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Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

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Agreement of Purchase and Sale

In General

The vendor by listing a house for sale is merely indicating to people that she or he is willing to entertain offers – an invitation to treat. Real Estate law is basically a form of contract law. Any contract that deals with land must be made in writing as per the requirement at section 4 of the *Statute of Frauds*: Any interest in land cannot be granted or transferred unless it is in writing.

Elements of the Written Transaction

The transaction may be represented in any form, but it must have some very basic elements in order to be upheld by the court to be a contract for the sale of land. There are six essential elements in a contract for land:

1. Who is the purchaser or who is offering to buy;
2. Who is the seller or the vendor;
3. Description of the property being sold;
4. Price;
5. Deposit amount;
6. When the transaction is going to be complete (closing date)

Vendors and Purchasers Act

This Act covers a number of different subjects that deal with transactions, deemed clauses, and deemed provisions of a contract.

Section 4 – deems certain provisions to be included in an agreement of purchase and sale. Consider the following examples:

1. The vendor is not bound to produce any abstract of title unless it is in its possession;
2. The purchaser has to search the title at its own expense within 30 days of the contract being binding. The purchaser must make objections within that time period;
3. The vendor has 30 days to clear up any objections made by the purchaser;
4. Taxes, local improvement rates, insurance premiums, rent, mortgage interest etc., are all adjusted on the date of closing; and,
5. It is assumed that the vendor will prepare all of the documents for the conveyance and the purchaser will pay for it. However, in the case of a mortgage the vendor pays for the mortgage registration unless the offer specified otherwise

Most contracts have conditions on them. All conditions must be removed before the contract is binding.

The "OREA" Form

The Agreement of Purchase and Sale dictates the special parameters by which the real estate transaction obtains its uniqueness. Every real estate board in the Province has adopted the Ontario Real Estate Association (OREA) form of agreement. The OREA form of agreement has 36 particular components each dealing with a specific aspect of the transaction.

Provisions and Clauses of the General Form

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1. Parties to the Contract

The parties to the contract are the buyer and the seller. Whoever signs as a buyer may ultimately become liable for a buyer's breach of contract. If a buyer wishes that title be held in the name of a corporation and the corporate entity refuses to complete the transaction, then the original buyer may be responsible for any damages that the seller has incurred – section 21 of the *Ontario Business Corporations Act*. It is extremely important to correctly identify the seller. If, for example, only one of two registered owners executes the agreement, then the buyer may ultimately only obtain on the interest of that seller. Where the seller in the Agreement is not the registered owner, it is important to identify that the seller in the transaction is selling other than as the registered owner.

2. Real Property

The municipal address is the first component. Then identify which side of the street the property is located by using one of the four compass directions. The municipality and region, county or district in which the property is located follows this.

The dimensions of the property must be identified – accuracy is imperative. Some descriptions include the terms *'more or less'* – as the property becomes more expensive the term becomes less forgiving. In instances where dimensions are important ensure that they are appropriately addressed. Referring to and attaching a survey identifying the property and its dimensions is one method for attaining accuracy. Finally, there is a space to provide a brief legal description of the property – this will include such items as lot and plan or lot and concession. The legal description position suits reference to mutual driveways or private driveways. It is also necessary to set out any easements that the property is subject to because easements are a limitation upon the owner's right to use the property. If not noted, the buyer may validly complain (*Charette* v. *Provenzano*)

Wilson Lumber Co v. *Simpson* (1910) HC - Where the term more or less is used in the description of lot size it will relieve the parties of liability in the case of deficiency or surplus unless the difference is so great so as to point to fraud or gross mistake.

3. The Price

The price should be set out accurately and the words and number ought to coincide.

4. The Deposit

The amount of the deposit will vary. The seller will want to see the largest amount possible to deter the buyer from default. The buyer will desire the smallest amount possible. There are two alternatives in the OREA form:

1. Have the deposit presented with the offer; and,
2. Have the deposit paid upon acceptance

In most instances the deposit is paid to the listing broker.

