elected not to be bound by the *present use*.

## X. Impact on Commercial Real Estate of a “Reasonably Intended Use” Test

Although the litigation in *Ridgely v. Nielson* arose in a residential context, its holding threatens to impact commercial purchase and sale agreements even more so than it is said to threaten residential agreements of purchase and sale. Commercial agreements of purchase and sale often also define “permitted encumbrances” with reference to variations of a *present use* test and are thus also vulnerable to any expansion of what is considered a *present use*. Presumably, there is a relatively finite number of “reasonably expected” alternative or future uses for residential real estate (if for no other reason than because local zoning by-laws for residential zones are comparatively strict). In contrast, the number of potential “reasonably expected” alternative or future uses for industrial, commercial and investment properties are perhaps orders of a magnitude greater than those relating to residential properties (especially if one factors in the possibility that at least some industrial, commercial and investment properties can be reasonably expected to be re-zoned to higher and better uses).

The implications of *Ridgely v. Nielson* are further exacerbated in the commercial real estate context because the *permitted use* test is also used in representations and warranties in some commercial agreements of purchase and sale (especially where the real property is not the exclusive asset being sold, as would be the case in the purchase of a business). Of course, while there is no reason why residential agreements of purchase and sale could not contain similar representations and warranties, some of which might relate to permitted encumbrances, as a practical matter, there are usually very few representations or warranties in residential agreements of purchase and sale. Instead, in residential real estate agreements of purchase and sale, the existence of encumbrances other than permitted encumbrances tends to operate as a condition precedent entitling the purchaser to opt not to close (as per *Ridgely v. Nielson* and *Dennis v. Hockin*). While encumbrances on title, other than permitted encumbrances, will often also constitute a similar condition precedent in commercial agreements of purchase and sale, the existence of such encumbrances can also give rise to post-closing damages when a vendor represents and warrants that there were no encumbrances other than permitted encumbrances, only to find that the scope of permitted encumbrances has been unexpectedly reduced following *Ridgely v. Nielson*.

## XI. *Ridgely v. Nielson* as a Vendors and Purchasers Motion

It has to be remembered that *Ridgely v. Nielson* is simply a proceeding under Ontario’s *Vendors and Purchasers Act*, an arguably archaic piece of legislation designed to expedite title quieting for vendors and purchasers in mid-transaction. One of the ways the legislation provides such expedited relief for litigants is by ensuring that decisions rendered thereunder have no *stare decisis* value. In other words, decisions rendered in motions under the *Vendors and Purchasers Act* should never form a part of case law binding on any parties other than the immediate parties to the motion.<sup>12</sup> As such, the decision in *Ridgely v. Nielson* cannot properly be authoritatively cited ever by any Ontario Court, even if the facts in a subsequent case are, for all other intents and purposes, identical to those before the court in *Ridgely v. Nielson*.

## XI. The Future After *Ridgely v. Nielson*

Luckily, *Ridgely v. Nielson* may not actually herald an evolution of the *present use* definition. *Ridgely v. Nielson* sparked considerable discussion within the Ontario real estate bar upon its release.<sup>13</sup> At one end of the spectrum, there was concern expressed that the “TREB clause was dead”, and at the other extreme, the case generated little more than mild academic interest, fuelled by a confidence that *Ridgely v. Nielson* will not lead to a permanent

and material increase in the number of purchasers being entitled to resale from their real property agreements of purchase and sale. This author is unabashedly ensconced in the latter camp, but the reputation and quality of the pundits lined up in the “sky is falling” camp necessitates some concern.

Even if *Ridgely v. Nielson* is ultimately binding law and anywhere near the “perfect storm” scenario that some jurists have forewarned, none of the advocates predicting an expanded construction of “present use” following *Ridgely v. Nielson* have actually suggested that such effects of *Ridgely v. Nielson* cannot be cured by better drafting, or that such remedial drafting will entail a degree of sophistication beyond the capabilities of the real estate bar. For these reasons, it is unlikely that *Ridgely v. Nielson* will leave much in the way of a permanent impact on real estate practice in the province (other than perhaps more precise standard form agreements of purchase and sale in much the same way that *Dennis v. Hockin* heralded in the “new” TREB and OREA form of agreement of purchase and sale).

