SOLICITOR: REAL ESTATE REVIEW

CHAPTER 46: AGREEMENT AND PURCHASE OF SALE

Real Estate ("RE") purchases have 3 stages:

1) AGREEMENT PURCHASE & SALE: Negotiating, drafting and signing agreement of purchase and sale;
2) DUE DILIGENCE: The Title Search process
3) CLOSING

STEP #1: AGREEMENT OF PURCHASE AND SALE ELEMENTS (p. 547)

1. The Parties

- Identification (Bylaw 7.1 Professional Responsibility)- Lawyer mandatory to confirm identity of each client whether buyer or seller before reviewing and negotiating agreement
- Capacity: Natural Persons =18 yrs old, not incapable and not undischarged bankrupt
- Corporations: Purchase and Sale of Land must be pass by Resolution of Directors- some protection afforded under 'Indoor Management Rule.' Corporations officers authorized to sign agreement*
- If sale to religious organization, can only be made for purpose as set forth by the Religious Organizations Act and only trustee of religious organization can sign agreement
- In General Partnership, if acting in ordinary course of business, only one of the partners will need to sign however it is prudent to get all partners to sign because usually transactions don't happen in the 'ordinary course of business'
- **If Power of Attorney "PoA",** lawyer must make sure that the power of attorney is valid, how? 5 ways to check validity:

  -Is power of attorney authentic? Can grantor's signature be verified or witnesses be called to verify the signatures?
  -Does PoA comply with the *Substitutes Decision Act (ss 8 and 10)*
  -if grantor incapable, is PofA a continuing power of attorney or made specifically for one purpose?
  -Is power of attorney in effect (ie no expiry date, subject to a condition or an event to occur, limitations on PoA authority or not?, Revoked or Not?)
  -If PoA used to consent to the selling of Mat house on behalf of untitled seller, the PoA must expressly authorize it.
  -Land titles office will not register transfer signed with PoA unless EXPRESSLY authorized to do so.

1.2: The Parties-Issues Unique to Buyers

- Title Direction = Authorization to seller to transfer title to original party and added party (ie in the case of a spouse)
- Trustee/Agents as Buyers= Submission of offer to purchase "in trust for" […]. Buyer's continuing liability for damages stems from OBCA, if seller defaults. A

buyer can only assign its rights and not its obligations. That's why it is important to include in the agreement a release of liability of original buyer to avoid liability.

- Multiple Buyers & Co-Owners: Buyers also include beneficiaries of inherited property. The issue is whether the property is going to be taken (purchased) as joint tenancy (w/right of survivorship) or tenancy in common. If tenancy in common, some issues such as: rights of possession, carrying costs, common areas, whether mortagees will be able to go after the tenants (whether owners as tenants in common understand consequences of a joint and several liability on default by mortgage lenders), indemnity issues as a result of actions of one owner exposing the other to liability for torts or breach of contract, what happens if one of the tenants die, how does his share get divided or will it result is smaller multiple ownership fractions? Should there be a clause that co-owners will have to buy out that fraction on death and who? Can a co-owner sell his fraction of the property to a 3rd party?

    -To deal with this issue, NEGOTIATED A COMPREHENSIVE CO-OWNERSHIP agreement where each co-owner has his or her own legal representation.

1.3: The Parties-Issues Unique to Sellers

- Correctly identify the registered owners of the property by doing a simple title search to reveal the true owners of the property wanting to sell the property
- Estate Sale = On an estate sale, ie when a person dies leaving an estate, the estate trustee of the deceased having ownership of the property must sign the agreement on behalf of the estate
- Even if an estate trustee is appointed in a will, for real estate transactions, it is important that the estate trustee be appointed estate trustee under r. 74+75 (ie be in possession of a certificate of estate trustee) to complete a transaction and to sign and delver a registrable transfer of title (the land titles office will require this proof)
- If the trustee has not yet obtained a certificate of appointment, make the sale condtional (precedent or on closing) upon estate trustee being appointed.
- Trustees as Sellers: Beneficial owners and beneficial spouse must sign agreement
- Seller of Matrimonial Home (Again, the untitled spouse must consent to the sale of the Mat house pursuant to the FLA since the FLA prohibits disposition unless seller spouse consents)
- **Seller as surviving joint tenant = if one of the joint tenants in common dies, surviving joint tenant become owner of deceased's interest unless the deceased spouse remarries or lives with a 3rd person and not with the other spouse, in that case, the joint tenancy is severed immediately before the time of death in favour of a tenancy in common.

2. Describing the Property (Second Part of Agreement)

- Minor Inaccuracies, Qualifications of "More or Less" and "Visible Boundaries"
- In the case of buying property (ie land) for development (such as having vacant land or an old home to be demolished), the qualifications of "more or less" should be deleted from the OREA form and instead, should follow the municipal zoning bylaws.

- If not sure of the accuracy of measurements, make the agreement condition precedent to allow the proper measurements to be done.
- Legal Description: Where property not the whole of a lot on a plan of subdivision or concession, include the entire detailed description as part on a reference plan or mets and bounds- should attach description as a schedule. A good way as well is to attach a survey prepared by an Ontario Land Surveyor.
- Limitations of Seller's title: Full disclosure to buyer required in the legal description of the buy-sell agreement (such as easements, encumbrances, etc). Failure to provide this information may result in the buyer, before closing, demanding an abatement or termination of agreement.
- Disclosure of Defects: Also must disclose latent defects or else run the risk of being pinned for fraud
- OREA Property Information Sheet: Sometimes, brokers for buyers will ask for the seller to fill a "**Seller Property Information Statement"** listing the physical conditions, specs, background, history, legal status of property. The seller's solicitor should inform the seller of potential liability to which a completed form can expose the seller in terms of errors and omissions. If this information is provided by the seller, the broker has a duty to disclose it to all potential buyers.
- Deposits-Timing of Deposits – deposit presented with offer or to pay deposit on acceptance of offer – but best to pay deposit on acceptance of offer.
- Deposits and "Red Flag": If seller asks buyer to deposit the deposit funds directly to the seller's account, can usually signal a red flag since deposit funds are usually held in trust by broker (if a broker is involved) or solicitor (where no broker is involved).
- For New Home Owner = Must include in OREA, Ontario New Home Owner Warranty Plan
- Condition Precedent-5 Elements for Condition Precedent to Be Effective: 1. Time Frame; 2. Terms of the Condition Precedent; 3. Deposit; 4. Waiver, providing option to buyer to continue with transaction even if condition not fulfilled
- VTB (Vender Take Back Mortgage) = Where first mortgage with a bank, VTB must be descried as 2nd mortgage. The VTM is registered at closing along with title transfer.
- Offer irrevocable = offer is void unless accepted before a specific date and time; offer is irrevocable until expiration of period so offerer cannot withdraw until expiration of that time. In order to compensate, offerer receives consideration for irrevocability by having buyer sign under seal.
- Notices and Representation Agreement: Broker is authorized to five and receive notices subject to having entered into a representation agreement. However, broker cannot give/receive notices if acting for buyer and seller (cannot be both parties agents for purpose of giving receiving notices)
- Fixtures and Chattels: Chattels not included in transaction unless included in agreement, however fixtures remain with land and building unless specifically excluded.
- Avoiding using "good" and "property" for describing the condition of chattels
- Rentals: Make sure buyer knows he is assuming some of the property that is rental property (such as hot water tanks, etc0
- HST = if seller in construction business or if there have been extensive renovations, the transaction may be taxable.

- Titles Searches = by way of requisition letter. By default, the Vendors and Purchases Act specifies that requisitions must be submitted within 30 day from date of K.
- Producing Mortgage Discharges (p.577)= private mortgages, i.e. mortages given by institutions other than listed financial institutions (public banks such as RBC, etc), must be discharged. For listed institutions, the mortgage does not necessarily need to be discharged on closing, but make sure to get a mortgage statement from lender for discharge purposes or a personal undertaking of the seller's solicitor or a direction that part of the balance due on closing be made payable by a separate certified cheque upon discharge of mortgage (basically, withholding a part of the purchase price upon seller's solicitor getting the mortgage discharge)

CHAPTER 47: LAND REGISTRATION IN ONTARIO

Division of Land –Lands in Ontario divided into counties, subdivided into townships, townships into concessions, and concessions into lots registered under a registered plan of subdivision

Two types of Land Registry Systems in Ontario:

Registry System	**Land Titles System**
-Governed by *Registry Act*	-Governed by *Land Titles Act*
-Older system where documents are registered w/o review for legal sufficiency by Government of Ontario -Not conclusive evidence of interest described in particular instrument -Each instrument of title must be examined to determine its legal effect -Title under registry system can be taken "in trust" for the benefit of another party	Parcel of register is statement of title=presentation of instrument for registration is more than just registration, it also creates, transfers, or terminates interest in land, deemed to be an application to registrar to amend registered title
Instruments under Registry Act include titles to land may be: • Transferred • Disposed of • Charged • Encumbered • Affected in other way • Crown grant • Deed • Conveyance • Mortgage • Assignment of Mortgage • Assurance • Lease • Release • Discharge	Instruments that can be registered: -Unlike registry system, no clear cut definition and prescribed by regulations

• Agreement for Sale and Purchase of Land	
-Registration under *Registry Act,* constitutes notice of said instrument AND lawyer needs to review instrument to determine its legal effect -Registration is effective when registrar has accepted documents for registration	Registration is complete when instrument and its entry is: certified by land registrar or deputy or assistant deputy land registrar, and the time of receipt is deemed time of registration Ex: if mortgage received 7 July 2011, certified on 6 August 2011, the instrument is deemed to be registered on 7 July 2011 (so it is the time of receipt which deems time of registration)
Notice is important element in determining priority (p.573)	Priority is determined by priority of registration (i.e. first to register) irrespective of notice
	4 types of document that can be registered under Land Registration Reform Act (LRRA) -Transfer/Deed of Land -Charge/Mortgage of Land -Discharge of Charge/Mortgage -Document General *Schedule possible to be registered when attached to forms
-40 year search to determine "root of title" (p.582)	No need to conduct 40 yr search No need to produce chain of title to property except for use in off-title searches
Deferred Indefeasibility: In the case of fraud, a fraudulent instrument is void and will not have any effect on title, and can be removed from parcel register. Director of titles may order a fraudulent instrument deleted from title register and return title to rightful owner. Note: Non-fraudulent instrument (as defined by Act) registered subsequent to undiscovered fraudulent instrument valid (indefeasible) In other words, where the first innocent party dealing with the fraudulent party does not get title. In this instance, they could still "pass on" good title by selling it, even though they themselves do not have good title. That further conveyance "cures" the defect. Only the second innocent P would get indefeasible title.	

RR. 3.4-15 and 3.2-9.8 of *Professional Conduct* = require lawyer acting for borrower & lender to make full disclosure of material information to the lender and borrower and to provide final reports to lenders w/I 60 days of the registration of mortgage. S. 3.4 simplifies the manner in which a lawyer acting for both borrower and lender acting jointly can obtain consent for institutional lender.

CHAPTER 48: ATUOMATED LAND TITLES RECORDS IN ONTARIO

- Organization of automated land titles records= when property automated, parcel register is assigned a property identification number ("PIN"), which must be referred to in any subsequent registration.
- How to bring registry land from *Registry Act* system into land titles *Land titles Act* system:
  - 1**. First Application** –First Registration =***Land Titles Absolute***= a first application is done when an owner wishes to register a plan of subdivision or condo. In an area w/ land titles system, this plan can only be registered if the property is recorded in the land titles system (s. 144, *LTA)* so a 1st application is necessary in that case
    - a survey is done on property wanting to be brought into land titles system
    - Applicant must serve owners of all adjoining property and other interest holders (ex: mortgagees) with first application and plan of survey to allow those parties to object to the first application, in which case a hearing will be held to determine their respective interests
    - Land titles parcel is subject to qualifications (land titles absolute)
  - 2. **Admistrative Conversion= *Land Titles Conversion Qualified***
    - Registry system records were administratively converted to land titles system records during automation of the system.
    - In this case a first Application is not done, no survey is conducted, no notice is served on interested parties and adverse possession issues cannot be dealt unlike in the first application process
    - Additional qualifiers are added to those listed
    - Additional guarantees to the title can be given and certain qualifiers can be removed from the parcel
    - The land registration system is able to offer a title with additional guarantees and less qualifications to ownership than "absolute".

- **<u>Types of Parcels under *Land Titles* system</u>**
  - 1. Land Titles Absolute (LTA)=Created on First Application= this qualification is given as a result of a first Application (upon the applicant applying for the parcel to be transferred from registry to land titles system)
  - **2. Land Titles Converted Qualified (LTCQ)**= Created on Administrative conversion of parcel from registry system
    - searching procedures used during automation and conversion to land titles system, land registration system can guarantee many things that cannot be guaranteed under LTA. For example, guarantee against *Planning Act* contravention up to time parcel is issued; guarantee against dower; guarantee a/ succession duty and previous corporate escheats or forfeitures to Crown
    - Applicable as of the date of conversion so no need to search behind record to ensure compliance with these items.

- From date of conversion forward=*Planning Act* and corporate escheats can apply, and the appropriate searches should be performed (so guarantees against such items backwards and not forwards)
- Cannot guarantee against mature claims for adverse possession or other survey issues, misdescription and unregistered *Registry Act* leases.
- Mostly, this type of parcel is superior to Land Titles Absolute for the fact that it gives more security and guarantee than Land Titles Absolute

▪ **3. Land Titles Absolute Plus (LTAP) =** Record created when owner makes an application to remove the additional qualifies in the LTCQ parcel.

- Required if owner wants to develop property by registering a plan of subdivision to develop or condominium on an LTCQ parcel, consolidate an LTCQ parcel with an LT parcel or deal with issues such as mature claims for adverse possession.
- Application for LTAP required to resolve adverse possession issues and parcels must have compatible qualifiers to be consolidated.
- Applicant must therefore submit an "application for absolute title" to deal with misdescriptions, adverse possession and *Registry Act* leases.
- Since ownership has been dealt with by LTCQ (administrative conversion process), the applicant must submit this application and deal only with those issues of misdescriptions, adverse possession and *RA* leases.
- No new claims for dower and adjoining owners can be made as a result of obtaining Land Titles Absolute Plus.
- Also compliance with *Planning Act* was guaranteed under LTCQ.
- Since August 2001, applicant required to make statement regarding *Planning Act* for period between conversion (ie. LTCQ) and the application. Therefore, in the parcels resulting from these application, the above qualifiers relating to *Planning Act* will be on the title
- If LTAP PIN issued prior to August 2001= no *Planning Act* statement is made on PIN. **In this case, searches for *Planning Act* compliance is required back to the date the LTCQ parcel was original created by searching abutting parcels.**

CHAPTER 49: TITLE SEARCHING

- **Steps to Conducting Search:**
  - Determine the commencement date for the search of title **(registry system only)**
  - Summarize all of the documents in the chain to determine their legal effect (registry system only) and of any other encumbrances or documents affecting title ("abstracting") (**registry and land titles systems**)
  - Conduct a *Planning Act* search (**registry and land titles systems**)

- conducting other miscellaneous searches, such as a review of the Crown patent, corporate owners, and executions (**registry and land titles systems**)
- reviewing the search by the solicitor (unless the solicitor conducted the search) (regi**stry and land titles systems**)
- preparing a solicitor's abstract of title (**registry and land titles systems**)
- checking for fraud indicators (**registry and land titles systems**)

- Root of Title (40 year rule) = a person must show that he or she has good title for a period of 40 years (title search period). The search will commence on the date that is 40 years prior to the date of the agreement of purchase and sale (commencement date). If the agreement is dated December 31, 2005, the commencement date is December 31, 1965.
- The conveyancer looks for the first conveyance of the freehold estate registered after the commencement date. This deed becomes the "root of title" and will serve as the starting point for preparing the chain of title. If there is no conveyance of the freehold estate registered after the commencement date, the conveyancer must go back further in time to the first conveyance registered before the commencement date, and that deed becomes the root of title (s. 112(2)).
    - For example, if the first deed registered after the commencement date was registered on January 1, 1972, that deed is the root (Scenario A). If there was no deed registered after December 31, 1965, but there is a deed registered on March 3, 1913, the search will commence in 1913.
    - In Scenario A, the chain of title commenced on January 1, 1972. Does this mean that the conveyancer can ignore anything registered on title before that date? The answer is NO. Every document registered within the title searchperiod still affects the lands. It is possible, for example, that a predecessor in title granted an easement in 1966. The document is not a root because it is not a conveyance of the freehold estate. Even though this document was registered before the root, it is still within the title search period and still affects the lands.
- **Claim expires 40 yrs from date of registration =** Any rights arising from a registered instrument expire 40 years from the date of registration unless the claimant registers a notice of claim in the prescribed form (ss. 111 and 113(1)). As an example, an easement right granted in 1963 will expire in 2003 unless a notice is registered.
- **Searching behind the Root=** Subsections 112(1)–(2) of the *Registry Act* make it quite clear that a chain of title commences with the first conveyance of the freehold estate within the title search period. <u>A conveyancer only has to search prior to the commencement date if there is no conveyance of the freehold estate registered after the commencement date.</u>
- **Each transfer and charge in the 40-yr period by an individual must contain an affidavit of marital spousal status or statement confirming spousal status**
- If dealing in some land registry offices where there is a Parcelized Day Forward Registry search (PDFR), must complete a 40-yr search because while records under PDFR are automated, they are still administered under the *Registry Act (*registry system). PTDRs are no longer being created and the ones that exist are being converted to LTCQ
- Non-automated land titles searches = searcher must obtain copies of all documents currently shown on register
- Automated land titles searches = PIN is obtained and POLARIS print out of parcel register is obtained and provides a complete copy of the paper parcel register for that particular property (shows all active instruments, including registered owner(s) outstanding encumbrances, and other documents that affect title to the property. Be careful though,

the searcher must still examine the documents entered on the automated system to check their content. PIN pages do not set out measurements for the parcel so it is important to look to documents such as the plan of subdivision or reference plan to review the measurements set out in the agreement of purchase and sale.

- **Exceptions to guaranteed title and required searches as a result of the exceptions:**

    - Crown claims: The Crown could have a claim to the lands if the lands escheated. Hence, the conveyancer must conduct a search of the names of all corporate owners throughout the chain of title so that a corporate search can be performed.
        - Note* when a corporation involuntarily dissolves while owning lands, the lands vest in "escheat" to the Crown. Claims of the Crown are an exception to the rule that a person need only show entitlement to lands for a 40-year period. Lawyer should therefore do a corporate search to ensure corporation was in existence during the period it owned the lands (corporate search through Ministry of Government Serves, if OBCA corp, or Industry Canada, if CBCA corp).
    - Crown Patent: Also, the conveyance must ensure that there is a Crown patent covering the lands in question and to make a notation to that effect (Crown patent=initial grant from Crown to private party). Also the 40-yr search does not apply to restrictions contained in a Crown patent, so it is important to obtain a copy of the patent to see if it contains any restrictions regarding use of the lands.
    - *Planning Act* violations: A search of all adjoining owners back until 1967 is still required (as with the registry system, sometimes the search can end sooner). Extra care is needed because it is more difficult to identify the legal descriptions for all adjoining owners in the land titles system.
    - ***NOTE****:* Under s. 44(6) of the *Land Titles Act*, title is not affected by a writ registered against a prior owner unless a notice of the writ has been registered on the title register. Hence, it is not necessary to search the names of the predecessors in title. In addition, s. 136 provides that a writ does not bind a current owner until the sheriff forwards a copy of the writ to the Land Titles office.
    - **Searching Executions:** A creditor w/ a judgment a/ a debtor that goes unpaid can file a writ of execution w/ the local sheriff's office and binds the debtor's interest in lands. The search should be made in the jurisdiction where the property is located. Note * A writ of execution ranks in priority to a mortgage in creditors priority claims.
    - *Planning Act* search: a purchaser must search title to make sure that there was never any common ownership between the subject lands and the adjoining lands, because a person cannot convey an interest in land while still retaining interest in it (ex below, you own an acre of land, you mortgage half of the acre of land, this is prohibited because you are subdividing land without the property legal authority). Hence, the conveyancer needs only to look at the names of the owners, lessees, and mortgagees on title and compare them with the names and dates in the chain of title for the subject lands.
    - **Note the following additional points:**
        - There are a number of important exceptions to the basic prohibition. The main one is that no *Planning Act* search is required if the lands in question constitute the whole of a lot on a registered plan of subdivision.
        - In addition, all violations prior to June 15, 1967, were forgiven. Accordingly, it is not necessary to search prior to this date.