5. The White Space

The white space is preceded by the words, "the buyer agrees to pay the balance as follows". This is the space where it is appropriate to set out the terms of payment. If there is a seller take back mortgage (or vendor take back) this clause would be preceded by a paragraph specifying such. At the bottom of the white space is a statement regarding any schedules appended to the agreement. These schedules are

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likely to include tailored conditions to the agreement. In drafting conditions, it is imperative that the wording be correct. For a condition to be effective there are a number of different elements required:

1. The time frame must be clear;
2. Define the terms of the condition clearly;
3. Provide for a means of notice for fulfillment, waiver or non-fulfillment of the condition;
4. Ensure that if the condition is not met that the deposit is to be returned to the buyer; and,
5. Make provisions for a waiver in circumstances where the condition has not been met but the party for whose benefit the condition was inserted has agreed to continue with the transaction

6. Fixtures and Chattels (Clauses 1 and 2)

The OREA agreement has made the chattels and fixtures issue much simpler. The rule is simple: if it is a fixture it must stay unless specified to be excluded and a chattel will not be present unless specified to be included. The rule to follow is 'when in doubt spell it out'. As a buyer's solicitor, it might be appropriate to provide for a warranty in the Agreement as to the 'good working order' of the chattels on closing.

7. Rental Items (Clause 3)

If a rental item is not mentioned in this section, the buyer may believe that they will become owners of these items when such is not the case. The most common rental items include a hot water tank, furnace and equipment, water softeners and the like.

8. Irrevocable Date (Clause 4)

Since the offer is stated to be irrevocable, the offeror cannot withdraw the offer until the expiration of the time period, with the proviso that the offeror received some consideration for that irrevocable promise. The simplest method of providing consideration is to have the buyer sign under seal.

9. Closing Date and Vacant Possession (Clause 5)

The closing date of the agreement should be specified as the completion date. There has been some ongoing dispute as to when vacant possession must be delivered to a buyer. Upon completion, vacant possession is to be provided unless otherwise provided in the Agreement. Any tenancy to be assumed by the buyer would have to be specified.

10. Notices (Clause 6)

This clause authorizes the Listing Broker to give and receive notice on behalf of the seller. Notice to the parties may also be given by delivery to the address of service provided. This specific address is located at the end of the form.

11. Goods and Services Tax (Clause 7)

In this clause there is a blank space provided which is to be completed by inserting either 'included in' or 'in addition to'. In most residential resale transactions, this blank will be complete with 'included in' but it is important to be correct.

12. Time for Searches (Clause 8)

A requisition must identify a specific problem or deficiency with respect to the property and should outline a corrective action. If the contract fails to provides a specific time period for submitting

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requisitions, section 4 of the *Vendors and Purchasers Act* prescribes a 30-day period from the date of the contract. If a requisition is submitted within the requisition period in the offer, the Seller's inability to properly answer it may enable a buyer to repudiate the contract, or to close the transaction and claim abatement in the Purchase Price. Clause 8 provides two time periods for searches:

1. The requisition date – the buyer and buyer's solicitor shall be given this time to examine title and submit any requisition revealed by the title search by the requisition date;
2. Secondary search – this time period is for a maximum of 30 days after the requisition date but not more than five days prior to the completion date. The purpose is to search for work orders, to determine if the use of the property as set out may be lawfully continued and finally to inquire whether the principal building may be insured against the risk of fire.

In this regard, it is imperative to accurately identify what use the buyer expects when the transaction is completed.

13. Future Use (Clause 9)

This provision restricts any intentions of the buyer with respect to future use of the property to those set out in the Agreement. If the buyer is contemplating a use different from that set out in the use permitted, then it is incumbent upon the Buyer's solicitor to make the agreement conditional upon being able to obtain permission for the change of use or being able to determine that the current zoning will permit this use.

14. Annulment (Title) (Clause 10)

The seller is to provide a title that is good. It is also to be free from all registered restrictions, charges, liens and encumbrances except those listed in subparagraphs (a) to (d):

1. Subparagraph (a) – any registered restrictions or covenants that run with the land provided such are complied with;
2. Subparagraph (b) – the buyer accepts and municipal and utility agreements without complaint provided that the agreements have been complied with and sufficient security has been posted to ensure compliance;
3. Subparagraph (c) – the buyer must accept the property subject to any minor domestic utility or telephone easements; and,
4. Subparagraph (d) – the buyer must accept any storm, drainage etc., easements provided that they do not materially affect the use of the property.