By the time that this copy of *The Abstract Page* goes to print, the Ontario Superior Court decision in *Ridgely v. Nielson* will be approaching its first anniversary without appeal or further judicial consideration, pro or con. Depending in part on how one interprets the *stare decisis* value of the case, deteriorating market conditions generally suggest that we will soon see whether the case will form a part of the perfect storm or be relegated to the dustbins of history as “just another V&P”.

\* Jeffrey W. Lem, *Davies Ward Phillips & Vineberg LLP*, (416) 863-0900.

<sup>1</sup> 2007 Carswell Ont. 2574, 53 R.P.R. (4<sup>th</sup>) 1, [2007] O.J. No.1699, Court File No. 07-CV-331036 PD2 April 27, 2007. The R.P.R. version of the case contains an annotation at p.2 *ff.* thereof containing much the same information as is contained herein. Likewise, the threat that *Ridgely v. Nielson* poses was addressed in J. Lem, “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.

<sup>2</sup> Actually, the argument was “innovative”, not so much because it was new *per se*, but more because it was a clever re-application of an older argument that most practitioners had long since believed superseded by the revised drafting of the standard form contract. See Section VI below.

<sup>3</sup> R.S.O. 1990, V.2.

<sup>4</sup> O.J., *supra*, Note 1, at §2.

<sup>5</sup> *Ibid.*

<sup>6</sup> Although not express in the TREB or OREA form of agreements of purchase and sale, the implication is that the required threshold is “materially and adversely affect the present use of the property.”

<sup>7</sup> O.J., *supra*, Note 1.

<sup>8</sup> O.J., *supra*, Note 1 §10.

<sup>9</sup> Consider for instance, the expression “all lawyers, doctors and engineers who graduated from U of T”. It is not entirely clear whether “who graduated from U of T” was meant to qualify lawyers, doctors and engineers” or simply engineers. It would depend on the context.

<sup>10</sup> The use of a “semi-colon splice” (a series of objects separated by both semi-colons and hard carriage returns and various indents so that each item occupies one line, and groups of objects are co-incidentally indented, etc.) is uniquely Canadian (although American contracts use semi-colons in sequence sentences, they rarely use the “semi-colon splice”) and an incredibly effective way to draft contracts incorporating lists.

<sup>11</sup> 1993 Carswell 617, 33 R.P.R. (2d) 57, [1993] O.J. No. 1701.

<sup>12</sup> Curiously, and very much to this author’s surprise, this law is far from settled. For a better (and perhaps quite eye-opening) discussion of the case law surrounding the *in rem* versus *in personam* duality of an order under the *Vendors and Purchasers Act*, see J. Lem and J. MacKenzie, “The Vendors and Purchasers Motion”, in *Remedies Fast Forward*, Ontario Bar Association, October 31, 2007.

<sup>13</sup> see, e.g., Robert Aaron’s excellent article on the case in his “Title Page” column in the May 5, 2007 edition of the *Toronto Star*.

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## Case Comment: Avoiding One More Expense on Moving

Willa M. B. Voroney\*

I have always enjoyed reading articles about the law, including those written by Bob Aaron for the Toronto Star. His article of February 9, 2008, headed **House must be completely empty when sale closes**, concerned damages for failure to provide vacant possession on closing of a real estate transaction.

Aaron cites two cases: *Foord v. Smith*, [1993] O.J. No. 4377 (Small Claims Court), and *Cooper v. Mysak* (1986), 54 O.R. (2d) 346 (Ont. H. Ct. (Div. Ct.)). As suggested in the article heading, he believes that the *Foord* case “serves as a useful reminder that at the moment the seller’s lawyer receives the purchase money and hands over the keys, the sellers should be completely out of the house.” Certainly this is straightforward advice to the public, and if followed would avoid some legal disputes.