- On the other hand, in addition to the basic prohibition, the legislation prohibits a number of other transactions.

CHAPTER 50: LETTER ENQUIRY SEARCHES-p.587

N/A

- **Just remember, Bank Act, s.427 Lien-Bank Act Searches:**
  - Under this statute, delivery of a document giving security on property to a bank under the authority of s. 427(1) vests in such bank in respect of the property described in such document as a first and preferential lien and claim for the sum secured and interest thereon. This preferential lien and claim covers crops before and after their severance from the soil, harvesting, or threshing (Farm Property). In addition, the bank has the same rights and powers as if it had a warehouse receipt or bill of lading with respect to encumbered property.
  - The rights and powers of the bank apply to real property, even though the property is affixed to real property and even though the person giving the security is not the owner of that real property.
  - Bank searches may be conducted personally at the Bank of Canada in Toronto or in writing by requesting a certificate upon payment of the prescribed fee. If there is a loan under the *Bank Act*, requisition for its discharge and payment.

CHAPTER 51: ELECTRONIC REGISTRATION OF LAND TITLES DOCUMENTS

- The LRRA resulted in first, the adoption of streamlined forms (under POLARIS system) and then was amended to include an e-reg system (electronic registration system), and adoption of law statements.
- In the electronic registration system, it is the information required in a document that is prescribed, not the form. Since POLARIS system is based on forms, it does not apply to e-reg (electronic registration) system. Instead, these forms are replaced with the law statements (if and when required)
- Exemptions from registering electronically: plans; Crown grants; first applications under the *Land Titles Act*; a declaration and description under the *Condominium Act, 1998*; and registrations in other indices such as the Highways Register, the Trans-Canada Pipelines Register, and the Canada Lands Index. They cannot be registered electronically and must be submitted in a paper form at the land registry office.
  - Documents that cannot be accommodated by the electronic system because of systems limitations (i.e., the number and/or size of the documents cannot be electronically accepted, such as an airport regulation that affects thousands of properties) or because they are not required by the regulations to be electronically submitted, are to be submitted on a POLARIS form.

- **Rules of Professional Conduct * Important= The two-lawyer rule for transfers**

  - In the preparation of a Transfer electronically, all lawyers must complete a law statement with respect to whom he or she acts for. An individual lawyer cannot act for or otherwise represent both the transferor and the transferee with respect to a transfer except in certain circumstances and only if the lawyer is able to comply with r.3.4-16.7 of the *Rules of Professional Conduct* regarding conflicts of interest. The exceptions

are set out in the rules and will assist the lawyer in choosing which box to electronically choose in the "Statement" section of the Transfer.

CHAPTER 52: SUBDIVISION CONTROL, SECTION 50 OF THE PLANNING ACT

- Principles
    - Under Planning Act, the development of land must be planned
    - Land owner NOT free to use or develop land at will
    - Planning Act thus regulates the use and development of land

- Section 50 of the Planning Act provides that: a person cannot enter into certain transactions (including a sale, transfer, or mortgage), UNLESS the person does not retain an interest in the abutting lands (meaning that he/she cannot retain an interest in the abutting land-in other words, she cannot transfer part of the land while retaining interest in the other part of the land, this would be a contravention of the *Planning Act.* So to be able to convey land, she must own the whole lot, and transfer it that way.

    - EXAMPLE: Jane owns an acre of land. Any dealings in connection with this land (for example, a sale, mortgage, or other interest (such as a lease) that exceeds 21 years) must encompass the entire acre. Jane cannot transfer one-half of the acre because she would retain the ownership interest in the other half and thereby violate the basic prohibition. By conveying half of the land, she would retain the fee simple in abutting land, therefore subdividing land without the proper legal authority to do so. One of the basic premises that underlies the *Planning Act* is that to subdivide land without authority will result in a lack of infrastructure such as schools, parks, roads, and other basic services.

- The provincial government does not, in most cases exercise direct control over development. These decisions are made with the municipalities and are regulated by the Ontario Municipal Board.

- **Effect of Contravention, ss.50(21) –**
    - Offending transaction/conveyance/transfer/charge/lease VOID if contravention of Planning Act (current convey must comply with current Act, past convey comply with prior Act). The *Planning Act* states that: "any transaction prohibited does not create or convey any interest in land."

    - Ss. 50(21) includes the possibility of the transaction being valid and fully enforceable if the agreement contains an express condition (a true condition precedent) that breaches of s. 50 of the *Planning Act* be cured or resolved. In other words, the agreement will be valid pending resolution of the breach. If condition cured =agreement valid and enforceable / if condition not cured =agreement declared ineffective and no interest in created in the land as a result of the breach, and the transaction fails [para. 15 of OREA contains this clause]

    - This condition must be included in every agreement of purchase and sale and option to purchase agreement, lease for more than 21 yrs or other document involving the conveyance of an interest in land =guarantees protection from contravention of the *Act.*

- A “lot” of land is identified by a 3, can be on a concession or on a plan of subdivision.

2.2. **The basic legal structure**

Difference between Concessions & Registered Plans

- Ontario originally divided into counties-divided into townships-divided into concessions-divided into 200 acre lots granted by Crown to settlers. So the legal description of that 200-acre lot is described for example: Lot 5, Concession 12, Township of Tiny, County of Simcoe

- There are two types of land divisions created and regulated by the *Act*

1. **Subdivision of lots on concessions and of lots on various plans that are not RPS (deregistered plans and registrars’ compiled plans) ss. 50(3) subdivision lands=**

    - Subsection 50(3) of the *Act* prohibits most transactions involving real property in Ontario, unless
        - A transaction falls into one of the exceptions listed in ss50(3)(b)-(h) OR
        - The property is located within a registered plan of subdivision (RPS) under s.50(3)(a)
    - In other words, a transaction is not prohibited by s. 50(3) of the *Act,* if the land being conveyed is described in accordance with and **is within a registered plan of subdivision under s.50(3)(a).** So basically, if the transaction falls within an RPS, there is no contravention of the *Act.* The logic behind this is that prior government approval has already been granted to the pattern of land division laid out on the registered plan.
    - Subsection 50(3) applies to all land that is NOT part of one or more lots or blocks within an RPS
    - The subdivision of lots on concessions and of lots on various plans that are not RSPs, such as deregistered plans and registrars’ compiled plans, are all regulated by s.50(3)
    - Reference plans illustrate the boundaries of land=prepared by Ont land surveyor and is not an RSP.

2. **RPSs, ss 50(5) subdivision lands=**

    - Lands on a registered plan of subdivision (RPS) are the subject of rules under ss. 50(5) of the *Act.*
    - Ss. 50(5) of the *Act* prohibits most transactions involving RPSs unless they fall within the exceptions in ss. 50(5)(a)-(h).
    - RPSs are created by the municipality on an application of a land developer and are “superimposed” on top of the original lots and concessions. Most RPSs consist of parts or all of one or more lots on one or more concessions.
    - RPS consist of numbered lots and or block and roads as shown on a numbered plan
    - The subdivision of a lot of block within an RPS is subject to s.50(5).

1. S. 50(3)

- **Prohibited transactions pursuant to s.50(3) i.e. concessions that are not on RSPs:**
  - Conveying land by deed or transfer
  - Granting, assigning, or exercising power of appointment=power to convey with respect to land
  - Mortgage or charging land
  - Entering into agreement of purchase and sale of land
  - Entering into agreement having the effect of granting use or right in land, directly or by entitlement to renewal, for a period of 21-yrs or more (ex: right of way or easement of land in perpetuity, granting lease with a term of 21-yrs or more, granting 15-yr lease with option to renew for 6 or more years or granting option to purchase)

- **9 EXCEPTIONS TO PROHIBTIONS IN SS 50(3):**

A) **EXCEPTION FOR RSP: SS. 50(3)(A):** THE fact that the land being conveyed is within a registered plan of subdivision. However, remember that despite this, any whole lot or block excepted by 50(3)(a) could still be severed into lots or part blocks, and may fall within the prohibitions under s.50(5). So even if under an RSP, check to make sure subdividing the land even further is not prohibited under s.50(5).

B) **"NO ABUTTING LANDS" EXCEPTION, SS 50(3)(B):** This exception will apply if trying to convey land not within an RSP, and allows the owner to proceed without violating the *Act,* if he/she does not retain the fee (ownership) or the equity of redemption (the right to recover unencumbered ownership upon repayment of a mortgage loan) in any land "abutting the land that is being conveyed or otherwise dealt with". This means that you can't own land and convey only part of it. To benefit from this exception, you must not hold ownership or redemption of the other part of it. This would mean for example, that you wouldn't be able to mortgage half your land while retaining the other half. This would violate the *Act.* ***Caveat:*** There is an exception to this exception, which would otherwise allow you to convey a part of the land while retaining fee or redemption in the other part, ***if the abutting land consists of the whole of a lot or block on an RSP***.

- ❖ **FOR EXAMPLE:** If owner conveys all of land owned and retains no abutting land-that is no ownership in any land having a common boundary with the land being dealt with-then such dealing is permitted since it complies w/ ss50(3)(b). Selling only a part of a parcel of land while retaining ownership of abutting land is prohibited b/c the transaction would have the effect of dividing the parcel in 2 without the express legal authority to do so. However, the exception to the exception may kick in to allow this transaction to proceed if the retained abutting land is the whole of a lot or block on an RSP and therefore the prohibition of subdividing the land while retaining the fee would not apply.

The reasoning is that if the whole lot or block is except in any event because it was in an RSP, it should not effect the separate conveyance of the abutting land that is not w/I the RSP.

- **Illustration of the exception ("no abutting lands") AND exception to the exception ("abutting lands permissible to be retained if on an RSP)**

  - **Concession Lot (**not on whole of a lot or block on an RSP)

A	B	C
D	E	F

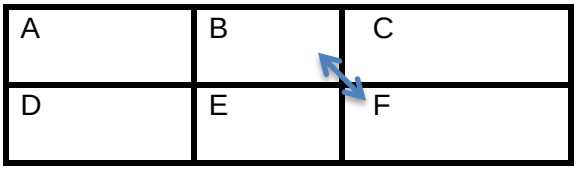
  - **<u>No-Abutting Lands" Exception:</u>** In this example, if Owner owns B-lot owns ONLY, Owner is able to convey any interest in all of B in any manner and rely on the "no abutting lands" exception to avoid a contravention of s.50(3). *This is the most frequent type of conveyance in Ontario.*
  - **<u>When exception cannot apply:</u>** If Owner owns B&C lots but wants to sell B-lot only while still retaining ownership in C-lot, the transaction falls outside no-abutting lands exception b/c Owner retains C-lot which abuts B-lot. Since the conveyance is not on an RSP, it cannot use the exception to the exception, which would have otherwise permitted this transaction to proceed. The same analysis would apply if Owner wants to mortgage B-lot but not C-lot; or to grant an option to purchase B-lot but not C-lot; or lease B-lot with a term of 21 years but not C-lot. Since both los abut, in the absence of an exception, they must be conveyed together so as not to violate the *Act.*

- **Variations on the above fact situation give some idea as to how the subsection has been interpreted and applied:**

  - **<u>Historical separation:</u>** Owner acquired B-lot in May 1985 and C-lot in June 1985. Historically, they had been separate properties. Can Owner now sell B alone and rely on the "no abutting lands" exception, arguing that the two parcels were historically separate? <u>NO, this transaction is prohibited.</u>

    - ***Subsection 50(3) <u>does not give</u> any consideration to the prior history of the lands in question***. All abutting land once under the same ownership "merges" into one parcel, and the transaction is prohibited.

* **Touching at a single point:** If Owner owned B-lot and F-lot, can Owner sell B and retain F? YES, possible.



  - B and F meet only at a single point. Lands that only meet at a single point have been held not to abut, and therefore Owner can sell B and retain F.

* **Horizontal planes:** May Owner sell the mineral rights to B and still retain the surface rights without the transaction contravening s. 50?

A	**B**	C
D	E	F

Subsection 50(2) provides that interests in lands do not abut when they meet on a horizontal plane only. As of December 9, 1994, s. 50(2.1) deems land to exclude mining rights in or under land, but not mining rights on the land.

* **Abutting land as a whole lot on an RPS (exception to the exception permitting interest in part of land to be retained if on an RSP):**

B	**C** =whole lot on an RPS ; here **C is the abutting land which is on the RPS permitting the exception to the exception to apply so Owner can sell B-lot only w/o violating the *Act***

Owner owns B-lot and C-lot. B-lot is part of a lot on a concession. C-lot is a whole lot on an RPS. Can Owner sell B-lot only and have the conveyance remain within the "no abutting lands" exception? YES.

  - The last phrase of s. 50(3)(b) provides that the "no abutting lands" exception applies if the abutting land is "the whole of one or more lots or blocks within one or more registered plans of subdivision."

(F) GOVERNMENT CONSENT EXCEPTION: This allows someone to obtain consent from the relevant government body to sever land under s.53 of the *Act,* and will permit and owner to convey part of his/her land while retaining an interest in the abutting remainder of his or her land. Often, consent will be given by a committee of adjustments or land division committee which are simply bodies to which powers to grant consent have been delegated. Consent lapses within 2 years following the date on which certificate of decision of consent was given if the transaction approved for consent has not been carried out.

- For example, Owner obtains consent under s. 53 to divide a parcel of concession land into parts A and B, and to sell A while retaining B.
- The consent is subject to conditions. If Owner satisfies the conditions and then sells A within two years after the date on which the consent was given, while retaining B, the transaction is permitted under the exception in s. 50(3)(f). The registered transfer of A will include a certificate issued to Owner under s. 53(42) that consent to the transaction has been given.
- However, if the transfer of A is registered more than two years after the date of the consent, then the consent has lapsed, s. 50(3)(f) no longer applies, and the transfer of A is null and void
- Also note in this example that if Owner sells B while retaining A, the transaction is null and void because the consent was given for a sale of A, not B.

(C)-(E) & (G)-(H) THE ACQUISITION+ DISPOSITION OF LANDS BY FEDERAL, PROVINCIAL AND MUNICIPAL GOVERNMENTS = There can be no contravention of the *Act* in the case of example, conveyancing to municipalities for road widening; or acquisitions of land for the purpose of transmission lines (exceptions (d) and (g),; and exception for the purpose of flood control (e), bank stabilization, shoreline management or perseveration of environmentally sensitive lands (exception (h)). Also, there is an exception to the rule that a lease cannot be extended past 21 years, allowing leases to be renewed for a period of 21 or more years but no more than 50 years for the purpose of renewable energy facilities or renewable project, provided that the party acquiring the land for the project makes a declaration that the land is being acquired for that purpose.

2. **LOTS WITHIN AN RPS, SECTION 50(5):** I've explained this rule before but basically, if the land being conveyed is within a registered plan of subdivision, no violation of s. 50(3) the *Act* will occur and the transaction is permitted.

Part-lot control

(5) **Where land is within a plan of subdivision registered before or after the coming into force of this section, no person shall convey a part of any lot or block of the land by way of a deed, or transfer, or grant, assign or exercise a power of appointment in respect of a part of any lot or block of the land, or mortgage or charge a part of any lot or block of the land, or enter into an agreement of sale and purchase of a part of any lot or block of the land or enter into any agreement that has the effect of granting the use of or right in a part of any lot or block of the land directly or by entitlement to renewal for a period of twenty-one years or more unless,**

(a) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision;

(b) the land or any use of or right therein is being acquired or disposed of by Her Majesty in right of Canada, Her Majesty in right of Ontario or by any municipality;

(c) the land or any use of or right therein is being acquired for the purpose of a utility line within the meaning of the*Ontario Energy Board Act, 1998* and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;

(c.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;

(d) the land or any use of or right therein is being acquired for the purposes of flood control, erosion control, bank stabilization, shoreline management works or the preservation of environmentally sensitive lands under a project approved by the Minister of Natural Resources under section 24 of the *Conservation Authorities Act* and in respect of which an officer of the conservation authority acquiring the land or any use of or right therein has made a declaration that it is being acquired for any of such purposes, which shall be conclusive evidence that it is being acquired for such purpose;

(e) the land that is being conveyed, or otherwise dealt with is the remaining part of a lot or block, the other part of which was acquired by a body that has vested in it the right to acquire land by expropriation;

(f) a consent is given to convey, mortgage or charge the land or grant, assign or exercise a power of appointment in respect of the land or enter into an

agreement in respect of the land;

(g) the land or any use of or right therein was acquired for the purpose of a utility line within the meaning of the*Ontario Energy Board Act, 1998* and is being disposed of to the person from whom it was acquired; or

(h) the only use of or right in land that is granted is an easement or covenant under the *Conservation Land Act*. R.S.O. 1990, c. P.13, s. 50 (5); 1998, c. 15, Sched. E, s. 27 (7-9); 2006, c. 23, s. 21 (2); 2009, c. 12, Sched. K, s. 2 (2).

- Section 50(5) will deal with the situation where the land conveyed on an RPS and is further subdivided. If the transaction does not fall within one of the exceptions listed in s.50(5)(a)-(h), s. 50(5) will prevent the further subdivision of the conveyed RPS land into smaller lots. Accordingly, there are also 9 exceptions listed as w/ s.50(3).
- Basically, this is how it works though: a proposed plan of subdivision takes a large parcel of land and through detailed planning, divides the parcel into many smaller parcels called lots or blocks. These lots or blocks are conveyable parcel once the proposed plan has been approved and therefore registered as an RSP. Under s.50(3)(a), the <u>whole lot and blocks are exempted from the general prohibition b/c they have been recognized for planning purposes as lots that may be dealt with w/o regard to s.50 of the *Act.*</u>

    - **<u>For example,</u>** a land developer wanting to build new homes may buy 50 acres of land that is part of a lot on a concession. If the developer completes the planning process with the municipality, the result might be an RPS consisting of the 50 acres and containing perhaps 100 or more numbered lots. The developer can then build homes on these lots and sell the homes, each on its own lot, one at a time
    - while retaining abutting lots.

- **BE AWARE THAT THE FOLLOWING DESCRIPTIONS WILL NOT FALL UNDER 50(5) but under 50(3):**

▪ the whole or any part of a lot on a concession ▪ the whole of a "parcel" in a "section" registered in the land titles system ▪ the whole of a lot on a *registrar's compiled plan* ▪ the whole of a lot on a deregistered plan▪ the whole of a numbered "part" on a reference plan.

- The phrase must always read "within a registered plan of subdivision" for s.50(5) and its exceptions to apply where as s. 50(3) would apply if the phrase read": <u>if the abutting land is "the whole of one or more lots or blocks within one or more registered plans of subdivision</u>."