The seller's solicitor should disclose any easements that would be of any significance and outside the parameters of subparagraph (c). It might be difficult to determine if an easement materially affected the use of the property. Both parties must act reasonably and in good faith in completing their obligations under the agreement. If the seller will be required to spend large sums of money to correct a problem, then the seller may rely on the 'annulment' clause to terminate the agreement.

15. Closing Arrangements (Clause 11)

This provision is meant to set out the general parameters surrounding the completion of a transaction. It is an acknowledgment and agreement by the parties to the fact that transfer of funds and registration of documentation may not take place contemporaneously. It acknowledges that there will be an agreement between the respective lawyers regarding the closing of the transaction.

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16. Discharges and the Production of Documentation (Clause 12)

The seller is to provide the buyer with title documentation in the seller's possession. Upon request, the seller is to supply any sketch of plan of survey in the seller's possession. Because a survey may be old and inaccurate, the buyer's solicitor may add a paragraph requiring the provision of a new survey. If there is an outstanding mortgage that will not be assumed by the buyer, then a discharge will not have to be provided so long as the seller delivers a mortgage statement, directs funds to pay the mortgage in accordance with the statement, and provides a Seller's Solicitor's Undertaking to obtain and register a discharge. Mortgages outside of those listed will have to be discharged on closing.

17. Inspection Clause (Clause 13)

The first part is an acknowledgment that the buyer has had the opportunity to inspect the property prior to submitting the offer. This first inspection is intended to limit any subsequent objection based on deficiencies that would have been patently visible on a physical inspection. The second part is an acknowledgment by the buyer that once accepted by the seller, the offer will become a binding contract. The buyer's solicitor should add a clause to the offer that allows the buyer a reasonable opportunity to inspect the property on one or more occasions.

18. Insurance and Risk of Loss (Clause 14)

At common law the seller was held to be a trustee holding the property for the buyer. As such, the buyer become responsible for any damage that has occurred in the ensuing period. This provision in the agreement is to transfer the risk to the seller and to impose the obligation to maintain insurance policies.

19. Compliance with the Planning Act (Clause 15)

An agreement does not create or convey any interest in land unless it is entered into subject to compliance with the *Planning Act*.

20. Preparation of Documents (Clause 16)

The transfer/deed is prepared at the seller's expense. The buyer is responsible for the Land Transfer Tax Affidavit and any mortgages given bank on closing.

21. Residency and Tax Implications (Clause 17)

Because the *Income Tax Act* (section 116) imposes potential tax liability upon a non-resident seller, the buyer is obligated to make reasonable inquiries as to the residency of the seller. There are three ways:

1. The buyer may withhold the amount of money for which s/he would be liable should the seller not pay;
2. The seller may provide the buyer with a certificate from Revenue Canada; or,
3. The seller may provide a statutory declaration stating that the seller is not a non-resident

22. Adjustments (Clause 18)

There are a number of monetary items that have come to be considered 'usual adjustments'. These are set out in this provision. Included are rents, mortgage interest, realty taxes, unmetered utility charges etc., The seller is responsible up to the day before completion. The buyer assumes responsibility on and from the day of completion.

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Suppose the taxes are $1200 per year and the closing day is on day 227 of the year. The vendor would pay taxes for the first 226 days of the year and the purchaser would pay for the remaining days. The vendor, therefore, would pay $743 and the purchaser would owe a balance of $457 in taxes.

23. Time Limits (Clause 19)

The dates and times for completing all matters set out in the agreement must be strictly adhered to. If one party defaults, the non-defaulting party may be able to pursue damages if he or she is able to demonstrate that he or she was ready, will and able to complete the transaction in accordance with the terms of the Agreement at the appropriate date and time.

24. Tender (Clause 20)

In order to pursue and remedies the respective parties must be able to demonstrate they were ready, willing, and able to complete as required under the terms of the agreement. Evidence of this 'ready, willing and able' capacity is demonstrated by delivery and presentation upon the other party of all documentation required. In the seller's case, this will also require keys. This paragraph permits the tender to be not only on the party but also on that party's lawyer. It also sets out acceptable methods of payment (ie cash or certified cheque etc.,).