*Cooper v. Mysak* argues that “In the absence of an agreement as to a specific time of day, . . . a covenant which requires a vendor to deliver vacant possession on a particular day, by necessary implication permits the vendor to do so at any time before the day actually expires. . . . If an appointment to meet at the registry office at a particular time during the day were permitted to vary the agreement, then the machinery of completion would be modifying the contract. . . which should not be done.”

A current Agreement of Purchase and Sale form from my files reads in part “This Agreement shall be completed by no later than 6 p.m. on [ ]. Upon completion, vacant possession of the property shall be given to the Buyer unless otherwise provided in the Agreement.” I submit that this form would allow the seller until 6 p.m. to vacate completely, even though the “lawyers have closed” earlier in the day.

In the *Foord* case there was a similar completion clause, but with no time specified. The Vendor’s agent argued (correctly in my view) that “vacant possession did not have to be given on closing, and that the vendor was entitled to possession of the property until midnight on closing.” How did that work for the Vendor in this case? Not well, apparently. The Purchaser tried to move in at 6 p.m. and again at 9 p.m., then did not return for several days to try again. The Court awarded the Purchaser damages for out-of-pocket expenses during the delay period until move-in, finding real loss. It appears that the Court held the Vendor entirely liable for the delay, although the case facts do not make clear whether the move would have been possible after 9 p.m. but before midnight on closing day.

The *Foord* decision implies an unwritten rule that if vacant possession will not be given until after the lawyers’ closing, the Vendor should inform the Purchaser, particularly if the vacancy will occur very late in the evening. The awarding of damages by the Court apparently was made in this case because that information was **not** shared, and led to monetary loss for the Purchaser over and above inconvenience.

Mr. Aaron is right: to avoid any problems, a lawyer should advise the client to vacate completely by closing. Alternatively a Vendor or Purchaser should include the time of moving in, if that is important to either party, in the Agreement of Purchase and Sale.

\*Willa M. B. Voroney, B.Sc., LL.B., Guelph, Ontario.



FUELS SAFETY PROGRAM

December 18, 2007

Steve Pengelly  
Executive Director  
Ontario Bar Association  
20 Toronto Street  
Suite 300  
Toronto ON M5C 2B8

Dear Mr. Pengelly:

**Re: Purchasing Gasoline Stations**

TSSA's Fuels Safety Program administers the *Technical Standards & Safety Act 2000*, providing fuel-related safety services associated with the safe transportation, storage, handling and use of fuels (such as gasoline, diesel, propane and natural gas).

Under this Act, TSSA regulates fuel suppliers, storage facilities, transport trucks, pipelines, contractors and equipment and appliances that use fuels. We also work to protect the public, the environment and property from fuel-related hazards such as spills, fires and explosions.

TSSA is aware of cases of great financial hardship due to licensing issues arising from the purchasing of gas stations. In many cases, new Canadians spend their life savings on purchasing or leasing a property unaware that they are assuming the liability for problems with the equipment or contamination in the ground. The cost to replace equipment and/or remediate contamination can cost up to hundreds of thousands of dollars.

TSSA is requesting the Ontario Bar Association's help in educating real estate lawyers on the potential pitfalls for this type of transaction. In order to protect the potential purchaser, we suggest that the lawyers advise their client to request the following items:

- A copy of the license for the facility. If the license has lapsed for more than 12 months, the facility has lost grandparented status and must meet current code

3300 Bloor Street West, 14th Floor, Centre Tower, Toronto, Ontario M8X 2X4  
Telephone: 416-734-3300 Fax: 416-231-1626 Toll Free: 1-877-682-8772  
E-mail: [contactus@tssa.org](mailto:contactus@tssa.org) [www.tssa.org](http://www.tssa.org)

Putting Public Safety First

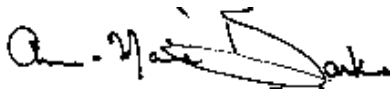
requirements. In the case of a station with single-wall, underground equipment the new owner will either have to replace the equipment or apply to TSSA for a variance to use it. These variances are difficult to obtain and the documentation required for the variance is expensive.