- The phrase "lot or block on a registered plan of subdivision" has a specific technical meaning. The terms "lot," "parcel," and "part" often arise in the description of land, but not every lot, parcel, or part is a "lot or block" on an RPS. Therefore a conveyance of land described as a "lot," "parcel," or "part" does not necessarily refer to a lot on an RPS as referred to in ss. 50(3)(a). The following are examples of land descriptions involving a "whole lot" or "part" that do not qualify for the exception under the last phrase of s. 50(3)(a) and are regulated by s. 50(3), not 50(5), because they are not whole lots on an RPS.

SO: HOW TO GO ABOUT 'PART-LOT' TRANSACTIONS UNDER S. 50(5) W/I AN RPS?

- Similar to s.50(3), s.50(5) prohibits person from dealing with "a part of any lot or block of the land" within an RPS, unless the transaction falls within the 9 exceptions as set out in s.50(5)(a)-(h).
- Accordingly, you can rely on the s.50(3)(a) plan of subdivision exception only if the land being dealt with is "the whole of a lot or block on an RPS". If you're not dealing with the entire lot or block on the plan of subdivision, you can't use the exception found in s.50(3) and must turn to exceptions found in s.50(5).
    - Ex:

WEST 1⁄2 LOT **1**	EAST 1⁄2 LOT **1**	WEST 1⁄2 LOT 2	EAST 1⁄2 LOT 2

**ILLUSTRATION: In this scenario, we assume that Owner owns the WHOLE (the entirety) of LOTS 1 and 2 on a registered plan of subdivision (RPS) triggering the exception found in s. 50(3). So owner may sell ALL of LOT 1 (that is the West and East halves) while retaining fee in LOT 2 and *vis versa,* without contravening firstly s. 50(3) since it is within and described on an RPS; and secondly, since it is land that is not part only of a lot of block on a plan of subdivision, therefore not contravening s. 50(5). In either conveyance, Owner would be dealing with the whole of a lot on an RPS.

In other words, s. 50(3) exceptions will apply if land dealt with is the **entire lot** or block on an RPS and s.50(5) exceptions will only apply if land dealt with is **part of the whole lot** on an RPS.

However, let's assume that the Owner of LOT 1 and 2 builds four houses consisting of one house on each part lot. The Owner in this case will not be able to sell any one of those houses individually without being in breach of s.50(5). In the case of each such part lot, even though Owner is dealing with land within an RPS, Owner runs afoul of s.50(5) because Owner retains ownership of abutting land that is not whole of a lot or block on an RPS.

So much like in the situation of s. 50(3), where you cannot convey part of the land you own and retain fee in the other part, s. 50(5) also applies only it applies to 'part lot' conveyance. In s.50(3) we can use the exception in 50(3)(b) to carry out the conveyance allowing the owner to retain interest in the abutting land if it is *on the whole of a lot or block on an RPS*. Once conveyed, retaining an interest in the other part of land, and we want to subdivide that lot even further, we have to look to s.50(5) which prohibits you keeping interest in part of 'the part lot' while conveying part of the 'part lot'.

So for example, if you will not be able to convey the ½ of West Lot while retaining interest in the ½ of East Lot 1 because they abut.

To deal with part of a lot or block on an RPS, one must not retain ownership interest in abutting land, or must obtain consent to the transaction or be dealing with a government.

One novel exception to this rule applicable to transactions occurring after 1983, dealing with part-lot conveyances, and the exception applies when the 'part-lot' has been acquired by a body that has vested in it's the right to acquire land by expropriation. So for example, in the case of a municipality that obtains interest in part-lot for road widening purposes, the conveyance would be permissible under this exception.

ILLUSTRATION:

LOT 1	LOT 2
----remainder--------	----remainder------

Assume that Owner owns all of Lots 1 and 2 on an RPS. Owner has conveyed (per s. 50(5)(b)) a strip of land from Lots 1 and 2 to the municipality for road-widening purposes (Figure3). If Owner later wants to sell the remainder of Lot 1 (being the part of Lot 1 that was not conveyed to the municipality), the transaction would appear to be prohibited by s.50(5), which prohibits dealing with part of a lot (in this example, the remainder of Lot 1) while retaining ownership of abutting land that is not the whole of a lot or block on an RPS (in this example the remainder of Lot 2).

OTHER EXEMPTIONS UNDER S. 50:

- **Ss 50(7):** exemption through by-laws: do a title search to see whether there are bylaws governing exemptions from part-lot control provisions & determine the exact parameters of the permission.

- **Statutory loopholes and the creation of new exceptions:** 2 groups- subsections that plug loopholes and subsections that create loopholes.

1. SUBSECTIONS THAT CREATE LOOPHOLES:

- **Subsection 50(8)—vendor take-back (VTB) mortgages :** VTB mortgages are allowed as part or all of the consideration for the purchase of land, provided that the mortgage applies to all of the land purchased. If the owner of Parcel B on a concession purchases abutting Parcel A and gives a mortgage of all of A to the seller as part of the purchase price, the mortgage would contravene s. 50(3)(b) since the owner would be mortgaging A while retaining B; however, s. 50(8) permits this VTB mortgage. Note that the mortgage must apply to all of A and must be given to the vendor and not to a third party.
- **Subsection 50(9)—leases of part of a building:** The prohibition in s. 50(3) of *"any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more" has the effect of prohibiting all leases of real property exceeding 21 years*. However, a lease such as a 25-year lease of one floor of a 20-storey office building was never intended to be caught by this prohibition because it does not compromise planning principles. The s. 50(9) exception thus allows leases for any period of years where only "part of a building or structure" is being leased. Note that a lease of outdoor surface rights for more than 21 years (i.e., parking lots, patios) that may accompany a lease of a portion of a building is not included in this exception and is, therefore, prohibited.
- **Subsection 50(10)—drainage systems:** This subsection allows owners of adjacent lands who wish to co-operate in the building and maintenance of drainage systems to make the necessary agreements regarding easements and mutual rights- of-way, etc., without contravening s. 50.
- **Subsection 50(11)—Agricultural Rehabilitation and Development Directorate:** This subsection allows the Agricultural Rehabilitation and Development Directorate of Ontario to deal with lands acquired separately as individual parcels, despite the fact that they may abut.

2. SUBSECTIONS THAT PLUG LOOPHOLES:

- **Subsection 50(15)—simultaneous conveyances:** This subsection prohibits subdivision of land by means of simultaneous conveyances. This was inserted to prevent schemes whereby the owner would theoretically convey the two halves of his or her land at the same instant, so that at the time of either conveyance he or she could not be said to retain the fee in abutting land.

- **Subsection 50(16)—partial discharge of mortgage:** Suppose that Owner owns Parcel A on a concession and mortgages Parcel A to Friend. Friend then gives Owner a partial discharge of the mortgage (releasing *part* of the land described in the mortgage) from a portion of A while retaining the mortgage against the remainder of A. Friend then forecloses on the mortgage of the remainder of A and becomes the registered owner of A through the foreclosure process. Before s. 50(16) was enacted, this technique could be used to sever land without consent. Subsection 50(16) prohibits such partial discharges of a mortgage by deeming the mortgagee to "hold the fee" in the lands subject to the mortgage and to be "conveying" the part that is the subject of the partial discharge. Subsection 50(17) contains several logical exceptions to this rule.

- **Subsection 50(18)—foreclosure or power of sale**: Before s. 50(18) was enacted, nothing in s. 50(3) or (5) prevented a mortgagee from enforcing its mortgage by foreclosure or power of sale against only a part of the land that was subject to the mortgage. It could then sell the foreclosed portion of the land to a third party, effecting a severance without consent. For example, an owner could give a mortgage to a co-operating mortgagee/purchaser, fail to make mortgage payments, and allow the mortgagee/purchase to "foreclose" on only the pre- arranged portion of the land. Subsection 50(18) now requires government consent to foreclosures and power of sale proceedings where not all of the land that is the subject of the mortgage will be affected, subject to certain exceptions. The court foreclosure order itself is not a prohibited transfer under s. 50(3) and is effective to divide the parcel, subject to Ministerial approval. The permitted exceptions are logical since they do not compromise planning principles.
- **Subsection 50(19)—ownership change between two existing owners:** Subsection 50(19) prohibits joint tenants and/or tenants in common from changing the ownership of land through a "release" of one owner's interest as a preliminary to what would otherwise be a prohibited transaction. For example, Owner 1 and Owner 2 own Parcel A as joint tenants and abutting Parcel B as tenants in common. A and B are lots on a concession. Neither A nor B can be sold separately due to s. 50(3)(b). Owner 2 transfers his or her interest in B to Owner 1 so that Owner 1 becomes the sole owner of B. This involves only a change of legal tenure of one parcel, which is not a prohibited transaction. The abutting lands are now owned by different legal entities and thus could be conveyed separately without contravening s. 50(3)(b). Subsection 50(19) now prohibits this practice.
- **Subsection 50(20)—*Partition Act* orders:** "To partition" means to divide. The *Partition Act* allows any person claiming an interest in land to apply to the Superior Court of Justice for an order (1) physically partitioning the land among more than one party; (2) partitioning the registered title, for example, by converting a joint tenancy to a tenancy in common; and in both cases (3) if appropriate, authorizing the sale of the land and the division of the proceeds of sale. Such orders may be sought where two or more owners of land cannot agree on the terms of sale of the land or as to whether the land should even be sold. Any person interested in land in Ontario may bring an action for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested. Before s. 50(20) took effect, *Partition Act* orders were sometimes made without a consent under s. 53 of the *Act*. Such an order could physically divide land among two or more claimants, thus circumventing ss. 50(3) and (5); or the order might change the tenure of land in circumstances similar to the situation described above with respect to s. 50(19). Partition orders now require consents under s. 53 unless each part of land described in the order could be conveyed without contravening s. 50.
- **Section 50.1—Division of land by will:** Deemed in force on July 26, 1990, s. 50.1 prohibits lands being divided by a will. Any division of land by will creates a tenancy in common in all of the land unless the *Act* has been complied with.

PLANNING ACT: SITUATIONAL PROBLEMS EXAMPLES

-**SCENARIO 1:** Conveyance of Stand Alone Property - PERMITTED

- ◊ Facts:
  - ■ Black owns parcel of called Blackacre
  - ■ Black does NOT own abutting land
- ◊ Result:

- Planning Act approval NOT required
- Black does NOT retain the fee or equity of redemption in any land abutting
- No approval necessary

-**SCENARIO 2:** Conveyance of Half a Property - PROHIBITED

◊ Facts:
- Black owns parcel called Blackacre
- Black purports to partition and sell half of Blackacre OR mortgage half the property

◊ Result:
- Planning Act approval REQUIRED
- Black has absolute right to convey the retained and abutting lands; she owns the equity or fee
- Planning Act approval necessary to sell portion/mortgage on half
  - Absent approval conveyance void and NO interest passes to purchaser

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-**SCENARIO 3:** Conveyance of Adjacent Property on Plan of Subdivision – PERMITTED - Exception in s. **50(3)(a)** applies

◊ Facts:
- Black owns Blackacre and adjacent Greenacre
- Both properties are lots on a registered plan of subdivision
  - Same result if one lot within and one lot without plan of subdivision
- Black purports to sell/mortgage Blackacre

◊ Result:
- Exception in s. 50(3)(a) applies: Adjoining lots on subdivision plan treated as if free-standing
- Planning Act approval NOT necessary

-SCENARIO 4: Conveyance of Partial Lot within Plan of Subdivision - PROHIBITED - **s. 50(5)** - Part lot control provision - applies

◊ Facts:
- Black owns Blackacre which is a lot on registered plan of subdivision
- Black purports to sell part of this lot

◊ Result:
- Planning Act approval REQUIRED
- Despite appearances, s. 50(5) - Part lot control provision - applies preventing alienation of partial lots within plan of subdivision
  - **Difference between scenario 3 and 4:** cannot sell only a portion of subdivision as part of lot control (internal subdivision control within plan of subdivision), whereas 3 is where owner can sell discrete full lots in a subdivision (i.e. she owns 5 subdivided lands, can sell each individually in full)

-SCENARIO 5: Conveyance of Adjacent Lot on **Deregistered** Plan of Subdivision – PROHIBITED – de-registration per **s. 50(4)** triggers ss. 50(26) and 50(30)

- ◊ Facts:
  - ■ Black owns Blackacre and adjacent Greenacre
  - ■ Both properties are lots on plan of subdivision
  - ■ Plan of subdivision de-registered pursuant to s. 50(4)
    - ▹ Note: De-registration regulated by ss. 50(26) and 50(30)
  - ■ Black purports to sell Blackacre and retain Greenacre
- ◊ Result
  - ■ Planning Act approval REQUIRED
  - ■ Otherwise applicable exceptions in s. 50(3)(a) or (b) inoperable by virtue of de-registration under s. 50(4)

-SCENARIO 6: Conveyance of Partial Lot to Municipality - PERMITTED - Exception in **s. 50(3)(c)** applicable

- ◊ Facts:
  - ■ Black owns Blackacre which is not on a plan of subdivision
  - ■ Black sells half (or anything less than the whole) of Blackacre to the municipality: Town of Blackwater
- ◊ Result:
  - ■ Planning Act approval NOT required
  - ■ Exception in s. 50(3)(c) applicable (public-purpose exemption)
    - ▹ Other public purpose exemptions - s. 50(3)(d) and (e)

-SCENARIO 7: Lease for less than 21 years/Gives a right-of-way less than 21 years - PERMITTED – **s. 50(3)** only for PA approval over 21 years

- ◊ Facts:
  - ■ Black owns Blackacre
  - ■ Black leases half of Blackacre/grants right-of-way over Blackacre for a term less than 21 years (inclusive of right(s) of renewal)
- ◊ Results:
  - ■ Planning Act approval NOT required

-SCENARIO 8: Leasing Residential/Commercial Space within Structure - PERMITTED - Exception in **s. 50(9)** applicable

- ◊ Facts:
  - ■ Black owns Blackacre and a Building/Structure on the land
  - ■ Black leases out residential/commercial space within building/structure
- ◊ Results
  - ■ Planning Act approval NOT required
  - ■ Exception in s. 50(9) applicable which exempts such agreements from operation of the Act

-SCENARIO 9: Conveyance of Mineral (and Air) Rights in Property - PERMITTED – **s. 50(2)** applicable, but note no mineral rights ON land (**s. 50(2.1))**

- ◊ Facts:
  - ■ Black owns Blackacre and NO abutting lands
  - ■ Black sells all mineral rights in Blackacre to mining company
    - ▹ Note: same result had conveyance been of air rights
- ◊ Results:
  - ■ Planning Act approval NOT required

-SCENARIO 10: Acquisition of Adjacent Property/Disposition of Original – PROHIBITED bc of merger

- ◊ Facts:
  - ■ Black owns Blackacre then acquires title to adjacent Greenacre
  - ■ Black purports to sell Blackacre after acquisition of Greenacre
- ◊ Results:
  - ■ Planning Act approval REQUIRED
  - ■ Upon acquisition, Greenacre and Blackacre merged into single land holding
  - ■ To sell either holding requires Planning Act approval since legally a partition/severance

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-SCENARIO 11: Acquisition of Adjacent Property/Mortgage on Acquisition – PROHIBITED bc of merger - **s. 50(3)** includes mortgages/charges to the land

- ◊ Facts:
  - ■ Black owns Blackacre then acquires title to adjacent Greenacre
  - ■ Black purports to give mortgage to bank to finance acquisition of Greenacre
- ◊ Results:
  - ■ Planning Act approval REQUIRED
  - ■ Upon acquisition, Greenacre and Blackacre merged into single land holding
  - ■ Language in s. 50(3) includes mortgages/charges to the land ERGO granting a mortgage on the parcel corresponding with Greenacre would constitute a conveyance with ownership of fee in abutting lands
  - ■ Black must obtain Planning Act approval or mortgage entire merged property

-SCENARIO 12: Acquisition of Adjacent Property/Mortgage Back on Acquisition – PERMITTED - exemption in **s. 50(8)** applicable, but must be for ALL of subsequent lands acquired

- ◊ Facts:
  - ■ Black owns Blackacre then acquires adjacent Greenacre
  - ■ Black purports to give mortgage back to Green who effectually finances Black's acquisition of Greenacre
- ◊ Results
  - ■ Planning Act approval REQUIRED by default

-SCENARIO 13: Simultaneous Conveyances of 2 properties to 2 diff purchasers – PROHIBITED bc of merger - **s. 50(15)** doesn't allow UNLESS purchaser is the same party

◊ Facts:
- ■ Black owns Blackacre and Greenacre
- ■ Black simultaneously delivers deed to Grey for Blackacre and deed to Emerald for Greenacre

◊ Results:
- ■ Planning Act approval REQUIRED

-SCENARIO 14: Adjacent Properties/Partnership/Asymmetrical Ownership - PERMITTED

◊ Facts:
- ■ Black owns Blackacre
- ■ Black and Green own adjoining Greenacre as partners

◊ Results:
- ■ Planning Act approval NOT required
- ■ Case law ruling:
  - i. Rationale: different identities of grantor (Black vs. Black/Green)
  - ii. Rationale: no single grantor has power to dispose of both

---

-SCENARIO 15: Adjacent Properties/Co-ownership/Asymmetrical Ownership – PERMITTED unless it's a checkerboard pattern of land holdings – s. 50(19)

◊ Facts:
- ■ Black owns Blackacre
- ■ Black and Green own adjoining Greenacre as co-owners (tenants in common/joint tenants)

◊ Results:
- ■ Planning Act approval NOT required

-SCENARIO 16: Adjoining Properties/Identical Mortgagee/Default(s) – PERMITTED - Exception in **s. 50(18)** applicable – bank can exercise Power of Sale

◊ Facts:
- ■ Bank has separate mortgages on Blackacre and Greenacre
- ■ Black defaults and bank commences power of sale to dispose of Blackacre
- ■ Bank has fee in Greenacre

◊ Results:
- ■ Planning Act approval NOT required
- ■ Exception in s. 50(18) applicable ➔where defaulted mortgages on adjacent properties to same mortgagee, bank may exercise power of sale vis-a-vis either property - i.e. Blackacre (or Greenacre)

-SCENARIO 17: Adjoining Properties/A held entire and B 'in trust' - CONTINGENT **on if under RA or LTA vs actual vs constructive notice**. See notes.