25. Spousal Consent (Clause 21)

Generally, it is necessary for the non-owner spouse to consent to the sale of the matrimonial home as defined in the *Family Law Act*. This provision in the Agreement is in the form of a warranty. The seller warrants that if consent is necessary it will be found executed at the 'spousal consent' section.

26. Urea Formaldehyde Foam Insulation Warranty (UFFI) (Clause 26)

This warranty is two-tiered:

1. Warranty by the seller that the seller has not insulated the premises with UFFI during the time that the seller was the owner; and,
2. A warranty that to the best of the seller's knowledge there is no UFFI in the buildings

27. Consumer Reports (Clause 23)

This clause is notification in accordance with the *Consumer Reporting Act* that a consumer report may be obtained or relied upon in the course of the transaction. This would occur where there was a mortgage taken back by the seller and the seller wanted to review the creditworthiness of the buyer/mortgagor as a condition of taking back the mortgage.

28. Agency (Clause 24)

There are three types of relationships that may occur in a transfer:

1. Where there is a listing broker representing the seller and the buyer is not represented in an agency relationship;
2. Where the seller is represented by an agent and the buyer is represented by a different agent pursuant to a buyer agency; and,
3. Where the seller and buyer each have an agency relationship with the same agent

Each of the different arrangements imposes different obligations and responsibilities upon the respective agents.

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29. Entire Agreement in Writing (Clause 25)

The agreement, including and schedules, is the complete agreement. Any representation, warranty or condition stated that are not in the agreement do not constitute part of the agreement. This is the four-corners provision – the agreement is only that which is found within the four corners of the document.

30. Successors and Assigns (Clause 26)

The purpose of this clause is to have an enforceable contract even though one or more of the parties are deceased.

31. Agreement and Instruction

The first part contains the buyer's signature, which is to be dated and witnessed. The second part is the seller's statement of agreement to the above stated offer. Where the deposit is insufficient to cover the listing broker's commission, the seller irrevocably instructs his/her solicitor to pay any unpaid balance from the sale proceeds to the listing broker before any payment is made to the seller. Where the seller has executed under seal, the irrevocable instruction is binding upon the solicitor and non-compliance will result in liability.

32. Spousal Consent

Where spousal consent is necessary, the spouse would sign beside the seal.

33. Confirmation of Execution

34. Confirmation of Representation

35. Acknowledgment

The purpose of this section is to obtain acknowledgment from the parties that they have received an originally signed copy of the Agreement, as required under the *Real Estate and Business Brokers Act*. The lawyers for the parties are identified with their addressed, telephone and fax numbers.

36. Commission Trust Agreement

Conditions

That party may waive a condition that is inserted for his/her sole benefit of one party. However, note that there are different types of conditions. Normally, a true condition precedent cannot be waived. There are two types of condition precedent to consider:

1. Condition that has to be performed before the contract even exists – if that condition is not fulfilled there is no contract period;
2. Condition that has to be performed before a duty of performance by either party arises – you may have a binding contract subject to conditions, these conditions would allow non-performance in the event that the condition is not met:
    (i) *Financing* – Conditional upon financing (getting a mortgage approved), which may include a cap on interest; or

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(ii) *Property to Sell* – Conditional upon the purchaser selling their present house – the vendor should be protected by providing a clause that the vendor can still offer the house for sale provided that she or he gives the conditional purchaser notice of any new offer

Validity of Waiver

Turney v. Zhelka (1959) SCC

Facts	Holding	Ratio
○ Contract was subject to the town's subdivision approval ○ Neither party undertook to fulfill clause ○ Purchaser made attempts, wants to waive the condition and sue to ensure the contract is performed	○ Condition is dependent upon actions of a 3rd party ○ Until the external condition is met, it cannot be waived ○ A party can only waive a promised advantage inserted for his own benefit	○ A true condition precedent may not be unilaterally waived

Beauchamp v. Beauchamp

Facts	Holding	Ratio
○ Purchase of land was subject to the purchaser able to arrange financing, otherwise purchaser can get out ○ Purchaser wishes to waive the clause outlining the financing required to be undertaken	○ Because the clause is for the exclusive advantage of the purchaser, the vendor's only interest is in ensuring that he will get his money – which ought to be gotten regardless of the method of financing	○ A condition inserted for the sole benefit of one party may be waived by that party