- Written confirmation from the seller that there are no outstanding orders against the facility.
- Copies of all maintenance records for the equipment, including cathodic protection records for steel tanks.
- A current environmental assessment report.
- A current precision leak test of all underground equipment.

The Fuels page on the TSSA website ([www.tssa.org](http://www.tssa.org)) has a lot of information regarding the licensing and operation of a gas station. For specific information, we encourage purchasers or their lawyers to contact a Customer Services Advisor at 1-877-682-TSSA (8772) or email [customerservices@tssa.org](mailto:customerservices@tssa.org). Please note that they will need to provide the Customer Service Advisor with the municipal address or 911 number for the site.

We would appreciate any help the Ontario Bar Association can provide. If you have any suggestions or questions regarding this issue, please do not hesitate contact me.

Yours truly,



**Ann-Marie Barker, P.Eng.**  
Fuels Safety Engineer  
Tel. No.: (416) 734-3354  
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[abarker@tssa.org](mailto:abarker@tssa.org)

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**Putting Public Safety First**



<b>Fuels Safety Program</b>	Ref. No.: FS – 081-06 R1 (Formerly GA 03/1)	Rev. No.:  1
<b>ADVISORY</b>	Date: November 2003	Date: April 2006

**Subject:** Guidelines for Re-Use of Underground Single-Wall Tanks  
**Sent to:** Posted on Web-Site and Distributed to Petroleum Council and LFHC RRG

Fuels Safety inspectors are finding retail facilities that have been operating without a license. When found, these facilities are ordered to obtain a license.

Facilities applying for a license shall meet the current Code requirements unless they have equipment that is approved by virtue of having been installed in accordance with a previous Code (i.e. “grandfathered” approvals). Grandfathered approval status is lost when a license is not maintained for longer than one year.

Typically, the facilities found operating without a license are installations with single-wall tanks and piping. The current Liquid Fuels Handling Code requires that all underground tank systems be double-walled. In order to allow the reuse of the single-wall tank system, the owner of the equipment shall apply for a variance from Section 2.1.1.1 of Liquid Fuels Handling Code. To consider the application for reuse of single-wall tanks and piping, the following documents shall be provided with the completed variance application form:

1. An environmental assessment report as per the TSSA guidelines titled “Environmental Assessment Requirements to Abandon an Underground Fuel Storage Tank in Place or Re-Use an Abandoned Tank”;
2. A precision leak test report for the tank and piping system; and
3. For all underground steel tanks located at a facility, records required to confirm that the mandated cathodic protection has been effective for the life of the tank (i.e. a copy of all required, bi-annual cathodic protection surveys).

**Please note the following:**

- It may be more prudent for equipment owners to replace single-wall, underground steel tanks as variances will not be accepted under any circumstances if the applicant cannot provide all of the documentation required – specifically the complete history of cathodic protection for steel tanks.
- A variance will not be considered for any tank system that has been upgraded, in accordance with sections 7(52)(b), (c) or (d) of Regulation 532 of Revised Regulations of Ontario 1990, with fibreglass lining or impressed current cathodic protection. Fibreglass lining has proven to be ineffective in containing product and there is no way to ascertain that an impressed current system has been in continuous operation.
- If a variance is granted, typical requirements include (but are not limited to) replacement of galvanized product pipe with approved double-wall pipe and the installation of an electronic, in-tank leak detection system.

Further information may be obtained by contacting: Director – Fuels Safety Division, Technical Standards and Safety Authority,  
 14<sup>th</sup> Floor – Centre Tower, 3300 Bloor St. West, Etobicoke ON., M8X 2X4 Ph:416 734 3300 Fx:416 231 7525

FS-081-06 R1 1/1

## Upcoming Program

**Closing a New Home or Condominium:  
Tarion Warranty Corporation's New  
Delayed Closing Rules Part II**

May 28, 2008

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