◊ Facts:

■ Black owns Blackacre

■ Green acquires legal title Greenacre but holds in trust for Black

◊ Result:

■ Planning Act Approval contingent on manner of registration of trusteeship & particular registration system governing

■ Central criterion:

i. Whether beneficiary (Black) has power of dominion meaning the power to dispose of the property is disclosed and apparent

- if under ***Registry Act***, interest will only be apparent if it's actual notice (X in trust for Y) and not constructive notice (X in trust) → PA then operates

- if **actual notice**, parcels combine and conveyance invalid

- if **constructive notice**, parcels separate and conveyance valid bc Black doesn't have power and dominion over the land

- if under the ***LTA***, then interest will only be apparent if she registers a caution or inhibition

- if no caution/inhibition registered, and no beneficiary stated, Green has dominion over lands and has right to convey, and Black has no fee in adjoining lands. (recall LTA and Randvest ratio – only registered trusts can count as actual notice)

-SCENARIO 18: Adjoining Properties/A held entire/B Express Trust – PERMITTED – disclosure of trust beneficiary, so fee is held by diff ppl

◊ Facts:

■ Black owns Blackacre and trustee of adjoining Greenacre expressly in trust for Ruby

■ Lands registered under Registry Act

■ Black purports to sell Blackacre

◊ Result:

■ Planning Act Approval NOT required

■ Due do disclosure of trust to benefit of Ruby, properties possess different owners ERGO treated as free-standing properties

- Fee of Blackacre held by Black
- Fee of Greenacre held by Ruby as disclosed beneficiary

PLANNING ACT: SUBDIVISIONS AND TIMING PROBLEMS EXAMPLES

Scenario 1: Adjoining Properties/Consent to convey A but actually conveys B – PERMITTED – s. 50(6) post August 1, 1983, says once consent granted for conveying one part, deemed consent for other part SO LONG AS before consent lapses per s. 53(43). *Must convey remaining parcel FIRST, otherwise consent used up (Acchione)

◊ Facts:

- Black owns Blackacre and adjoining Greenacre (merger)
- No Planning Act approval or inclusion in plan of subdivision
- Black obtains consent under PA to sell Blackacre but instead conveys Greenacre

◊ Result:

- Planning Act Approval NOT required
- Rationale: If consent expressly given to one half, implicit consent to other half
- Limitation
  - i. Remaining parcel must be dealt with BEFORE severed parcel for which consent obtained + before lapse of consent (**timing**)
  - ii. Where remaining parcel dealt with AFTER consented parcels dealt with ➔ consent used up ERGO cannot convey remaining parcel (**1390957 Ontario Ltd v. Acchione**)

SCENARIO 2: Adjoining Properties/A within plan of subdivision/B without – PERMITTED

◊ Facts:

- Black owns Blackacre and adjoining Greenacre
- Blackacre a whole lot on registered plan of subdivision
- Greenacre abuts but NOT within plan of subdivision

◊ Result:

- Planning Act Approval NOT required
- Blackacre may be conveyed first per exemption in s. 50(3)(a) re: free disposition of lots within plan of subdivision irrespective of adjoining lands
- Greenacre may be conveyed first per exemption in s. 50(3)(b) but only where the abutting and retained lands are to whole lots or blocks on a plan of subdivision (**effective as of August 1, 1983!!! Can it be retroactive? Book says yes if no violation of policy/planning)**

SCENARIO 3: Consent to convey parcel of A to B/B sells conveyed land – PERMITTED - **s. 50(12) & (13)** – once a consent, always a consent, but only for identical parcel conveyed by deed/transfer (i.e. not mortgage consent)

◊ Facts:

- Black owns Blackacre
- Black obtains consent and sells portion of Blackacre to owner of adjoining Greenacre
- Green subsequently purports to sell just the land purchased from Black which had presumably merged with Greenacre upon acquisition

◊ Result:

■ Planning Act approval NOT required (subject to official stipulation contrary)

■ 'Once a consent, always a consent' exemption per s. 50(12) & (13) triggered

■ PA: S. 50(12) ➔ DEFAULT: SUBJECT TO OFFICIAL STIPULATION OTHERWISE, CONSENT TO CONVEY CREATES DISCRETE SEVERED LOT WHICH MAY BE INDEFINITELY TREATED AS FREE-STANDING

■ PA: S. 50(13) ➔ EXCEPTION: MANNER OF STIPULATING OTHERWISE BY APPROVING AUTHORITY

CURATIVE PROVISIONS FOR PAST ILLICIT CONVEYANCES

Scenario 1: Illicit Conveyance/Regulatory Approval Granted**,** and purchaser objects **– OKAY** s. 50(14) (CURED). Once regulatory approval granted via plan of subdivision/description under Condo Act/consent under s. 53, all previous violations are forgiven. Applies retroactively, and to both mortgages and conveyances.

◊ Facts:

■ Green owns Greenacre

■ Green conveys parcel of Greenacre to owner of adjoining Blackacre WITHOUT consent

■ Black obtains plan of subdivision for all his land & otherwise illicitly conveyed parcel from Green

■ Purchaser signs agreement of purchase and sale vis-a-vis registered loton Greenacre parcel

■ Purchaser investigates title, discovers illicit conveyance by 'going behind the plan of subdivision' and objects (refuses to close)

◊ Result:

■ Objection/Requisition invalid per s. 50(14) ➔Illicit transaction CURED

■ PA: S. 50(14) ➔ PAST CONTRAVENTIONS VOID WHERE SUBDIVISION, CONDOMINIUM, OR CONSENT TRANSACTION VALIDATED BY REGULATORY AUTHORITY

Scenario 2: Vendor/solicitors represents that they comply with PA/But all are Ignorant - OKAY s. 50(22) to s. 50(25) (CURED) **(s. 50(22)** only for conveyances, not mortgages.)

◊ Rule

■ Where representations made by the following persons, NO need to search behind most recent transactions

■ Following person must represent that NO contravention of Planning Act

i. Vendor
ii. Vendor solicitor
iii. Purchaser solicitor

■ Knowingly false statement punishable by fine NOT exceeding combined value of subject and abutting land (potentially awesome) - s. 50(25)

◊ Effect

■ Purchaser's solicitor need only search back to last time Planning Act representations of this type made

◊ Facts:

- Black owns Blackacre via illicit conveyance in contravention of Planning Act at time
- Contravention NOT cured by curative provisions
- Black purports to convey to Green
- Black (Vendor) as well as Solicitors for Black and Green honestly unaware of Planning Act contravention but make representations affirming NO contraventions

◊ Result:

- Past contravention cured and of no consequence due to universal ignorance of contravention of Planning Act

Scenario 3: Approving Authority grants validation of prior contracvention – HAIL MARY OKAY s. 57(1) (CURED)

◊ Rule:

- PA: S. 57(1) ➔ DISCRETIONARY AUTHORITY TO VALIDATE PRIOR CONTRAVENTION OF PLANNING ACT

◊ Commentary

- The approving authority must generally have the authority to grant a consent under s. 53 in order to validate under s. 57(1)
- Essentially a hail mary curative provision
  - Ex post facto validation

REMEDIES: ABORTIVE REAL ESTATE TRANSACTIONS

Remedies: Recission (restore to pre-K state), SP, Damages (loss for benefit of bargain, position would be in had K been performed), Termination

Contract Term Classification and Remedies FLOWCHART

◊ Typology

- **Misrepresentation**

Trigger ➔ i. Representation is material; AND
ii. Representation induces opposite into contract

Remedy ➔ a) **Before Closing**
I) Rescission
II) **Damages** for **Deceit** IF:
A) Representations made **fraudulently**
III) **Damages** for **Negligent Misrepresentations** IF:
A) Representation made **negligently**

b) **After Closing**
I) **Rescission** IF representation:
A) Made **fraudulently**; OR
B) An **Error in Substantialis**
II) **Damages** for Deceit IF:
A) Representations made **fraudulently**
III) **Damages** for Negligent Misrepresentations IF:
A) Representation made **negligently**

- **Breach of Contract (Condition/Warranty) +remember Time of the Essence!!**

1) **Condition**

Trigger ➔ i. Promissory Terms is classified as Condition; AND
ii. Promisor breaches

Remedy ➔ **Before/After Closing**
I) Damages;
II) Specific Performance; **OR**
III) Termination of Contract AND Damages

2) **Warranty**

Trigger ➔ i. Promissory Terms is classified as Warranty; AND
ii. Promisor breaches

Remedy ➔ **Before/After Closing**
I) Damages; **AND/OR**
II) Specific Performance

PLANNING ACT DATES TO REMEMBER IDENTIFYING PLANNING ACT CONTRAVENTIONS

- Many amendments have been made to the *Act* since 15 June 1967.
  -Every time a title search is done as part of a real estate transaction, consideration must be given to the possibility of present and past violations of ss.50(3) and (5). The searches on title and abutting lands will confirm whether there has been a contravention of the *Act* or not.
- There will be two questions to consider:
  - Will the PRESENT transaction violate ss 50(3) or (5) of the *Act?*
  - Did a violation of ss 50(3) or (5) occur in the PAST, as a result of which the present owner, as a matter of law, has no title to convey?
- S. 50(21) of the *Act* states that: a past violation that HAS NOT BEEN CURED, will have the effect of voiding the transaction in which the violation occurred. If that void transaction was a transfer of the title, then very likely, every registered instrument, beginning with the one that caused the breach, will be NULL and VOID, since no title would been transferred by the defective instrument, so that the owner of the present transaction will have no title to sell, mortgage, etc.

DATE/TRANSACTION	RULE /SIGNIFICANCE
15 June 1967 -Transactions prior to this date forgiven	"Default start day": 15 June 1967 is how far back you must go to search on title for contraventions, unless legislation passed after 1967 stating otherwise. -Any contravention of the Act that happened prior to 15 June 1967 is deemed never to have had effect of preventing conveyance or creation of interest in land (ie deemed never to have breached or violated *Act)*

<table>
<tr>
<td>15 June 1967 (transactions after) but 27 June 1970 (before)=no forgiveness but must look to bylaws</td>
<td>-If transaction after 15 June 1967 but before 27 June, no forgiveness if bylaw enacted and registered bringing land under ambit of Act.
-If no bylaw registered=no contraventions of Act until 27 June 1970, when all land became subject to the Act, ridding it of the necessity of the passing of bylaws. (Note * The role is now reversed, must look to bylaws to see if there is an exception you can use for the purposes of permitting a contravention of the Act)

<u>CONVEYING DATES & BYLAWS: CONTRAVENTIONS</u>
<table>
<tr><th>Date of By-law</th><th>Date of Conveyance</th><th>By-law passed: YES/NO?</th><th>Contravention: YES/NO?</th></tr>
<tr><td>N/A</td><td>1968</td><td>NO</td><td>NO</td></tr>
<tr><td>1960</td><td>1968</td><td>YES</td><td>YES</td></tr>
<tr><td>1960</td><td>1965</td><td>YES</td><td>NO</td></tr>
<tr><td>N/A</td><td>1971</td><td>NO</td><td>YES *(b/c Act applicable in 1970 regardless of bylaw passed or not)</td></tr>
<tr><td>1969</td><td>1968</td><td>YES</td><td>NO (*b/c bylaw passed after conveyance)</td></tr>
<tr><td>1969</td><td>1970</td><td>YES</td><td>YES</td></tr>
</table>
</td>
</tr>
<tr>
<td>3 May, 1968
“10 Acre Rule”</td>
<td>-Prior to this date, it was permissible to deal with 10 or more acres of land if vendor retained fee in 10 or more acres of abutting land. After 3 May 1968, rule was abolished</td>
</tr>
<tr>
<td>27 June 1970</td>
<td>-Planning Act became applicable on this date to ALL transactions throughout Ontario. Prior to this date, the Act applied only if a municipality passed a by-law designating lands as within an area of subdivision or control.

-Prior to this date, part-lot land on a plan or subdivision was exempt from the Act unless municipality passed by-law making subdivision applicable. The new Act reversed process and part-lot control applicable unless municipality enacted a bylaw to exempt it from subdivision control.</td>
</tr>
<tr>
<td>17 December 1973
-“Prevention of partial discharges of mortgages”</td>
<td>-Amendment was added to prevent partial discharge of mortgage from being used to avoid the provisions of the Act. A person giving partial discharge of mortgage is deemed to hold fee in lands mentioned in the mortgage and to retain fee in balance of lands and is deemed to convey lands mentioned in the partial discharge.

-The rule does not apply if dealing with the whole of a lot or block</td>
</tr>
</table>

	on a plan of subdivision
28 June 1974	-The rule regarding partial discharges no longer applied for land where a consent to convey has been given, or where such land is owned by the Crown. -Also, the *Act* now deemed that land does not abut if it abuts on a horizontal plane only. This permits, for example, the conveying of underground mineral rights while retaining the ownership of land itself -Also, an exception was created permitting VTB mortgages provided that all of the land that is purchased is made subject to mortgage. The vendor is required to take the mortgage back and there might be some question as to validity of such a mortgage if mortgage is registered in favour of some other part. Notwithstanding, *Drewery v. Century City Development Ltd (No 2)* confirmed that giving back of mortgages did not offend *Act* since section dealt with land use control and did not cover situation of contemporaneous sales and purchase-money mortgages given back.
December 18, 1975	Foreclosures or power of sale transactions without the approval of the Minister became prohibited unless all of the land referred to in the mortgage is included in the foreclosure or power of sale.
7 June 1976	Foreclosures or powers of sale are permitted where the land being foreclosed consists of one or more lots or blocks on a plan of subdivision or a parcel of land that does not abut another parcel of land that is subject to the same mortgage.
23 November 1978	-Any release by a joint-tenant or tenant in common of an interest to one or more of the other joint tenant or tenants in common while retaining the fee in abutting land is deemed to constitute a conveyance of his/her interest by deed while retaining fee in abutting land.
15 December 1978	Contraventions that occurred prior to the registration of a plan of subdivision, a condominium plan, or a conveyance made with consent were cured on this date.
31 March 1979 “Once a consent, always a consent"	“Once a consent, always a consent"- Where a parcel was created by consent and subsequently it was obtained by an owner of abutting land, a further consent would not be required on a subsequent sale of the same parcel, provided the consent did not stipulate otherwise. This applies so long as the *identical* parcel of land *conveyed* with consent is being dealt with.

26 June 1981	*Partition Act* orders require consent unless each part of the land described in the Order must have been conveyable without contravening the *Act*
1 August 1983	Section 50 was amended to add new provisions regarding: • Ability to convey part of a lot on a plan of subdivision where abutting land is the whole of a lot on a plan of subdivision (the last phrase ss.50(3)(b) and 5(a) ("other than land that is…")) • Ability to deal w/part lots on a plan of subdivision if the only other part of the lot is owned by an expropriating authority (s.50(5)(e)); • Exceptions for Ontario Hydro, transmission lines, and conservation authorities • Exceptions for dealings w/ parts of a building • New exception for simultaneous conveyances
26 July 1990	No provision in any will, whether it was made before or after 26 July 1990, that purports to divide land is of any effect unless each parcel of land could be conveyed w/o contravening s.50. The only exception to this prohibition would be if the testator died prior to 26 July 1990.

CHAPTER 53+54: THE SURVEY + LETTER REQUISITIONS

N/A

CHAPTER 55: THE STANDARD LOAN TRANSACTION

-Chargor and Chargee (Mortgagor and Mortgagee) negotiate loan and agree to a commitment letter, which is then finalized by their respective lawyer. The chargee provides instructions setting out the conditions that need to be satisfied before the solicitor can advance the loan to the mortgagor (borrower of the funds).

Under the *Registry system,* the old form of a mortgage create an actual conveyance of the legal estate to the land in favour of the mortgagee until the mortgager repaid the debt back. The mortgagor under this system retained the equity of redemption. However, with the introduction of the *LRRA,* the previously viewed conveyance was removed from the language of the legislation and instead was replaced by an encumbrance in favour of the mortgagee until debt was paid back. So instead of the transfer of the estate of the land, under the *LRRA,* a mortgage creates an encumbrance against the property in favour of the mortgagee until the mortgage is paid off.

FORMS AND STANDARD FORMS OF CHARGE: ELECTRONIC AND NON-ELECTRONIC:

Under the paper or document system (non-electronic)- mortgages must be documented in the form of Charge/Mortgage of Land (Form 2) and can be included in a schedule containing the

terms of the chargee's own standard form of mortgage; incorporate by reference or without incorporation but with additional implied covenants contained in s. 7 of the *LRRA*

Under the electronic system (Teranet), there is one standard electronic form for land. The applicable PIN, legal description, address and interest being charged must be indiciated.

The electronic document must be submitted for registration approved by Director of Titles. An electronic charge can also be completed by attaching an electronic schedule of mortgage terms, relying on standard charge terms filed under *LRRA,* or relying on implied covenants in the *LRRA*.

The interest charged is usually the fee simple (or freehold interest). However, a tenant can create a leasehold charge. Keep in mind that a leasehold interest must be drafted clearly since it includes both real property concepts and landlord and tenant concepts. Some things may be addressed under the real property concepts while others, such securing payment by charging it against personal property need to be dealt with under the *PPSA* (ie in a general security agreement).

Since a charge is not a conveyance but an encumbrance, a lawyer should include in the agreement that all present and future fixtures are encumbered by the charge for the benefit of the chargee (mortgagee), s.15(1) of the *Conveyancing and Law of Property Act.*

PRIORITY RULES AS TO FIXTURES IN REAL PROPERTY UNDER THE PERSONAL PROPERTY SECURITY ACT (PPSA):

1. (a) If a security interest attaches BEFORE good become fixture to the real property, it will have priority over the claim of any person who has an interest in the real property. Example: if you make a security agreement as a supplier of pot-lights to be installed in a house with builder and the pot-lights are not yet affixed to the house; and the supplier's security interest attaches-the supplier gives value, provides rights to the debtor (builder) in the collateral, and has the right to enforce the agreement against third parties-; then the supplier will have priority claim against any person who buys the house or has an interest in the house (ie in the case it will probably be the bank).

Reminder-Attachment occurs when:

- value is given,
- the debtor has rights in the collateral, and
- it is enforceable against third parties.

(b) If a security agreement in goods attached AFTER the goods became a fixture (say in that example, the security agreement in the goods attaches after the potlights are installed in the house), it will have priority over anyone who subsequently acquires an interest in the real property, but not over any person who has a registered interest in the real property at the time the security interest in the goods attached, and who has not consented in writing to the security interest or disclaimed an interest in the fixtures. So that person will not have priority if the person that acquires an interest in the real property registers it at the time the security interest attaches and has not consented to the security interest in the goods or has not disclaimed it. This is logical since under the *PPSA,* registration takes priority over attachment.

2. A security interest in goods as mentioned in paragraph (1) will be subordinated to the interest of a subsequent purchaser for value of an interest in the property or a creditor with a *prior* encumbrance of record on the real property to the extent of $$ of his interest IF the subsequent purchaser or subsequent advance under a prior encumbrance of record is made WITHOUT knowledge of the security interest and BEFORE NOTICE OF IT IS REGISTERED. So basically, a subsequent purchaser and or a creditor having a prior encumbrance of record on the property will have priority over anyone having a security interest in the goods prior to the goods becoming affixed to the real property or anyone who has an interest as per (b). The only caveat is that anyone in (a) or (b) will have priority over anyone in paragraph 2 if the notice is registered, because registration constitutes notice so if a creditor with a prior encumbrance of record or a subsequent purchaser takes interest in the real property without notice of the security interest then either or will have priority however, if the security interests as described in para. 1 (a)(b) are registered, those interests will have priority over the interests of the creditor or subsequent purchaser for value. In other words, the priority of the chargee (mortagee's) security interest in the real property will not be affected as long as the charge was properly registered.

*NOTE: Chattels (ex: refrigerator, stove, whatever is not considered a fixture) is not covered under this form of charge, and if a mortagee wishes to encumber chattels as security for the loan, a general security agreement against the chattels should be executed in favour of the mortagee and properly registered under the *PPSA* registry system.

Part II of *Family Law Act* and replacement of affidavit of martial status by statement: The former affidavit regarding martial status has been replacement by a statement, which provides whether consent has been given by the non-owner spouse to charge the matrimonial home (i.e. encumber the property) in favour of the mortgagee. Section 21 of the *FLA* requires that if the property being charged is a matrimonial home, the consent of a non-owner spouse of the chargor is required. If the non-owner spouse does not provide the statement, then the charge/encumbrance will be subject to the non-owner spouse's prior possessory rights in the property. If the property is not a matrimonial home, the chargor needs to make that clear.

It is the lawyer's duty when acting for the spouse to make sure that any consent given will be limited only to the particular loan transaction so that the spouse can retain a possessory right in the property for all other purposes.