Barnett v. Harrison (1976) SCC

Facts	Holding	Ratio
○ Purchaser wanted to buy land upon which to put a number of apartments ○ The purchase was subject to zoning approval and the land being serviced ○ This approval was not gotten by closing date and the purchaser wanted to waive the condition	○ The court held that the purchaser did not have the right to unilaterally waive the condition ○ There were a number of conditions ○ The right to waive will depend on whether it is a true condition precedent or a condition inserted for the sole benefit of	○ Majority – applied Turney and held that the condition precedent is not sever-able from the contract ○ Dissent – the clause was for the sole benefit of the purchaser, who should have been able to waive it unilaterally

In the absence of a clause indicating that the condition is inserted for the 'sole benefit of' it will be considered a true condition precedent and it cannot be waived. The parties must take all reasonable efforts to satisfy the condition. If all reasonable efforts are not taken, then the party cannot rely upon the condition in order to get out of the contract.

Metro Trust Co. v. Pressure Concrete Services

Facts	Holding	Ratio
○ Defendant vendor is required to secure the consent of another mortgagee – no consent, no contract	○ The consent of the mortgagee was a true condition precedent ○ Vendor did not use best effort ○ Purchaser entitled to damages	○ In a true condition precedent the party obligated to fulfill the obligation must use best efforts to do so

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Marleau v. Savage (1998) ON Gen. Div.

Facts	Holding
o Not Done	o The court will consider: (i) The circumstances surrounding the deal (ii) The reasonableness of the parties that are to comply with the condition (iii) The reasonableness of the position of the parties throughout the dealings

Drafting Conditions

When you are drafting conditions in the offer to purchase you must be careful to ensure that the condition covers what you need – words can often be imprecise. The most common problem in drafting is making the conditions too vague. In other words, conditions must be both precise and vague. Consider the following condition – conditional upon the purchaser obtaining satisfactory financing. Such a clause gives very little power to the vendor and takes away objectivity. From an objective standard there ought to be some way to determine that the condition has been met. Also, there ought to be some subjective standard as well. Because of the dual nature of conditions, if there is an action the trials are generally long. The best thing to do is to deal with the condition in such a way that the client does not have to go to trial.

Marshall v. Bernard Place (2002) ON CA

Facts	Holding	Ratio
o Agreement conditional upon an inspection by a home inspector of the purchaser's choice and receipt of a report satisfactory to the purchaser in his sole and absolute discretion o The inspector's report indicated that the house was well-built and above average – the report verified various deficiencies (minor) relating to construction o The cost of repair was small o The purchasers decided that they did not want to go through with it	o **Trial** – a return of the deposit was ordered o **Appeal** – the sole discretion clause was the key part of the condition o Sole discretion clauses must be exercised honestly and in good faith and the good faith applies whether you are exercising the discretion clause from an objective or subjective standard o On an objective basis the report identified deficiencies – something upon which the purchaser's could rely o On a subjective basis the purchaser's found they could not do something so they did not have to	o There is no protection for a vendor in a sole discretion clause, so long as the purchaser acts honestly and in good faith s/he can exercise the condition

The other type of conditions found in offers is warranties. Warranties are to be dealt with just before the contract is completed, but does not affect whether or the contract will come to play or not. For instance, the vendor may warrant that all the appliances are and will be in good working order. It is not really a condition of the contract entitling the party to escape the deal, but it can bring damages.

Fixtures

A fixture is a chattel – a chattel is an item of personal property, which becomes affixed in some way to the realty. It can be affixed to the land adjoining the home or in the home itself. The fixture becomes affixed to a degree that it loses its character as a chattel. There is some legislation that deals with fixtures in the *Conveyancing and Law of Property Act,* 1990. Section 15(1) stipulates that types of things that go with a transfer of property. There are three various common law tests on how to determine whether something is a chattel or fixture:

1. *English test* – look to see whether the chattel was affixed with the apparent purpose of being used in connection with the realty. For instance, consider whether or not a house was proposed to connect with the realty;
2. *American test* – what was the intention of the party who affixed the chattel to the realty. Was it the individual's intention to make the chattel a permanent party of the realty or just temporary;
3. *Institutional test* – the owner of land ordinarily intends that whatever is essential to the operation or enjoyment of the property passes with it. In this test, the trier wants to know just what is essential.

Stack v. T-Eaton Co. (1902) ON Gen. Div.

Facts	Holding
o Not Done	o Judge listed five things that he took to be settled law on fixtures: 1. Articles that are not otherwise attached to the land other than their own weight is not part of the land and does not go; 2. Articles that are affixed even slightly are to be considered part of the land unless the intention shows that they were intended to continue as a chattel; 3. Circumstances are necessary to alter the character of the article and the circumstances that are necessary to show the character of the article was changed is the degree of annexation/fixation and the object that is being dealt with; 4. The intention of the person affixing the article is to be presumed form the degree and the object; and, 5. In the case of a tenant who puts in fixtures, although they would become part of the freehold, the tenant has the right to make them chattels again as long as it can be done without destroying the land or building

Credit Valley Cable (1980) ON Sup. Ct.

Facts	Holding
o Cable was run through a condo o Another provider was called in to provide the service o Original cable company wanted to come in and remove the cable	o The cable did not become a fixture, because in determining whether the chattel becomes a fixture you look to the degree and object of fixation o The cable was affixed to the building, but only in a minor way o The cable was easily removable with minimum damage

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The Real Estate Agent

Role of the Real Estate Agent

The real estate agent has not authority to enter into a contract with the purchaser or vendor. The *Real Estate and Business Brokers Act* helps identify who the players are and what their obligations are. One level up from the sales agent is the broker – someone who may trade in real estate. Note: a sales person may only sell real estate through a broker and only a broker can trade in real estate subject to the following exceptions found at section 5 of the *Act*.

1. A private individual who has title;
2. A trustee in bankruptcy taking control of the title-holder's interest;
3. An executor under a will; and,
4. A bank that takes the property back on a mortgage

Duties of the Real Estate Agent

The duty of the real estate agent is a fiduciary duty and, as a result, if s/he acts negligently s/he can be held liable. In acting for the homeowner the obligation to the homeowner is to get the highest purchase price possible. When acting for the vendor the agent must also ensure that all the details of the property are accurately reflected in the listing agreement and the offer.

In acting for a vendor (homeowner), if any information is obtained that the purchaser is willing to pay a higher price, that information must be disclosed to the vendor.

Canada Permanent Trust v. Hutchings (1977) Ont. Co. Ct.

Facts	Holding	Ratio
○ The agent listed the property for sale at $36,900 ○ The purchaser came with the agent wanting to put an offer indicating should would pay within $30,000 to $38,000 ○ The vendor accepted an offer for $33,500 ○ Vendor's agent knew purchaser was willing to pay more	○ Agent should have disclosed to the vendor that purchaser was willing to pay more money	○ The vendor's agent must be acting in the best interest of the vendor

In acting for the purchaser, the agent has a duty to get the lowest price possible. This creates a conflict for the agent him/herself because s/he makes a living on commission – directly affects how much money they get paid. The agent must be careful to be sure that s/he does not disclose anything that the other agent should not know.

Agent's Disclosure of Interests

If an agent is going to buy a property him/herself, there are rules that specifically affect them. In 1980, a number of agents bought homes themselves with the intention of reselling quickly. This was because of a downturn in the economy.

Section 31 prohibits the agent or broker to buy property for him or herself unless:

1. A written statement is delivered to the vendor indicating their status as agent or vendor;
2. A written acknowledgment must be received from the vendor; and,
3. The agent must give full disclosure in the statement to the vendor about any facts s/he has that will affect the resale value of the property.

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The Listing Agreement

The listing agreement is a contract between the agent and the vendor. The listing agreement set out the property description and the terms under which the vendor is willing to sell. By entering into the listing agreement the homeowner is not obligated to sell. The agreement is simply an indication that the homeowner is willing to consider offers. Where a homeowner meet a potential purchaser during the listing period then the agent is entitled to the commission as specified by the original agreement.