The right to pay off right after 5 years by providing 3 months' interest in lieu of notice- mortgage must not be shorter than 5 years- and this right will only apply as well if mortgage not renewed for a period shorter than 5 years:

- The *Mortgages Act* provides that if a mortgage agreement is not longer than 5 years, the mortgagor (except of mortgagor is a corporation) has the right at any time after 5 years following the date of the mortgage (the date of maturity of mortgage) to pay it off with three months' interest in lieu of notice;
- HOWEVER, if the term of the mortgage <u>does not exceed five years (ie is shorter than 5 yrs)</u>, the mortgagor cannot pay of the mortgage until the end of the five-year renewal period;

- Chargor has no right to shorten mortgage (pre-pay) term without agreement by the chargee;
- Chargee has no right to shorten term and accelerate repayment w/o agreement of the chargor (but can do so if chargor in default of payment of the mortgage).

Acceleration of principal and interest

The wording replaces the implied covenant contained in s. 7(1)1.ix of the *LRRA*, which provides that upon default of any payment of principal or interest, the entire balance may become immediately due at the option of the chargee. This does not cover a breach of any other covenant. See below for the chargee's right to accelerate for a breach of covenant.

Section 22 of the *Mortgages Act* provides some relief against this acceleration by providing that, notwithstanding any agreement to the contrary, where there has been default and acceleration, the chargor may pay all arrears and expenses and put the charge into good standing at any time

- before the sale of property pursuant to the power of sale contained in the charge; or
- before any action has been commenced

whereupon the chargor is relieved from the consequences of the acceleration clauses. The amount the chargor must pay does not include any accelerated amounts. After a "sale" has taken place, no relief against acceleration is available.

Once an action has been commenced, s.22 of the *Mortgages Act* no longer provides any relief against acceleration. However, the chargor can resort to s. 23 of the *Mortgages Act*, which provides that notwithstanding any agreement to the contrary, if an action by the mortgagee has been commenced for enforcement of its rights and the charge has been accelerated, the chargor can apply to the court to put the charge into good standing by paying the arrears and certain costs. Moreover, s.17 of the *Mortgages Act* provides that notwithstanding any agreement to the contrary, the chargor may put the mortgage into good standing at any time by paying

- the amount of principal in arrears; and

- a bonus of three months' interest on the principal in arrears or giving three months' notice of his or her intention to put the mortgage into good standing. This provision protects the chargor by permitting payment of arrears without penalty. The chargor is not required to make further payments of interest except to the date of payment. Such interest would merely constitute payment for the use of the principal during the three-month notice period. This provision also protects the chargee by giving a three-month period during which to arrange for reinvestment of the chargee's principal or compensation for lack of that notice. The option is that of the chargor. However, s. 17 of the *Mortgages Act* does not give the chargor the right to also pre-pay the balance of principal that was not in arrears without paying the interest that is payable on this balance of principal to the maturity date, unless the chargee has taken steps to compel payment. Case law also holds that this provision does not apply if the chargee is exercising its remedies to recover the money on default and asking for this bonus as well. Subsection 17(3) further provides that s. 17(1) does not limit the right of the mortgagee to pursue any of the mortgagee's remedies with respect to the amount in default.

-Where a mortgagee obtains judgment against current owner of property satisfying mortgagee's claim, mortgagee ceases to have a right to claim against guarantor or mortgagor, as the case may be.

-Note: that a transfer of property by the original charger does not automatically relieve the charger of possible liability if the charge later falls into default (p.640).

- Other Considerations: Right to assign mortgage, consent of mortgagee must be sought before mortgagor sells property (unauthorized sale); power of sale; obligation to insure, solicitor to obtain insurance certificates on closing as proof that the property is insurance is important;

CHAPTER 56: ENFORCEMENT OF MORTGAGE SECURITY

- SEE TABLE OF REMEDIES FOR ENFORCEMENT OF SECURITY

- **POTENTIAL REMEDIES: When a mortgagor has defaulted under a mortgage, the mortgagee has a number of remedies to choose from. The mortgagee may:**

1. **Sell the mortgaged property:**
   -Under private power of sale provisions contained in mortgage; or
   -pursuant to court order made in judicial sale action;

2. **Obtain title to the mortgaged property by means of a:**
   -Foreclosure action; or
   -acceptance of a quit claim deed to the mortgaged property

3. **Take possession of the mortgaged property privately, by court order, or by a receiver; OR**

4. **Obtain judgment against:**
   -the mortgagor and/or any guarantor; or
   the current owner of the mortgaged property, if there has been a change of ownership for payment of the debt secured by the mortgage either

   - Before the sale under power of sale; or
   - After sale under a power of sale for the amount then due on the mortgage debt (after application of the net proceeds of sale)

TABLE OF REMEDIES FOR ENFORCEMENT OF SECURITY

	FORECLOSURE	**JUDICIAL SALE**	**PRIVATE SALE / POWER OF SALE**
PROCESS	technical	technical	simple
COST	expensive	expensive	cheap
NOTICE REQ'D BEFORE SALE	longer threshold under Rules of Civil Procedure - then the	longer threshold under Rules of Civil Procedure	35-45 days (recommended min 37 days)

	mortgagor has a further 60 day redemption period	then the mortgagor has a further 60 day redemption period	*default must continue for at least 15 days and sale should not be made for at least 35 days after notice has been given. *mortgagee required to give mortgagor notice of any breach of covenant that constitutes a default together with reasonable time for mortgagor to remedy breach prior to issuing notice of sale.
WHEN IT'S BEST	in a depressed market - where value of the property is less than the debt. In long term, values may improve that after foreclosure mortgagee able to sell property for an amt in excess of mortgage debt without having to account for surplus.	where there are legal issues regarding title and need the court's assistance	in most situations – this is the best
ENFORCEMENT OF SECURITY (BIA)- NOTICE OF INTENTION TO ENFORCE SECURITY			BIA requires secured creditor intending to enforce security on all or substantially of the inventory, accounts receivable or other property of insolvent to send notice of intention to enforce security if assets being enforced upon have been acquired for or used in relation to a business carried on by that insolvent Enforcement of security cannot proceed by creditor until 10 days after notice of intention to enforce security has been sent, unless insolvent consents otherwise. *in case of a farmer, a mortgagee is required to give 15 days notice of intent to enforce security for farm property. Farmer has right to apply for relief which can result in stay of proceedings
STATUTORY PROTECTIONS			If mortgage does not contain power of sale provisions, mortgagee looks to statutory power of sale provisions. If it

			does contain a power of sale, then the statutory protections will not apply -Statutory protections when there is n power of sale term in the mortgage requires mortgagees to provide lengthier notice periods in case of default by mortgagor (no power of sale until at least 3 months default continues (as opposed to 15 days) and 45 day notice period) -a power of sale cannot take place until after at least three month default in payment of moneys due under mortgagee or after omission to pay any premium of insurance by terms of mortgage.
PROCESS	Issue Statement of Claim and serve personally	Issue Statement of Claim and serve personally	-Conduct subsearch of title to mortgaged premises. -Prepare draft notice of sale -Registration receipt from post office should be prepared and addresses to which notice of sale is to be sent be set out in registration receipt-envelopes be marked registered mail -Notice of sale should be completed after confirming all amount with mortgagee -Finalize notice of sale and each copy should be signed by solicitor for mortgagee and place in separate envelope and taken to post office where registration receipt will be stamped. A copy of notice should be sent to mortgagee together warning that NO further proceeding to enforce mortgage should be taken until expiation of the time for payment in the notice (p.667) -Prepare and swear on a statutory declaration as to service of notice of sale on day of mailing notice of sale -Served on : original mortgagor, owner of the equity of redemption,

			spouses, subsequent mortgagees, assignees of subsequent mortgagees, execution creditors, construction lien claimant (where mortgagee is claiming priority over construction lien claimant), guarantors (although guarantors do not have an entitlement to notice of power of sale but it is good practice); tenants, and in case of bankrupt mortgagor, the trustee-in bankruptcy is the proper party to be served or court-appointed receiver (for corporations) -Manner of Service: sale can be served personally or by registered mail (p.670), however if mortgage provides for personal service only, then registered mail not available and must only be served by personal service. -**NOTE* Notice of power of sale is given on the day on which it is mailed (not received)**
DEFICIT AFTER SALE	can't claim for deficit – take property in entire satisfaction of debt	can sue mortgagor and any grantors thereof for deficiency or shortfall	can sue mortgagor and any grantors thereof for deficiency or shortfall
MORTGAGOR'S RIGHTS POST SALE	court can allow mortgagor to redeem the mortgage even after foreclosure and in certain circums even after a subsequent sale by the mortgagor who has foreclosed to a 3rd party P	purchaser's title is immune if power of sale in "professed compliance" with MA. BUT mortgagor and other interested persons retain its rights to sue mortgagee for non-compliance with MA	purchaser's title is immune if power of sale in "professed compliance" with MA. BUT mortgagor and other interested persons retain its rights to sue mortgagee for non-compliance with MA
TAX ON REMEDY	Land Transfer Tax applicable b/c considered a legal transfer to mortgagee (also payable for quit claim)	no Land Transfer Tax when mortgagee takes control of property (bc no transfer of title)	no Land Transfer Tax when mortgagee takes control of property (bc no transfer of title)
LIABILITY POST SALE	not a court-approved process – liable for suit alleging less than FMV	court-approved process – court must approve sale and price	not a court-approved process – liable for suit alleging less than FMV by mortgagor, subsequent mortgagee or guarantor for

			improvident sale
ABANDONMENT	can't abandon foreclosure action once commenced without leave of the court	can't abandon once commenced without leave of the court	entitled to abandon power of sale at any time (subject on to s. 42 of Mortgages Act)
SURPLUS	not req'd to account for surplus to mortgagee or subsequent encumbrancer for any surplus on sale	not req'd to account for surplus to mortgagee or subsequent encumbrancer for any surplus on sale	req'd to obtain fair value. Conduct sale properly and must account to mortgagor and subsequent encumbrancers for surplus
RESOLUTION OF PROBLEMS	Court is available forum for the disposition of complex issues	Court is available forum for the disposition of complex issues	Court forum NOT available
COMBINED ACTION	can add a combined claim for possession and recovery of mortgage debt	can add a combined claim for possession and recovery of mortgage debt	separate action is req'd for claim of possession or recovery of mortgage debt
STANDARD OF CARE		Mortgagee is subject to a subjective standard of good faith and an objective standard of reasonable care in the sale of real property	Mortgagee is subject to a subjective standard of good faith and an objective standard of reasonable care in the sale of real property

CHAPTER 57: PREPARATION FOR CLOSING AND POST-CLOSING

Things to remember in this chapter

- ***LRRA* provides 5 basic categories of documents that can be registered on title:**
    - Transfer/Deed of Land;
    - Charge/Mortgage of Land;
    - Discharge of Charge/Mortgage;
    - Document General;
    - Schedule (if a schedule is required to be attached to the other documents)
- **Do not give undertakings for private mortgages**
- **Land Transfer Tax Affidavit:** Tax is calculated as
    - = ½ of 1% (0.5) on first $55, 000 of purchase price
    - =1% on balance of purchase price up to and including $250,000
    - =1.5$ on balance of purchase for property valued at $250,001 and up

- *If property contains 1 or 2 single-family dwellings and purchase price exceed $400,000, additional tax imposed = 2% on balance of purchase price.

-Also, a 13% HST is paid on value of goods and chattels transferred. The purchaser provides a statement containing among other tings, a statement of the value of the consideration paid for the property. The cheque for land transfer tax and HST is paid to Minister of Finance. If certified, no need to be drawn from trust account but must be certified if drawn on client's account. Sometimes, it can be tendered directly to Ministry of Revenue prior to closing. Purchasers of real property in Toronto since 1 Feb 2008 have to pay a Municipal Land Transfer tax (first time homebuyers get a rebate)

- **Pre-Closing (7.0)-** a day or two prior to closing, executions should be checked a/ vendor and you should hold a meeting with your client as the purchaser to review any problems with your client. At the meeting provide the client purchaser w/copies of the following documents:
    - Statement of adjustments
    - Draft transfer and draft charge
    - The Survey
    - Draft title insurance policy and draft trust statement and account.

  If acting for vendor, provide your client w/copies of the following documents:
    - Statement of adjustments
    - Mortgage and Discharge Statements;
    - Real Estate commission statements
    - Draft trust statement and account

- **Closing the Transaction** (8.0- Personal Attendance at registry office, *Registry system and land titles)*, before time fixed for closing in order to conduct subsearch of title from the last instrument shown on initial title to determine whether anything new has been registered since date of original search. In registry, this entails look at the abstract book and updating records through the day book. After that, purchaser's solicitor should obtain an affidavit of execution against vendor.
    - **Electronic Funds Transfer =** Every person wishing to use e-reg must become a subscriber w/Teranet. Each subscribing lawyer or law firm will need to establisher an account w/ Teranet for payment of user fees, access charges, and online chargers.
    - **<u>*Registration fees and land transfer taxes CAN be paid from lawyers' special trust accounts or general accounts.</u>**

- **If Vendor is giving a VBT**, vendor will require production on closing of a certificate of insurance or binder letter evidencing coverage in accordance w/ terms of mortgage and showing vendor as a loss payee. Also, make sure to do an execution search to see whether purchaser is in any way in default of payment

CHAPTER 58: SPECIAL CONCERNS FOR RESIDENTIAL REAL PROPERTY (p.703-711)

-Pretty straightforward; N/A

CHAPTER 59: REMEDIES- WHAT TO DO IN THE EVENT OF DEFAULT

-Pretty straightforward chapter. You make an application under s. 3 of the Vendors and Purchaser's Act for issues relating to requisitions, objections or claims for compensation. Disputes with respect to entitlement of title are not appropriate. For such disputes that involve controversial issues, you must bring forward an action (proceed by way of action) since they are situations that cause for material disputes to be put into issue, and therefore are more appropriately dealt with by way of an action. Things such as:

- disputed claims for possessory title;
- disputes respecting purchaser's right to assign agreement of purchase & sale
- request for order of conveyance of land where such application does not arise in context of answer to a requisition;
- disputes respecting answering of requisition relating to zoning-by-law on grounds that these do not constitute requisition on title

ARE NOT APPROPRIATE MATTERS DEALT BY WAY OF APPLICATION UNDER VENDORS AND PURCHASER'S ACT BUT BETTER DEALT WITH BY WAY OF AN ACTION!

-Other issues that CAN be dealt with on application (rule 14.05(3) are for example, determination of rights that depend on interpretation of a deed, will, contract or other instrument, interpretation of statute, regulation, by-law; declaration of interest in or charge on land; in respect of any matter where it is unlikely that there will be any material facts in dispute.

-You can either rescind or claim the contract as repudiated. For a contract to be repudiated, you must have been substantially injured as to your rights under a contract.

-**For procedure if acting as purchaser's lawyer, see p. 718 (10.1) and if vendor's lawyer, see p.718-719 (10.2) and summary.**

CHAPTER 60: THE PURCHASE AND SALE OF A CONDOMINIUM UNIT

Key Condominium Documents

1. The description and declaration: registration of this document by the declarant in the land titles office creates a condo plan upon the land described in those documents. The declarant is the owner, at the time of the declaration and description are submitted for registration, of the land in respect of which the condo is to be registered. For the time of these registrations, the *Condominium Act* governs land and all interests in the land. The land is divided into various units+ common elements which constitute the condo description. The description takes the form of a condo plan prepared by the declarant's surveyor. The plan is a survey containing a depiction of the boundaries of the units, common elements and exclusive-use elements. NB: The surveyor's plans are registered and retained in the land titles office and may be downloaded via the electronic land registration system (e-reg) as part of the title search. A buyer's solicitor should review surveyor plans comprising description in order to confirm w/ client location of the residential unit, as well as parking and locker units. The plan and corporation numbers include a unique number.

The declaration: Is the most important document registered on title and must contain seven mandatory provisions. The mandatory information includes, for example, the boundaries of each unit; the percentage of common expenses each particular unit owner is responsible for, and the exclusive-use common use elements set aside for particular units. Declarations can be amended either by vote of 80 or 90% of unit owners. Alternatively, a judge of the Superior Court of Justice may amend the declaration upon application under s.109 of the *Act.* Some errors may also be corrected by Director of Titles under s.110.

2. **The various by-laws of the condominium corporation:** By-laws must be registered on title

3. **The rules of the condominium corporation:** rules may ONLY deal with use of common elements and units. Further, the registration of a declaration and description creates a condo corp. without share capital. Its members are the unit owners from time to time, and the condo corp. is also the registered owner of the common elements, which it holds on behalf of all unit

- Common expenses – are payable monthly. The condo's board of directors approves a budget each yr for the upcoming financial year.
- Municipal property taxes – are individually levied on each unit directly to unit owners. However, the condo corp. will pay property taxes on the common elements.
- Reserve fund- used for major repairs and replacement of the common elements and assets of the corporation. Each condo corp. must regularly conduct reserve fund studies and act on them. Within 120 days of receiving a reserve fund study, the BofD must review it and send to unit owners a plan for future funding of the reserve fund based on the study.
- Because it is a corporation, a unit owner may use the oppression remedy if he/she feels that the condo corp's actions are being oppressive or unfairly prejudicial and disregarding his/her interests or the interests of the unit owners.
- Purchase and Sale =OREA condominium agreement.
- Condominium status certificate – primarily of concern for a buyer during a resale of the condo unit.
- Statutory protection for buyers of resale condo units, s. 76 of *Act*- states that condo corporation MUST provide a status certificate in statutory form to a person who requests one: includes financial, organizational, other info about the condo corp. With the status certificate, will be copies of the condo's declaration, bylaws, rules, current budget, most recent annual financial statements, and reserve fund study (*the status certificate must include the most recent reserve fund study and the plans for future funding).
- The status certificate will show whether there is any claim or legal action against the condo corp.
- **The condo corp must also provide with the status certificate the following documents:**
    - A copy of the budget of the condo corp for the current fiscal year
    - The last annual audited financial statements for the condo corp
    - The auditors report on the financial statements
    - Copies of the current declaration, by-laws and rules and
    - A copy of a certificate or memorandum of insurance for each of the current insurance policies held by the condo corporation.
- Legal description of every condo unit is governed by a unique identifier number (PIN), parking and storage spaces have their own PIN as well.

- You must do an execution search against the condo corporation in addition to the usual searches against the seller and buyer. This is to protect your client, because under the *Act,* a judgement for payment of money against the corporation is ALSO a judgement against each unit owner at the time of judgement (joint liability). The holders are liable for a portion of the judgment determined by their respective proportion interests in the common elements. If a large judgment is issued a/ the corporation, this may result in a special assessment to all the current unit owners. It is the duty of the purchaser's solicitor to determine that there are no judgements at the time the buyer's purchase of the condo unit is completed
- Corporation has liens for arrears of common elements and for unpaid special assessments. Notice of lien must be provided to unit owners at least 10 days before lien is registered.
- Condo liens are enforceable in the same manner as a mortgage: that is, it may be enforced using the statutory power of sale procedures or by foreclosure or judicial sale under R.64 of the *Rules of Civil Procedure.*
- New condo unit buyers are protected by the Ontario New Home Warranties Plan and so this requires a declarant to deliver to a buyer a copy of the current disclosure statement. This applies to new residential, commercial, industrial and retail condominiums. If the disclosure statement is not delivered, the agreement for purchase and sale is not enforceable until delivery of the statement is made. A buyer can also rescind an agreement within 10 days of receipt of the disclosure statement w/o any obligation to provide reasons for doing so and is entitled to a refund of all the monies paid to the developer .The 10-day period commences on the later of the date of receipt by the buyer of a proper disclosure statement and the date the agreement of purchase and sale is FULLY executed.