Terry Martel Real Estate v. Lovette Investments (1981) ON CA

Facts	Holding	Ratio
○ A homeowner entered into a contract with someone who had gone to an open-house shortly after the listing period expired and then refused to pay the agent commission	○ *Issue*: Whether this person was introduced to the vendor during the listing period ○ The definition of 'introduced' has been dealt with in the statute, it includes bringing the purchaser to the property for the first time – this can be done by sign, open house, or by personal escort	○ Where the agent introduces the purchaser to the vendor during the listing period he is entitle to the commission

Liebig & Co. v. Leading Investments (1981) ON

Facts	Holding	Ratio
○ The vendor did not want to pay his listing agent who had procured an offer but the sale did not close	○ Both the listing agreement and the offer had to be read together ○ When read together, the governing contract is the one between the agent and homeowner (listing agreement), in this agreement the clause read "on any sale effected" ○ The court found that effected means closed	○ The sale needs to be completed before any commission is payable

The lawyer is obligated to discharge trust monies as per the agreement of purchase and sale notwithstanding the vendor's instructions not to discharge the money. Recall that because the contract is signed under seal it is irrevocable as per clause 4 of the Agreement. In this regard, the vendor has already given an irrevocable direction to pay the monies and cannot later decide not to.

Remax Garden City Realty v. 828294 Ontario Inc. (1992) ON Gen. Div.

Facts	Holding	Ratio
○ The vendor instructed the lawyer not to pay the commission and held it back from the agent	○ The lawyer is under a duty to discharge the monies ○ Solicitor was held liable for failing to ensure the commission was paid	○ A contract under seal, such as an agreement of purchase and sale, is binding and irrevocable

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Land Registration Systems in Ontario

Introduction

The purpose of land registration is to provide a uniform system of registering instruments creating or disposing of interests in land. A search then discloses the ownership of a parcel of land and the restrictions and obligations, if any that affect its use. There are two land registry systems in Ontario, namely, the registry system and the land titles system. The registry system produces an inventory of instruments affecting title, whereas the land titles system produces a statement of title. The land registry system was established in 1795. A registered document must provide a clear description of the land so that it is clear exactly what parcel of land is being affected.

POLARIS

The province of Ontario began a project in 1975 called POLARIS – Province of Ontario Land Registry Information System. POLARIS is a move to simply the registration of documents and title-searching and was implemented as part of the *Land Registration Reform Act* (*LRRA*). The major aims of the *LRRA* are to: develop an automated title record system; develop a property mapping system; bring the Land Titles and Registry systems closer together; and, provide for the electronic registration of documents.

The Registry System

Instruments That May be Registered

Subsection 22(1) of the *Registry Act* permits the registration of any instrument within the meaning of clause 1 of the *Registry Act* and any document under Part I of the *LRRA*. Section 1 defines ‘instrument’ very broadly – it includes every instrument whereby title to land in Ontario may be transferred, disposed of, charged, encumbered or affected in any other way and includes a Crown grant, deed, conveyance, mortgage, assignment of mortgage, certificate of discharge of mortgage, assurance, lease, release, discharge, agreement for the sale or purchase of land, as well as other instruments listed in the definition. There are exceptions – for instance, instruments that refer to an unregistered instrument or to an interest or claim dependent upon or arising out of an unregistered instrument are not registrable.

Subsection 81(1) requires descriptions of land to be clear. Where an instrument submitted for registration contains a description that, in the opinion of the land registrar, is complex or vague, the registrar may require the deposit of a ‘reference plan’. Subsection 81(2) permits the land registrar to accept a sketch of the land prepared in accordance with the regulations if insisting on the deposit of a reference plan would be unreasonable in the circumstances.

The provisions of the *LRRA* override the provisions of the *Registry Act* that apply to the registration of various instruments.

When Instruments Deemed to be Registered

Registration is effected in accordance with section 77 of the *Registry Act*:

> **77.** An instrument capable of an properly proved for registration shall be deemed to be registered when the land registrar has accepted it for registration in accordance with the regulations and no alteration may be made to it after that time

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When the registrar accepts a document, s/he puts a stamp on the document indicating its acceptance. The document will be assigned a particular number alongside the date it was registered and the instrument number.

The Books (Abstract Index etc.,)

The main books in the registry system are the abstract index; the copy book; the by-law index and the general register index.

Abstract Index

The abstract is an index with reference to a number of particular pieces of land. This index lists all instruments registered and their dates of registration. When a plan of subdivision is registered a new abstract index is opened and the entries for each lot are indexed separately. A 'property' is generally defined by the regulations to consist of land held in single ownership in a single capacity. Each property is assigned a four-digit property identifier number an a five digit block designation number which are entered into the system for automated information recording and retrieval.