- Condo closings happen in two stages: 1. Interim closing and 2. The final closing

    1. Interim closing: buyer takes possession of purchased unit, must complete an inspection and sign a certificate of completion and possession under *ONHWPA.* Buyer will pay to the seller the balance of the "down-payment" portion of the purchase price minus the buyer's intended mortgage amount and deposit monies the buyer has paid. AN interim occupancy agreement, interim statement of adjustments and pod-dates cheques for the monthly occupancy payments are exchanged between buyer and seller, as well as keys are released to buyer but title is not yet transferred.
    2. Final closing: This stage occurs AFTER condo corp's declaration and description have been registered on title in the land titles office Payment of balance of purchase price to seller is completed, title is transferred to buyer, buyer's mortgage is registered and further documents including status certificate is provided. The interim occupancy agreement terminates when the final closing is completed.

CHAPTER 61: ESTATE CONVEYANCING

- Numerous concerns are raised when an owner of real property dies. **MATTERS TO CONSIDER IN ESTATE CONVEYANCING:**

    - Whether the property was owned in joint tenancy by the deceased, either with a spouse or with some other third party
    - Whether the deceased had a spouse
    - Whether some or all beneficiaries of the estate are children
    - Whether the debts of the estate have been paid
    - Whether the deceased died with or without a Will
        - If there is a Will:

        - Whether there is an *express* power of sale in the Will
        - Whether there is an *implied* power of sale in the Will
        - Whether there *any* powers of sale at all in the Will
        - Whether the particular real estate is *specifically* dealt with in the Will (ie: whether it the subject of a specific bequest)
        - Which statutory provisions are likely to govern *certain* aspects of the conveyancing process
    - If there is no Will:
        - Which statutory provisions *will* govern *all* aspects of the conveyancing process
- What is the *purpose* of the proposed conveyance
    - Is it to pay debts
    - Is it to liquidate in order to distribute proceeds to the beneficiaries
    - Is it to transfer to those beneficially entitled, whether by Will or on intestacy
- What *consents* might be required (this may already be known, based upon the answers to many of the above questions)
- Has the property *vested* in the beneficiaries

-Prior to dealing with lands belonging to a deceased owner, there will be things that will be need taking care of such: - proof of death; proof of ownership; dower rights and creditors rights to the real property; taxes; as well as beneficiary rights, and so forth.

- **Proof of death:** proof of death is required in order to deal with the deceased owner's property for conveyencing purposes. Best proof of death? Obtain death certificate from Office of the Registrar General under the *Vital Statistics Act.* This will be the certificate issued by the funeral home that handled the funeral arrangements is also generally accepted as proof of death. Another way of proving death is if death has been recited in another document that is more than 20 years old and there is no issue as to the truth of its contents. Another way of proving death is of course, production of the certificate of appointment of estate trustee with or without a will. This certificate will be required in any case to be registered at the land titles office so it is good to obtain.
- **Proof of Ownership-** Do a sub-search of registered title to make sure of the ownership and what it entitled prior to death.
- **Spousal rights (past rights) i.e. dower:** Prior to 31 March 1978, if a man died the wife was entitled to downer right in the land where the deceased husband, during the marriage, owned the legal estate. The Family Law Reform Act abolished dower rights. Still, any dower rights vested prior to 31 March 1978 may still be registered on title, so make sure of this when doing your sub-search.
- **Creditors' rights to the real property:** debts of deceased create a charge on deceased's assets in favour of creditors= do a PPSA search for writs of execution of deceased. Search of titles to real property should be done and advertisement to creditors should be executed. In some cases, BIA related searches may also be needed.
- **Land Transfer Tax on Conveyance to Beneficiary:** No tax consequences if conveyencing property to the beneficiary but tax is applicable if transferring to 3rd party. *Note that survivorship applications are not subject to land transfer tax under *Land Transfer Tax Act.*
- **Conveyencing Forms- 2 sets of forms:** 1) Electronic Registration *LRRA* (law statements); and 2) Non-electronic procedures and records
- **Joint Tenancy and Survivorship Applications:** If joint tenant dies, real property vests automatically in surviving joint tenant by operation of law. To vest (convey) title to the

surviving joint tenant (ie remove the deceased owner and replace the deceased owner on title with the surviving joint tenant) a document called the a survivorship application needs to be submitted and filed. Both *Registry* and *Land Titles* systems have their own procedure:

- **Under land titles system,** vesting occurs with the filing of a removal by way of a survivorship application of the name of deceased from parcel record pursuant to s.123 of *Land Titles Act.* Under e-reg system, in addition to the information you need to provide, the law requires that a survivorship application contain: name of deceased joint tenant; proof of death of deceased (death certificate, appointment estate trustee w/ or w/o a will or other document where it is undisputed proof of death (where document 20 yr or older); and a statement by applicant that the land affected by the application is not subject to any spousal right under *FLA* with r/ to deceased
- **Under Registry system:** registration of satisfactory evidence of death of deceased joint tenant, by way of registered deposit under Part II of *Registry Act.* There is no formal survivorship application under the *Act.* *Note that survivorship applications are not subject to land transfer tax under *Land Transfer Tax Act*.

- How to sever a joint tenancy b/f death? : Note, that where title is registered in the names of two or more trustees and one of them dies, the trustees are deemed to have held title as joint tenants. Therefore, death of one trustee maintains the joint tenancy and does not sever it in favour of a tenancy in common. A tenancy in common usually created when one joint tenant acting alone mortgages or transfers his/her undivided interest in jointly owned real property. The persons entitled to the Real Property ("RP") of deceased tenant in common will be determined by intestacy or testate succession.

- **FLA (SPOUSE) & SEVERANCE OF JOINT TENANCY**: Section 26(1) of the *Family Law Act* provides that if a spouse dies owning an interest in a matrimonial home as a joint tenant with a third party and not with the other spouse, the joint tenancy is deemed to have been severed immediately before the death of the deceased spouse. Accordingly, in such a situation, the interest of the deceased joint tenant would fall into his or her Estate, to be dealt with by Will or on intestacy, as the case might be, and would not devolve to the surviving joint tenant by operation of law. Clearly, then, if the death occurred after March 1, 1986, it is crucial that the spousal status of the deceased person at the time of death be known. Unless it can be stated that the deceased joint tenant and the surviving joint tenant were spouses of one another at the time of the death *or* that the deceased joint tenant was not a spouse at the time of death *or* the property was not a matrimonial home of the deceased at the time of death, the title will be subject to rights of another (ie: the beneficiary of the deceased's Will, if any, or the statutory beneficiaries, if it is an intestacy).

  To clarify, just because both spouses live in a mat home doesn't mean that they are both the registered owners on title. One can be the registered owner on title and one can be the non-titled spouse. So in this case, if A and A's mother own the house as joint tenants and then A and B as spouses live in that home and designate as their mat home, and then subsequently A dies, this would sever the joint tenancy immediately before the time of death in favour of a tenancy in common because the rule state that if one spouse (here it would be spouse A) owns interest in mat home as joint tenant with a 3rd person (here it would be A's mother) and not with the other spouse (here it would be B), then the joint tenancy will be deemed to have been severed. So if A dies, survivorship would not apply and therefore, X (A's mother) would not become the sole owner by way of this right of

survivorship. Had A and X owned an interest in a home not designated as the matrimonial home, the survivorship rule would have been preserved. In this case however, A's title as tenant in common would have been dealt with will be dealt with under intestacy laws or by testate succession and will be subject to B's spousal rights as the non-titled spouse (such as the right to possession-occupation of the mat house, and election under the FLA)

- In so many situations, persons married to each other own their matrimonial home (family residence) in joint tenancy, and so on the death of one spouse title will pass to the surviving spouse / surviving joint tenant by "simple" operation of law.
- In the *Registry* system, no specific notice or information needs be recorded on title until the surviving joint tenant wishes to sell or to transfer or to mortgage the property, but at such time there would be registered on title the appropriate proof of death and the statement confirming that the deceased and the surviving joint tenant were spouses of one another at the time of the death of the deceased.
- In the *Land Titles* system, the surviving joint tenant would customarily make a Survivorship Application sometime after the death of the first party, to have the name of the deceased owner deleted from the parcel register, leaving the surviving joint tenant as the sole registered owner of the property. Again, the proof of death would be registered or the fact of it stated on an electronic application (as a law statement completed by a lawyer) and confirmation provided that the two joint tenants were spouses of one another when the first joint tenant died.
- One reason for the "subject to spousal interest, if any" notations on the *Land Titles* converted titles is that very often, in prior *Registry* Deeds, no indication was given of the spousal status of the deceased person at the time of his or her death, and consequently it was not possible to determine whether the deceased was in fact married at all, married to the surviving joint tenant, or married to someone else entirely (ie: to someone <u>not</u> on title).

- **Right of Possession of the Non-Titled Spouse:** Section 26(2) of the *Family Law Act* provides that where a non-titled spouse is in actual occupation of the matrimonial home at the time of the death of the other spouse who held title, **<u>the non-titled spouse has a right to retain possession of the home for 60 days after the death of the other spouse, rent free.</u>** Accordingly, if there is a sale of the home with a closing within sixty days of the death and the non-titled spouse was living in the home at the time of death, the non-titled spouse <u>must consent to the transfer</u> or the title would be subject to spousal rights, at least for the duration of the 60 day period.
- **Right of Election By Surviving Spouse Under the *Family Law Act*:** Under Section 6 of the *Family Law Act*, a surviving spouse has a right to elect, within 6 months of the death of the other spouse, *either* to take under the Will of the deceased (in the case of an intestacy, under the *Succession Law Reform Act) or* to take his or her equalization entitlement under Section 5 of the *Family Law Act*. If the spouse elects to take equalization, the Act provides <u>that no *distribution* of the estate can be made until the election has been dealt with</u>. **<u>This does not prevent the sale of real property to a third party purchaser, for consideration, since the proceeds would merely be held pending distribution</u>**. Where there is a sale for consideration, to pay debts, no consent of any beneficiaries or spouse is required, whether there is a Will or on intestacy.

  However, some conveyances of property actually constitute a technical *distribution* of the estate, as in the case of the **conveyance of the real property where the stated purpose**

is to distribute to those beneficially entitled. In such a situation, the interests of the surviving spouse must be dealt with appropriately in the transfer, failing which the title could be marked as being subject to spousal rights.

****** Note** pursuant to the Fraudulent Conveyences Act:***

- ❖ In order for a spouse to qualify as a creditor intended to be protected from conveyances of property made with the intention of defeating the spouse's interest in the equalization of net family property, the spouse must have had an existing claim against the other spouse at the time the transfers were made. An example in the family law context where spouses are cohabiting is a spouse's right under 5(3) of the *Family Law Act* to challenge a transfer of assets as an improvident depletion of net family property and seek an equalization of net family property as though the spouses were separated with no reasonable prospect of resuming cohabitation
- ❖ The *Fraudulent Conveyances Act* states that *Family Law Act* does not specifically exclude the *Fraudulent Conveyances Act* as a means of determining the net family property of each spouse on the valuation date;
- ❖ A spouse cannot, via deliberate non-disclosure of the transfer of assets, deprive the other spouse of his or her ability to establish himself/herself as a creditor.

- **Transfer to Beneficiaries: Conveying to those beneficially entitled w/I 6 months of death of spouse:** A transfer within six months of the death must have either a Court Order authorizing the transfer *or* the surviving spouse must consent to the transfer. Where there is no Court Order authorizing the transfer, in addition to the spouse's consent, the consent of all beneficiaries must be obtained (Children's Lawyer to consent on behalf of minors and incompetents) as well as spousal statements for all consenting beneficiaries and an execution search against all beneficiaries. If the property is actually a matrimonial home of any beneficiary, the spouse of the beneficiary should *also* consent to the transfer. If any of the necessary spousal consents are not obtained, the title will be subject to spousal rights.

- Transfer to Beneficiary **After 6 months** from death of the spouse: a transfer *after six months* from the death must have either a court order authorizing the transfer *or* statements must be made in the transfer concerning the status of the spouse's election, if any, and the spouse may be required to consent to the transfer, depending upon what has or is occurring in respect of any such election. If the estate trustee confirms that no election has been made and no application under Part 1 of the *Family Law Act* has been received, the spouse remains a beneficiary under the Will (if he or she is so named) and accordingly consent of the spouse will still be required unless he or she is the beneficiary to whom the property is being transferred. If there is an application pending under Part 1 of the *Family Law Act,* the consent of the surviving spouse must be obtained for the transfer. If an election has been filed with the Court but no application under Part 1 of the *Family Law* Act is pending, the estate trustee will confirm what the election is (ie: an election to take under the *Family Law Act)* and it will then be known whether or not the spouse remains a beneficiary under the Will. If the spouse has opted for the *Family Law Act* benefits, he or she ceases to be a beneficiary under the deceased spouse's will and, accordingly, his or her consent to the transaction would no longer be required. However, as in any situation where there is a transfer to those beneficially entitled, the consent of all beneficiaries is needed, along with spousal statements for and execution searches

against the consenting beneficiaries.

- **Spouses of (Consenting) Beneficiaries**: As set out above, for certain transfers, the consent of beneficiaries is required. For instance, on a transfer to beneficiaries (to convey to those beneficially entitled), the consent of all beneficiaries is required (Children's Lawyers Office to provide consent for minors and incompetents) and spousal statements must be made for all consenting beneficiaries except for those for whom approval is given by the Children's Lawyer. If the property actually is a matrimonial home of any beneficiary, the spouse of that consenting beneficiary should also consent to the transaction.

- On an intestacy, where there is a transfer for consideration, in order to distribute proceeds to beneficiaries, the consent of beneficiaries having a 50% interest is required, along with spousal statements for all consenting beneficiaries, save for minors and incompetents for whom approval is given by the Children's Lawyers Office. Once again, if the particular property is an actual matrimonial home of one of the consenting beneficiaries, the spouse of that beneficiary should also consent to the transaction.

- **TESTACY- CONVEYANCING UNDER A WILL:** *It is important to remember that real property of the deceased CANNOT be transferred until it has been first registered in the name of either the estate trustee or in some other cases, to a beneficiary named in the will.
    - So how is title transferred from the deceased to the estate trustee or beneficiary named in the will? *Trust wills..

      In Registry System: First register on title, a certified/notarial copy of certificate of appointment of estate trustee with or without a will together w/ the prescribed statements and other documents required pursuant to s.53(1) of the *Registry Act.* This creates evidence on title as to death of owner and right of estate trustee or other entitled party to be registered as owner and is required b/f land can be conveyed to 3rd party.

      Land Title System by way of Transmission Application registered by Estate Trustee under *Land Titles Act*:

        - **Trust Will:** real property must be transferred from name of deceased to name of estate trustee (Transmission Application by estate trustee), which requires the following:
            - Name and date of death of owner;
            - One of the following:
                - ✓ Certificate of appointment or order confirming appointment of applicants as estate trustee, executor or administrator
                - ✓ Date and court file number of certificate or order or
                - ✓ Proof satisfactory to Director of Titles that value of estate less than 50K and;
                - ✓ All the following:
                    - Statement that land affected by application is not subject to the debts of deceased if that's the case

and;

- A statement that the applicant as estate trustee, executor, or administrator, as the case may be, is entitled by law to be registered at owner.

* Note that a transmission will not require a certificate of appointment for lands under land titles system if value of estate does not exceed $50K; or if the conveyance is the first dealing with real property of ANY value after its conversion from registry to land titles system, a certificate of appointment has not been applied for and certain other criteria are met. The rational for this second exception is that if province converted property to LTCQ, it could have been transferred w/o certificate of appointment. For example, if an estate's sole asset is a house worth $1M, and there have been no dealings with the land since its transfer to LTCQ system, then the estate trustee can register a transmission application w/o certificate of appointment and thereby save about $15K of estate admin tax.

- **NO NOT A TRUST WILL (ie where all bequests and other dispositions are made directly to the persons beneficially entitled):** where the will is not a trust will and the land is bequeathed to a specific beneficiary who wishes to take title to the land, to such beneficiary, a transmission application must be made by a beneficiary contain the following:
  - Name and proof of death of owner satisfactory to the land registrar; and
  - All of the following:
    - A statement by applicant that land is not subject to any spousal right under *FLA* w/respect to the deceased;
    - A statement that the land is not subject to debts of deceased if that's the case; and
    - A statement that the land has vested in the applicant

- What powers does estate trustee have to deal with such RP once it is registered in the estate trustee's name?

  - **<u>By way of a Power of Sale expressed in Will:</u>** Estate trustee can sell land w/o consent of any beneficiary and a purchaser acting in good faith for value w/o notice will take property free from debts, unless there is a specific bequest to a beneficiary, and in that case, a release (consent) will be required.
  - **<u>By way of a Power of Sale implied in Will- 2 Conditions:</u>**
    1) The land be devised to the estate trustee (that is the will is a trust will) and
    2) The land be charge w/payment. When a will charges a land w/ payment, implication is that land must be sold to raise money for the payment. In this case, a power of sale will normally be

implied. If there is an implied power of sale in a will and it contained a specific bequest of land, then as with express power, the release (consent) of person to whom the specific bequest was made must be obtained b/ estate trustee can sell to 3rd party.

- **By way of the Statutory Power of Sale Provisions in the *Estate Administration Act (ss.17)***

* **Automatic Vesting:** In certain situations, automatic vesting occurs pursuant to s. 9 of the *EAA,* where there is *(a)* no power of sale and *(b)* no devise to the estate trustee, real property vests by statutory authority 3 years after death of deceased. However, where (1) a will provides for an express or implied power of sale, or (2) there has been a conveyance to the estate trustee upon trust, vesting will not occur pursuant to s.9 since it would interfere with the estate trustee's rights under the will.

* **In an intestacy,** the authority under which an estate trustee may sell land is resolved by way of the automatic vesting rules under ss.17 of the *EAA.* In this case though, a certificate of appointment of estate trustee w/o a will from Ontario court must be obtained (no exceptions).

* **An estate has power to sell property of deceased for purpose of paying debts within 3 yrs of death of deceased w/o consent of beneficiaries** (or longer if a caution is registered) w/o consent of any beneficiaries, whether or not any of beneficiaries are minors, or mentally incapable. Under these circumstances, purchaser for value w/o notice will take title free of debts of deceased.

* If however, **the estate is being sold for the purpose of distributing it to the beneficiaries entitled**, then the concurrence of majority of beneficiaries representing together not less than 50% of all interests in the estate is required together w/ the approval of Children's lawyer on behalf of any minors, and the Public Guardian and trustee acting on behalf of a mentally incapable person who has no guardian and no attorney for property pursuant to a continuing power of attorney for property under the *Substitute Decisions Act*.

- **By way of Court Order under ss.17(5) of *EEA* :** order dividing or distributing estate among persons beneficially entitled can be applied for by personal representative BEFORE expiration of 3 years from death of deceased. A purchaser in good faith for value from a person beneficially entitled receives property free and clear of any debts of deceased owner.

* **Sales by persons beneficially entitled (*EEA)* Conveyancing:** Beneficiaries may convey property to 3rd persons provided no minors are involved where either:

- The real property has been conveyed to them by estate trustee;
- The real property has vested in them automatically (automatic vesting rules-i.e. after 3 years)

- When real property is conveyed to beneficiaries w/i 3-year period following death of deceased **w/o court order** and beneficiaries in turn have conveyed the real property to a purchaser in good faith and for value, purchaser takes property SUBJECT to debts of deceased. Liability of purchaser ends after 3-year period has expired unless proceedings have commenced and a certificate of pending litigation or caution has been registered a/ the RP. In contrast, if conveyance to beneficiaries was made pursuant to a court order, purchaser who obtains conveyance of the RP from the beneficiaries takes property free and clear from debts of deceased.
- If purchaser required to pay debts, purchaser has right to claim relief over against beneficiaries and in certain circumstances against the personal representative as well.
- When RP vests in beneficiary pursuant to s.9 of *EEA,* RP continues to be charged with debts of deceased owner so long as it remains vested in such person or in any person claiming under him/her not being purchaser in good faith for valuable consideration.

- For electronic conveyancing, see p.743
- Under the *Registry System,* make sure to include in Transfer/Deed, a schedule with all the following recitals:
  - date of death of deceased and interest of deceased in real property being conveyed;
  - registration particulars of certificate of appointment of estate trustee w/ or w/o will;
  - registration particulars of certificate for registration;
  - registration particulars of caution (if any) pursuant to s.9 of *EAA;*
  - spousal status of deceased at death; and
  - purpose of sale.

    *If sale is made for purpose of paying debts, no further recitals should normally be required. If purpose of sale is to distribute proceeds to beneficiaries, must include a list of all surviving heirs-at-law and next of kin, their relationship to deceased and specification as to any minors/mentally incompetent persons as well as consent and approval of Children's Lawyer and Public Guardian and Trustee (if minors and mentally incompetents are involved as beneficiaries); a statement of all debts to be paid and where there is a surviving spouse appropriate recitals regarding *FLA.*

CHAPTER 62: COTTAGE CONVEYANCING

N/A

CHAPTER 63: UNDERSTANDING NEW HOME AGREEMENT OF PURCHASE AND SALE

- Home construction industry regulated by the *Ontario New Home Warranties Plan Act (ONHWPA)* (i.e. applying to new homes).

- Two categories of new homes: (1) Homes subject to the *ONHWPA* regulations and; (2) Homes excluded from the protection and regulation of *ONHWPA.* Every new home is subject to *ONHWPA,* unless it falls within the exception that excludes it.
- When lawyer reviewed agreement for P&S (purchase and sale), and hopefully b/f agreement is firm and binding, the lawyer MUST read contract provisions carefully and explain them to the client.
- Definition "home" as self contained one-family dwelling, detached or attached to one or more others by common wall; building composed of more than one and not more than 2 self-contained, one-family swellings under one ownership; a condo, including the common elements; and any other dwelling of a class prescribed by regulations as home to which the Act applies.
- Definition of "new home" is then a home that has not been previously occupied.
- Definition of "vendor" is "a person who sells on his, her behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract w/the owner"
- So often times the vendor and builder will be the same individual for the purposes of the *ONHWP*.
- Builder excludes person who constructs home for his or her own use contracting out much of the work to various subcontractors and therefore that home is excluded from *ONHWPA.*
- New homes that do not qualify for *ONHWPA* protection are:

    - Condo conversions (i.e. existing building that has been rebuilt into condo units)
    - Previously occupied homes: new dealings that have been previously occupied by or rented to tenants by vendors, or possibly occupied by vendor
    - Owner-built homes: home where landowner rather than a contractor (1) exercises significant control over construction of a new dwelling or; (2) is responsible for contributing one or more essential elements to it. The owner has acted as his/her own general contractor, and purports to live in the house for even a limited amount of time. In such a case, there is "no builder" as defined under *ONHWPA,* and is therefore excluded from the warranty protection program.
    - Home built on existing foundations where foundation footings exceed 40%.
    - Modular homes: these homes are only subject to *ONHWPA* if assembled sections are placed on a permanent foundation that complies w/ Part 9 of the Building code and was installed by the same vendor as sold the home to the purchaser.
    - Mobile homes: only subject to the warranty again if placed on a permanent foundation and complies w/ Part 9 of the Building Code, and was installed by same vendor as sold the home to purchaser.
    - Seasonal homes: does not comply with part 9 of the building code and not build for yr-round occupancy and therefore does not enjoy warranty protection.

    * NOTE ON NON-COMPLIANT BUILDERS & VENDORS: the fact that a new home is built as part of a large project or is built singly or in small numbers says nothing about whether such a home is subject to *ONHWPA.* Some are and some aren't. Therefore a vendor must expressly state in the agreement of P&S that the home being sold and purchased does not qualify for warranty coverage. The purchaser & purchaser's solicitor should make sure that this representation is accurate and that the vendor is not trying to avoid responsibility. Sometimes as well, vendors and builders who fail to

register for TARION or enrol their homes in *ONHWPA* do not inform purchasers of their right to statutory warranty coverage. Sometimes, they will falsify information regarding the foundation of the new home to "prove" that the new home is not subject to *ONHWPA.* Solicitors for purchasers should check TARION records which can provide them with the information as to whether a new home builder is registered or not and can also verify lists of prosecuted builders and revoked licenses at TARION's website or by contacting TARION.

* In the case of a new home subject to *ONHWPA* that has not been registered w/ TARION, purchaser can before or after closing contacting TARION to maintain entitlement to TARION warranty. However sometimes this is not possible since by the time homeowner discovers that he/she qualifies for protection, part of the warranty period may have already passed. How to avoid this result? As the purchaser's solicitor, make the agreement of P&S conditional on the vendor producing documented proof of its registration with TARION along with the home's enrolment # before agreement registered b/f entering into agreement.

- The *ONHWPA* prohibits any person from acting as a vendor or builder unless the person is registered under *ONHWPA.* Therefore a vendor and a builder must first register home under w/*ONHWPA* before beginning to build a home. The typical builder's agreement of P&S will indicate the TARION enrolment # for the dwelling and the registration # as well as the telephone number of the vendor. These registration requirements for vendor, builder and home give TARION basis for regulation much of home construction industry.
- Under the Plan, there can be two scenarios: the builder is the owner and will be the vendor when property is sold; or builder is not owner, but builders at least one home and possibly hundreds, under a construction contract w/owner. *ONHWPA* considers builder to be vendor along with party who ultimately contracts as vendor to sell home. Therefore, vendor under the Plan includes both builder and vendor.
- For agreements entered into BEFORE 1 July 2008, the regulation required all sellers of new freehold homes to attach the TARION new home agreement of purchase and sale addendum or incorporate by reference, all agreements of purchase and sale made b/ that date
- TARION lists two types of vendors and builders: those who build homes under a huge construction project, such as a registered plan of subdivision or registered condo plan and; those who build homes one at a time or in smaller numbers. TARION however does not legally distinguish between the two types and both have the same duty to register accordingly.
- At closing, it is possible that the vendor is not registered owner of the land, in the case where the vendor is the builder but not the owner of the land, or the vendor may be the beneficial, but not legal owner of the land. In the case where the vendor is not the registered owner, the purchaser will want proof that the vendor will be able to convey the land to the purchaser when the transaction closes. At CML, vendor is bound, at very least, to prove that it is in a position to convey title on closing, failing which a claim for anticipatory breach of contract will arise. Purchaser should require at the outside a written acknowledgement by registered owner of land that the owner will convey registered title to purchaser when vendor is ready to close transaction.
    - It is very important to note that sometimes the agreement of P&S may also require purchaser to sign at closing an acknowledgement that the registered owner transferring title to purchaser is not the vendor and will have NO liability to purchaser whatsoever w/ respect to transaction. Purchaser will then have to rely solely on representations, warranties and covenants to title provided by the named

vendor in the agreement, rendering the vendor solely responsible for compliance w/*ONHWPA.*

- Where owner and vendor are different, usually an agreement btw the two in which owner will agree to convey title as instructed by vendor.

- Qualifying for First-Time Home Buyer Land Transfer Tax Rebate (Ministry of Finance): TO qualify for this rebate, purchaser of qualifying new home, home must be covered under TARION's *ONHWPA* warranty plan. This rebate provides a qualifying new home buyer w/ same rebate of land transfer tax that a first-time buyer of a resale home receives, but to obtain the rebate, must provide builder's TARION registration # on application. A purchaser's mortgagee will almost always rely contractually on lawyer to confirm TARION registrations.
- Flipping Homes: If you are wanting to purchase a home and flip it title before closing, solicitor should include in the agreement of P&S a condition precedent requiring consent of builder to such assignment w/I a few days and should also require reselling purchaser to pay all fees chargeable by builder for its consent.
- Subsection 52(1) of *Planning Act,* prohibits sale of land by reference to an unregistered plan of subdivision unless draft plan approval has been issued under s.51. *ONHWPA* requires vendor of new home to disclose current planning status at time agreement is entered into. The purchaser's solicitor should required, by way of condition precedent, written documentation from vendors verifying status of draft plan of subdivision.
- Deposits: (1) for freehold properties = $40,000 of the purchase price and (2) for condos=#20,000 of purchase price/ deposits placed in vendor's trust account pending completing or termination of agreement.

- **HARMONIZED SALES TAX 30 JUNE 2010**

* Ontario introduced HST consisting of two separate components: Federal GST of %5 and provinces Retail Sales Tax (RST) of 8%. As of 1 July 2010 = the sale of EVERY NEW HOME purchased in Ontario will be subject to HST.
    - **The first rebate program is the federal GST New Housing Rebate of 36%** of the GST payable at (%5) on first $300,000 of purchase price, with rebate declining between $350K and $450K. The rebate applies only to GST component of Ontario HST (ie only the %5)
    - The GST rebate is not available for homes worth $450,000 and up.
    - The second rebate program is the provincial HST New housing Rebate and applies only to the provincial RST (of %8) of total HST. The rebate consists of 75% of the 8% RST component. In other words, the rebate is 6% of the sale price of a new home. The Ontario rebate program applies to the first $400,000 of the sale price, and has a maximum amount of rebate of $24,000. If price of new home exceeds $400,000, the Ontario rebate is a flat rebate of $24,000.
        - EXAMPLE: If a new home costs $300,000 before HST, the total HST applicable at 13% will be $39,000: $15,000 represents the Federal GST at %5 (300,000 x 0.05) and $24,000 Provincial RST at 8% (300,000 x 0.08).

          Now apply the rebate:

          Provincial RST- 75% of RST component (0.75 x 24,000)= $18,000. The net RST portion is reduced from $18,000 to $6000.00 represented by the following formula = 0.75 x 24,000= $18,000 - $24,000 ($24,000

represents the provincial RST at 8% calculated above as 0.08 x $300,000).

Federal GST – 36% (0.36 x 15,000)= $5400. The net GST is represented reduced from $15,000 to $9,600 represented by the following formula =0.36 x 15,000 =$5400,00 -15,000 =$9,600.00

The Result? The new home agreement will price the agreement at $315, 600 inclusive or HST ($300,000 + the next taxes of $9600 [Federal GST] and 6,000 [Provincial RST]). The P&S agreement will state that if the purchaser does not qualify for the HST rebate, ten the $315,600 sale price will be adjusted at closing by adding to it the $5,400 and $18,000 rebate amount resulting in a final price of $339,000.

Land Transfer tax will be calculated on the $300,000.

TARION WARRANTY COVERAGE PERIODS *ONHWPA* [6.4, p. 771]	
CLAIM PERIOD AFTER DATE SPECIFIED IN CERTIFICATE OF COMPLETION AND POSSESSION (CCP)	**WHAT IS COVERED UNDER CLAIM?**
W/I **I** 1 YEAR	All claims or deficiencies relating to manner in which home was constructed, its fitness for habitation and breach of *Building Code.*
W/I **I** 2 YEARS	- Water penetration thru basement or foundation of home; - Defects in materials incl. windows, doors, and caulking rendering building envelope of hoe susceptible to water penetration; - Defects in electrical, plumbing and heating delivery & distribution systems of home; - Any defects in exterior cladding of home, resulting in detachment, displacement or physical deterioration; and - Violations of *Building Code* affecting health+safety of occupants, including and w/o limitation to those violations pertaining to fire safety, insulation, air and vapour barriers, ventilation, and heating and structural adequacy.
W/I **I** 7 YEARS	- Major structural defects, including- defect in work or materials that results in the failure of a load-bearing portion of any dwelling or adversely affects its load-bearing function or that materially and adversely affects use of such dwelling for purpose of which it was intended, including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure.
NOTE BIEN: ALL STATUTORY WARRANTIES APPLY DESPITE ANY AGREEMENT OR WAIVER TO THE CONTRARY (THEREFORE, PURCHASER AND VENDOR CANNOT CONTRACT OUT OF THESE STATUTORY WARRANTIES)!!	

Before taking possession, purchaser must execute confirmation of receipt of homeowner package, complete a pre-delivery inspection (PDI) and immediately after the PDI, complete and sign a certificate of completion of possession (CCP) together w/ vendor or its representative. If purchaser cannot personally attend the PDI w/vendor, then purchaser may appoint a designate by signing * delivering to vendor before the PDI, an "appointment of designate for pre-delivery inspection".

-Purchaser's warranty coverage begins on date of closing if possession is delivered at closing. In case of new condo units for which interim closing takes place, warranty coverage begins on date of taking possession.

-Purchaser must deliver 30-day statutory warranty form to TARION and vendor w/I first 30 days after warranty coverage begins, must list all outstanding or incomplete items. If the forms is received later than 30 days, TARION will not act on it, and purchaser will have to wait until 11 month after obtaining possession to submit a yr-end warranty form, in which case TARION will not again act on it and the purchaser will lose his/her right to warranty.

-**LASTLY (Regarding Substitutions of Materials):** If agreement of P&S allows purchaser to select items and vendor has made substitutions w/o purchasers consent (provided that selection of substitutions has been made within the time specified in the agreement), vendor must either change items back to original selection or offer purchaser a cash settlement instead. TARION entitles purchaser to the forgoing monetary compensation for the following substitutions it considers minor:

- Colour of pant (interior and exterior) but excludes any shading differences. Changes in colour must be a major change in colour and not merely a difference in shading
- Design and colour of cabinets and countertops
- Colour of Roofing
- Colour and type of kitchen and bathroom fixtures
- Style of Interior Trim
- Colour and Type of Floor
- Type of Windows

WHAT IS EXCLUDED (NOT COVERED) UNDER TARION'S *ONHWPA*?

- Defects in materials, design & work supplied by owner;
- Secondary damage caused by defects, i.e. property damage and personal injury;
- Normal wear and tear;
- Normal shrinkage of materials caused by drying after construction;
- Damage caused by dampness or condensation due to failure of purchaser to maintain adequate ventilation;
- Damage resulting from improper maintenance;
- Alteration, Deletion or Additions made by purchaser (owner);
- Subsidence of land around building or along utility lines, other than subsidence beneath footings of building;
- Damage resulting from an act of God;
- Damaged caused by insects, rodents, except where construction in contravention of *Code;*
- Damage caused by municipal services or other utilities; and
- Surface defects in work & materials specified and accepted in writing by owner as at the date of the CCP.

- **DELAYED OCCUPANCY/CLOSING WARRANTY:** Vendors/Builders can choose between firm and tentative dates for closing. Tentative dates must be converted into firm dates in accordance w/ the regulation. As of 1 July 2008, builders and vendors for each new home agreement of P&S, select one of the following forms of addendum:
    - Freehold firm closing date;
    - Freehold tentative closing date;
    - Condominium firm occupancy date; or
    - Condominium Tentative Occupancy Date
    - POTL (Parcel of Tied Land for condos after 2012) firm or tentative occupancy date

-Each addendum containing Delayed Occupancy or Closing Warranty consists of up to 4 parts:

1. Statement of critical dates, requiring vendors to *inter alia,* provide specific closing date and state whether date is firm or tentative.
2. Addendum itself containing definitions, early termination conditions, vendor's rights and obligations regarding extensions of closing dates, conditions of occupancy, delayed occupancy compensation, and termination of agreement of P&S.
3. Schedule "A" listing permitted early termination of agreement conditions.
4. If Required, a Schedule "B" (for agreements entered into on and after 1 October 2012, listing every closing adjustment the vendor proposes to charge)

DELAYED CLOSING OR OCCUPANCY WARRANTY: **DISCLOSURE TO PURCHASER REQUIREMENT**	
DATE OF AGREEMENT	**WHAT VENDOR NEEDS TO DISCLOSE TO PURCHASER**
BEFORE 1 JULY 2008	- Whether the plan of subdivision on which the dwelling was to be built has been registered (*compliance w/ planning act basically)*; - Whether a building permit for the home's construction was available for issuance by the municipality; - Terms and conditions in the agreement that entitled the vendor to terminate the agreement, regardless of whether purchaser was in default; - A condition of closing that any purchaser assuming a mortgage be approved by the mortgage lender designated by the vendor; - That interest rates payable on any mortgage been assumed or given on closing was subject to the increase; - The vendor's right to alter the plans and specifications of the swelling or to substitute materials, without notice; - That the purchase price could be increased by certain additional costs or charges; - That the purchaser was specifically advised to consult a lawyer before executing the agreement.

AFTER 1 JUL 2008 BUT B/F 1 OCT 2012	- Whether property is within a plan or proposed plan of subdivision (*basically, whether* it complies w/ *planning act or will comply, see next point)* - Whether plan of subdivision is registered or in draft form. Subsection 52(1) of the *Planning Act* prohibits sale of land unless plan of subdivision in question has at least received draft plan approval under s.51 of the *Planning Act.* - Whether vendor has received government confirmation and there is sufficient water supply and sewage capacity to service the property - Whether there has been a building permit issued for the property - Whether construction has begun, if not, when it is expected to begin - Early termination conditions precedent: Vendor is permitted to make a P&S agreement conditional upon receipt of various government approvals. These are true condition precedents in that they are for the benefit of both vendor and purchaser and cannot be waived by either party. Others, conditions financial in nature, may be waived by vendor.
ON/AND AFTER 1 OCT 2012	- Must include a new "Schedule B" listing every closing adjustment the vendor proposes to charge.

DELAYED CLOSING OR OCCUPANCY WARRANTY: **EXTENSIONS AND TERMINATIONS**		
DATE OF AGREEMENT	**RULE/NOTICES/TIME FOR EXTENSION/TERMINATION**	**STATUTORY ADDENDUM: YES/NO?**
B/F 1 JULY 2008	- 120 days: Automatic entitlement to extension by Vendor - Automatic Termination if exceed 120-day extension on purchaser 10-day notice: transaction would automatically be terminated if purchaser provides vendor w/ notice of termination w/i 10 days. - Automatic extension for additional 120 days if no notice is given to vendor by purchaser w/i 10 days: - Automatically terminated upon expiry of second extension period unless parties agree otherwise (so total of 240 days in extension time max, unless purchaser terminates earlier by providing notice after first extension period): Second Extension period expires 240 days after original closing date - If an Event (such as a strike, fire, flood, act of God or civil insurrection) occurs, the closing date will be further extended by the length of the delay period, but length of delay period does not count	- **NO**

	towards 120/240-day time period. - Purchasers can "crystallize the Delay Period" by making a formal request to vendor and to TARION to extend closing date as a result of an Event (to forestall approach of 240th day and automatic termination of transaction) - **As part of the 120/240 extension period including as well as the right to exempt delays by Event therefrom), vendor requiring an extension of the closing date of: o **15 days or more (so 15 more days to closing date):** vendor must provides 65 days' written notice to purchaser b/ the original schedule closing date to establish new/extended closing date with impunity o **Extension of less than 15 days:** vendor must provide 35 days written notice. - LIABILITY OF VENDOR: If agreement is terminated, and in accordance w/ the rules, the vendor may also be exposed to claim in damages if both of the following occur: 1. Home has not been completed by end of Initial Extension Period (120 days) where purchaser delivers notice of termination w/i 10 day Window or home is not completed by end of Second Extension Period (240 days) 2. There is evidence that vendor has not taken all reasonable steps to construct the house w/o delay.	
ON OR AFTER 1 JUL 2008 & B/F 1 OCTOBER 2012	- Closing date must be stipulated as: *Tentative* or *Firm* (i.e. addendum of freehold or condominium delayed closing warranty and statement of critical dates) - Limits builder's use of conditions that provide for early termination of agreement if builder decides not to proceed w/ construction - Provides for adequate notice of delays to purchasers - Compensates purchasers for excessive	**YES, MUST INCLUDE ADDENDUM- *Either Freehold Delayed Closing Warranty or Condominium Closing Warranty (2 Options-Firm OR Tentative)*** **1. FIRM Freehold/Condo Closing Date Option must include:** ▪ Specific Firm closing Date; ▪ Outside closing date (365 days

	delays; and - Sets an "outside closing date: after which purchaser has right to terminate agreement and to compensation.	after first closing date established) ▪ End of purchaser's termination period: end of 30-day period that purchaser has to terminate agreement if home is not ready by **outside closing date** **2. TENATIVE Freehold/Condo Closing Date Option must include (remember tentative dates must be converted to firm dates):** ▪ First Tentative Closing Date: Date of builder's original closing estimate ▪ Notice of Delay Beyond First Tentative Closing Day: 90 days b/f first tentative closing date. This is the last date by which notice of a further delay must be given. ▪ Second tentative closing date: a date 120-days after First Tentative Closing Date. The builder can UNILATERALLY extend closing to this second date W/O PENALTY. ****Tentative Dates must be converted to firm dates so the tentative option must also include firm dates as the following:** ▪ First Closing Date: A date after Second Tentative Closing Date. This is the maximum limitation on builder's ability to extend the closing w/o setting a Delayed Closing Date and w/o having to pay compensation to purchaser for delayed closing. ▪ Outside Closing Date: Date that is 365 days after Second Tentative Closing Date or Firm

		Closing Date- **whichever is earlier.** If house is STILL not finished and final closing does not take place by this outside date or firm closing date (whichever earlier) the purchasers may at their option terminate the agreement, receive a FULL REFUND, and claim delayed closing compensation ▪ End of Purchaser's Termination Period: End of 30-day period that purchaser has to terminate agreement if home not ready by OUTSIDE CLOSING DATE (If construction of a house is NOT completed by Outside Closing Date, purchaser may at its option terminate the agreement within 30 days after Outside Closing Date has passed. Purchaser receives full refund of all paid monies, plus delayed closing compensation of up to $150/day for a maximum total of $7500.00

CHAPTER 66: COMMERCIAL LEASING

- Commercial leasing incorporates 2 concepts: (1) contract negotiation and; (2) commercial transactions.
- Also commercial leasing is an area where two facets of law collide: (1) contract law and; (2) property law:
    - **On the property law side:** there are rights in a lease that run w/ the land such as the right of the landlord to collect rent, the right of the tenant to quiet enjoyment, and rights of assignment and sublease in favour of the tenant.
    - **On the contractual law side:** some lease covenants are contractual only and do not run with the land. These are typically special rights that have been negotiated by the tenant, such as expansion rights, rights to parking, tenant inducements, and exclusive-use rights.

- **Lease v License?**
    - A lease creates property rights that are defensible a/ third parties (such as a mortgagee).
    - A license is a contract that binds only the named parties and does not run with the land. The real property concepts available to leases do not apply to licenses.

Licenses are more appropriately given for granting rights for storage areas, kiosks in malls, and rooftop areas.

REQUIREMENT FOR VALID LEASE- 5 CERTAINTIES AS TO (6th depends on circumstances, but first 5 required):

1. **PARTIES**-landlord & tenant + guarantor & indemnifier;
2. **PREMISES**- to be leased (i.e. what type of unit it is, location etc)
3. **COMMENCEMENT**
4. **DURATION OF TERM:** Must be fixed or ascertainable.
5. **RENT FEES**
6. **ALL OTHER MATERIAL TERMS OF K** – not incidental to relation of landlord and tenant

> **Lease must be in Writing**

- Lease must be in writing as per *Statute of Frauds* but no particular form is required to be followed.
- A lease or agreement to lease not exceeding a term of 3 years where rent during term is at least 2/3rds of full improved value of the premise being lease is NOT subject to requirement to be in writing (the value is the rental value NOT the sale value)
- Past Performance can save writing requirement: past performance may save an agreement or lease that is not in writing. The requirements are that (1) acts are undertaken pursuant to a contract asserted and (2) the contract, had it been prepared in writing would have been enforceable; (3) there is proper evidence of the existence of the contract; and (4) denying recognition of acts of past performance would fraudulently enable the resiling party to take advantage of the fact that the contract was not in writing.
- Types of Leases – 3 Major Categories – By subject matter: (1) Industrial leases; (2) Office Leases and (3) Retail leases.
- How to measure rental areas? By using BOMA standards of measurement (see 3.1.4, p. 800)
- Leases by financial structure – most common financial structure is a NET lease where tenant pays base rent (also known as basic rent or minimum rent) and additional rent consisting of the cost involved in use & occupation of premise (reality taxes, landlord's insurance costs, common-area maintenance costs and utility costs). If it is as single tenanted building, some of these items may be direct responsibility of tenant w/ tenant having direct obligation to pay. In a multi-tenanted building, costs are generally incurred by the landlord and each tenant pays its proportionate share.

- **THE LEASE TRANSACTION PROCESS**

1. **THE PRELIMINARY DOCUMENT -** The lease transaction start with this document, such as a term sheet, letter of intent, or agreement to lease. It can be binding or non-binding. The most common type used is an offer to lease (usually binding and often conditional)**.**
    - The offer to lease or whatever is used as the preliminary document will need to deal w/ the 5 legal certainties of: parties, premise, commencement date, duration, rent fees and if applicable other material terms as necessary. It

should also set out process of getting to final lease document, such as having lease settled w/i a specific period of time failing to do so deal becomes null and void.

- The document will set out preliminary conditions and due diligence that either parties will want to waive or satisfy before proceeding further (such as zoning allowances, financial disclosure, investigation of landlord's title, financial ability of the tenant, etc)

2. **PRIORITY ISSUES AND NON-DISTURBANCE- OBTAINING A NON-DISTURBANCE AGREEMENT:** A tenant under a lease that has priority over a mortgage is bound by the lease, if the mortgagee enters into possession (that means, the tenant has a duty to continue paying rent and so forth). The mortgagee in possession must also honour the tenant's right to quiet enjoyment of the property, and cannot oust the tenant. However, a tenant under a lease that is subordinate to a mortgage (i.e. does not have priority over mortgagee) is not bound by the lease if mortgagee enters into possession, and accordingly, the tenant can vacate the premises rather than recognize the mortgagee as the tenant. Where the lease is subordinate to the mortgage, the mortgagee is similarly not bound by the lease and may evict the tenant. How to avoid this situation? By agreeing to a non-disturbance agreement and incorporate into the lease.
    - **A non-disturbance agreement typically provides that upon landlord's default under its mortgage, that the mortgagee will not terminate the lease or otherwise disturb tenant's occupation of the premises. In return, tenant agrees to "attorn" to mortgagee in these circumstances (i.e. promises to recognize the mortgagee as its landlord)**
    - If the solicitor for the lessee (tenant) does a subsearch on title and sees that there is a prior mortgage on title, he/she should seek instructions from client as to whether client wishes to obtain a non-disturbance agreement w/ the landlord's mortgagee.

3. **REGISTRATION OF LEASE ON TITLE- SEEK INSTRUCTIONS FROM CLIENT:** After executing lease agreement, lawyer should seek instructions from client as to whether client wishes to register lease or a notice or short-form thereof, on title to the applicable property.
    - If tenant does not register its lease = risks losing priority to subsequent purchasers, mortgagees and other 3rd parties having dealings w/ the property. This could result in purchaser, mortgagee, or other 3rd party refusing to recognize the lease, and consequently terminate the lease.
    - If tenant does not register lease, it may still be protected in terms of its priority rights against subsequent 3rd parties, since in Ontario, actual notice trumps the requirement of registration. What this means is that subsequent 3rd parties are bound to unregistered leases if they have actual notice- actual notice inferred where 3rd party is provided w/ copy of lease, or is provided with an estoppel certificate containing details of lease. Also, under the *Registry Act (*i.e. registry system) a lease of property does not have to be registered to bind 3rd parties where lease has a term not exceeding 7 years and where actual possession goes along w/ lease. Under the *Land Titles Act (i.e. land titles system)*, a property is deemed encumbered by an unregistered lease if lease has period yet to run that does not exceed 3 years and if there is actual occupation under lease.

- Most commercial leases prohibit registration of lease itself but permit tenant to register a notice or short-form of lease. The short-form should include: 1. Names of parties; 2. Length of term; 3. Rights to extend or renew term; and 4. Details as to rights to purchase.

Form of Landlord Security for Payment of Rent:

1. Collection of prepaid rent (first and last)
2. Security Deposit- here it is important to remember that if a lease is disclaimed or repudiated pursuant to the *Bankruptcy and Insolvency Act,* the courts have held that a trustee-in-bankruptcy may not seek a return of pre-paid rent that has yet to be applied but can seek return of security deposit. Accordingly, in order to avoid having to return security deposits in face of bankruptcy, landlords will opt to collect rent on first and last month of the term and expressly reserve right to re-apply funds towards a tenant default if occurs prior to the last month of the term
3. A Guarantee or Indemnity
4. Letters of Credit – as a means of securing performance of tenant's obligation under the lease
5. Personal Property Security interest – landlords may require a PPSA interest against tenant's personal property located on the premises, or, in some cases, against all of the tenant's personal property wherever it may be located. Prior to granting any such security, the tenant should ensure that the grant will not conflict with the tenant's existing credit agreements w/its bank and other third party creditors.

Remedies for Landlords resulting from tenant defaults – two types:
1. Monetary Default: when tenant fails to pay any instalments of rent or other amount due to landlord under lease. The statutory curing period of default where lease is silent on this matter is 15 days, following which a landlord can terminate the lease if rent has been outstanding for more than that period of 15 days;
2. Non-monetary default: failure to perform lease obligation- (making a required repair or conducting business on premises in violation of permitted-use clause, etc)- Notice and cure period is 10 days-prior to exercising its right to terminate, the landlord must provide written notice of non-monetary default and reasonable amount of time to correct it. This statutory provision of the *Commercial Tenancies Act* cannot be contracted out of. This right does not affect the landlord's right to other remedies.

If landlord seeks to keep the lease (i.e. not terminate it), can use other remedies such as distraining, commencing court proceedings for recovery of damages, seeking an injunction or order for specific performance. The landlord can also use distress (self-help remedy) to seize and sell goods of tenant upon leased premises to satisfy any existing rental arrears. Distress is only available where both a default in the payment of rent and the landlord-tenant relationship (distress cannot be used after lease has been terminated)

If landlord uses distress, 3rd party claims may take priority over the goods of the tenant. This is why following execution of distress rights, landlord must provide tenant with proper notice to the tenant. Also before the seized goods may be sold, landlord must wait 5 clear days to give the tenant an opportunity to pay the arrears and landlord's costs. The *Act* also requires the landlord to obtain 2 independent appraisals before the landlord may sell the tenant's goods.

How can a landlord terminate the lease? By providing a written notice of termination to the tenant or a writ for possession under the *Commercial Tenancies Act.*

Tenant Remedies in case of Landlord Default? Tenant could claim: Damages, Equitable relief such as specific performance of injunction pursued by way of an action or application for breach of contract.

CHAPTER 67: CONSTRUCTION LIENS

The protection provided by the *Construction Liens Act* to general contractors and sub-contractors operates by way of 3 statutory mechanisms:

1. THE TRUST – designed to prevent outside parties such as secured creditors from intercepting funds intended for payment of materials and services supplied to the improvement. The trust also operates to prevent the recipient of funds from appropriating those funds to the recipient's own use, thereby depriving those lower on the period of payment
2. HOLDBACK: Creates a minimal insurance to those on the period, ensuring that even in the event of default, insolvency, or bankruptcy by those higher on the period, they will receive at least a portion of the balance outstanding. The hold-back is the most effective method of insurance for sub-contractors, who unlike general contractors akin to secured creditors, have a priority lien claim against other creditors of the owner w/ respect to the property that is being improved by the general contractor's efforts and certain rights to enforce lien by way of sale of the property in the even that the owner fails to pay. In other words, unlike the general contractor, the subcontractor have no privity of contract with the owner. So if it weren't for the *CLA* statutory holdback mechanism, subcontractors would have no way of enforcing their security or to obtain security a/ the owner's land because they have no direct dealing w/ the owner. The holdback is 10% of the value of the work done and will be held until released to the contractor on the expiry of the lien rights. Once the general contractor receives its payment, it will in turn pay the subtrades while retaining a similar holdback. Now, there is also the mechanism of a notice holdback for subcontractors, which is a statutory mechanism in addition to the holdback requiring every payor (general contractor, subcontractor, sub-subcontractor, etc..) to retain an additional 10% of the value of work done in ADDITION to the 10% statutory holdback. This is achieved when a party lower in the chain gives the payor written notice. Once delivered to the contractor higher up in the chain (usually the general contactor, the owner and the mortgagee), the Owner, whether or not the subcontractor preserved his/her lien by registration, would be required to hold back from the General Contractor the notice holdback (basically that would be 20% of the value of the work will be withheld -10% for the general statutory hold back mechanism + the notice holdback). The notice holdback does not belong to the lien claimant who served the notice however, the amount of money comprising the holdback a/ which all lien claimants may claim has grown by the amount of the lien of the claimant who gave its notice.

3. THE LIEN: Two types- 1) Contractor's lien: priority over creditors of the owner w/ respect to property that is being improved by general contractor's efforts; and certain rights to enforce lien by way of sale of property in event owner fails to pay. General contractor does not need to take any step in order to obtain its lien-the right arises as soon as the work on the contract commences. However, the requirement to register the contactor's lien-or any construction lien-is merely to preserve the lien, so it is best to register it to ensure proper preservation to maintain the lien. The general contractor is entitled to recover from land and the owner the full amount of the lien. This is because of the direct contractual relationship w/ the owner so the holdback would not necessarily apply here (it becomes irrelevant) for the general contractor but relevant for the position of subtrades

and subcontractors; 2) The General Lien: Attaches to each of the sites or lots equally for the full extent of the monies that are owed. There are 4 requirements for registration of general lien:

- There must be common ownership of the properties
- There must be a single contract for work to be done on the properties
- There must have been supply by lien claimant under a single K
- The contract must not provide that lien rights arise on a lot-by-lot basis

- If a general lien is improperly registered when no right to a general lien exists, **all lien rights will be lost**
- When there are competing lien priorities, general liens rank w/other liens of the same class to full extent of the general lien, divided by the # of premises to which the person supplied those services or materials. The balance of the general lien ranks next in priority to all other general liens registered a/ the premises, whether or not of the same class.

How to preserve lien and perfect it?

TWO DEADLINES:

1) PRESERVATION OF A LIEN – 45 DAYS, the date by which a registration must be made a/ the land where the work was done or the materials or services were provided (or a notice of lien served in the case of Crown land). A lien may be preserved during the supply of services or materials or at any times b/ it expires:

- Where the lien **attaches to the premises**, it may preserved by registration of a claim for a lien on title of the premises with **the proper land registry office** w/I 45 days from date of the contractor's last supply of materials or services.

- Where the lien **does not attach to the premises** (i.e. in case of Crown land-where Crown is owner of premises w/i meaning of *CLA* or where premises is a public street or highway owned by the municipality or a railway right-of-way, the lien does not attach but **constitute a first charge** resulting the provisions of the *CLA* having effect w/o need for registration of a claim for lien a/ premises
- Where claim for lien is in respect of a public street or highway owned by the municipality, the copy of the claim for the lien and an affidavit must be given to clerk of the municipality.

2) PERFECTION OF LIEN – 90 days – by which an action must have been commenced and a certificate of action issued and registered against property (or in case of Crown land solely the date by which an action must have been commenced). A lien must be preserved w/i 45 days of the designated date, while the lien must be perfected w/90 days.

- For difference btw normal action and *CLA* action see p. 817 (top left)

FOR PRIORITY OVER MORTGAGES SEE P.818 (13)

- What is important for priorities in *CLA* to remember is if the mortgage is a building mortgage (ie a mortgage obtained to secure financing of an improvement) then it will be subordinate in priority to liens claims to the extent

of any deficiencies in the holdbacks required to be retained by the owner under the *CLA*

- **A PRIOR mortgage (building mortgage) HAS priority over liens arising from the improvement to the extent of the LESSER of the actual value of the premises** at the time the first lien arose and the total amounts advanced prior to that time under the mortgage.
- **A non-building mortgage PRIOR mortgage (a mortgage that was registered prior to the time the first lien arose) has priority over claims to the extend of the advance, provided that:** (a) at the time when the advance of funds was made, no preserved or perfected lien existed a/ the premises; and (b) prior to the time when the advanced was made, the person making the advance had not received written notice of lien.
- **A lien claimant will have priority over a subsequent mortgage (building mortgage)** registered after the first lien arose to the extent of the deficiency in the holdbacks required to be retained by the owner where it is established that the mortgage was: **registered AFTER the first work was done or the first materials were supplied the improvement.**

CHAPTER 68: ABORIGINAL PROPERTY ISSUES

- Any action by federal or provincial governments that interferes w/ or restricts existing Aboriginal rights or treaty rights of an Aboriginal person or group infringes those rights.
- To infringe this right, there must be justification for it as set out in s. 35 of the *Constitution Act* and as per *Delgumuukw v B.C.* The infringement may be justified if:
    1. **For furtherance of legislative objective that is "compelling and substantial":** Reconciliation of prior occupation- if objective can be traced to the "reconciliation of prior occupation of North America by aboriginal peoples with assertions of Crown sovereignty.

    2. **Fiduciary Relationship- Whether infringement is consistent with the special fiduciary relationship between the Crown and the Aboriginal peoples**: If the government can show both that the process by which it allocated the resource and actual location of the resource which results from that process, reflect the prior interest of the holders of Aboriginal title in the land. This could mean that the government will need to accommodate the participation of aboriginal peoples in, for example, the development of resources in Aboriginal title areas, conferral of fee simple for agriculture, issuance of leases and licenses for forestry and mining. The aspects of Aboriginal title and government's fiduciary duty to aboriginal peoples also mandate, at a bare minimum, the duty to engage in good faith consultation and the requirement of full consent. Where title is infringed even where justification warrants infringement, compensation will ordinarily be required

APPLICATION OF PROVINCIAL LAWS ON RESERVE LAND	
APPLICABLE: general laws of application	NON-APPLICABLE
Seizure legislation (criminal purposes of investigation), except to extent that calls upon seizure of property that is exempt according to s. 89 of the *Indian Act.* [NB: Also s. 29 of *Indian Act,* exempts all reserve lands from seizure under legal process].	Landlord-tenant legislation
Some hunting & fishing legislation except where it conflicts w/ *Indian Act*, band by-laws and Aboriginal and/or treaty rights;	Provincial legislation dealing w/ prescriptive rights to property and dedication of roads
Occupiers' liability legislation	Portions of hunting & fishing legislation
	Provincial laws tending to encroach upon water rights attached to reserve lands

- Absolute Surrender of Aboriginal Land- 3 step process- 1) Must be made to Her Majesty; 2) must be assented by a majority of electors of band; 3) must be accepted by Governor-in-Council.
- Designations of Aboriginal Lands- 3 step process- 1) made to Her Majesty; 2) assented by majority of electors of band; 3) recommended by Minister of Indian Affairs and Northern Development by the council of the band and 4) accepted by the Minister

    * The effect of surrender or designation is to confer all rights that are necessary to enable Crown to carry out terms of surrender or designation. When surrender is made to Crown, Crown is bound by fiduciary duty to deal w/ the land in the best interests of the First Nation.

CHAPTER 69: FRAUD IN REAL ESTATE TRANSACTIONS

N/A