By-Law Index

There are many times that a by-law may be registered that may apply only to a specific piece of property. The by-law would be registered in this index. The by-law index should be searched to see whether or not the property in question is subject to a by-law

General Register Index

This index includes any other documents that are not by-laws and do not apply to the specific piece of property. For instance, letters probate and power of attorney would be kept in this book.

Effect of Registration

Section 74 of the Registry Act is the authority for the general principle that registration of an instrument constitutes notice of the instrument. If a document is not registered then the document will be considered void as against any subsequent purchaser of the real property for value without notice.

Priorities

The order of registration will prevail. Section 71 of the *Registry Act* deals with priority of registration:

> **71.** Priority of registration prevails unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration

Section 49 stipulates the method of determining priority of registration. All instruments will be numbered consecutively in order of time of registration. However, where two or more are received at the same time they will be registered and numbered in the order requested by the person from whom they are received.

> **49(4)** For the purpose of section 71, priorities shall, subject to subsection (5), be determined in accordance with the respective registration numbers

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Certificate of Title

Pursuant to the *Certificate of Titles Act* you may find a certificate of title in the abstract. This *Act* was passed to allow an owner of land registered in the Registry System to request an investigation and certification of title. The government officer would conduct an investigation and, if satisfied, issue a certificate of title registerable on the property. This certificate provides conclusive evidence of the title at the date and time of certification. The person named on this certificate has absolute title to the property subject only to the encumbrances and limitations listed on the certificate itself.

The Land Titles System

The land titles system produces a statement of title and is governed by the *Land Titles Act*. Each separated owned piece of land is called a 'parcel' and each parcel has a number. Dealing with a parcel registered in a book commonly referred to as the 'parcel register'. On registration of an instrument, the registrar rules off the previous instrument that had disposed of the same instrument. The parcel register is the title – it states the owner of the parcel and lists encumbrances by instrument number.

Title under this system is guaranteed. If the land registry office had made a mistake in registering the documents under this system, one can make a claim on the land title assurance fund for any costs. This is because once a document is registered in land titles, the registrar is bound by it.

Instruments That May Be Registered

The *Land Titles Act* does not define 'instrument'. The instruments that may be registered are permitted individually by various sections of the *Act* itself and the forms of those instruments are prescribed by the regulations.

Because the parcel register is a statement of the title, the presentation of an instrument for registration results in something more than mere registration of the instrument. It is an application to amend title.

When Registration is Deemed to be Registered

When an instrument is brought in for registration the Registrar has 21 days to certify it. If the Registrar finds something wrong with the document in the intervening period, s/he may reject the document although it had been dated and stamped at the time of receipt. Subsection 78(3) of the *Land Titles Act* provides when an instrument is deemed to be registered:

> **78(3)** Registration of an instrument is complete when the instrument and its entry in the proper register are certified in the prescribed manner by the land registrar, deputy or assistant deputy land registrar, and the time of receipt of this instrument shall be deemed to be the time of its registration.

In other words, although registration under land titles system is not complete until certification by the land registrar, the effective date of registration is retroactive to the time when the instrument was received for registration.

The Books

The main books in the land titles system are: (1) the fee and receiving book, the register, the leasehold register, the highways register, the Trans-Canada Pipe Line register, the powers of attorney register and the registers referred to in the *Condominiums Act*.

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Fee and Receiving Book – When an instrument is received for registration, it is added into the fee and receiving book.

Effect of Registration

The effect of registration is simply expressed in subsection 78(4) of the *Land Titles Act*:

> **78(4)** When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register

Priorities

Subsection 78(5) of the *Land Titles Act* provides that priority of registration prevails, irrespective of notice. As noted earlier, the document is date-stamped with a time and date and then assigned an instrument number. The priority of registration is on the basis of the instrument number.

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The Land Registration Reform Act

Introduction

The general intent of the legislation is to deal only with matters of form and not to attempt reform of the substantive law. There are four major aims of the *LRRA*:

1. To automate title reporting systems;
2. To develop a property mapping system;
3. To bring the two systems (Registry and Titles) closer together; and,
4. Electronic registration of documents

The reforms are embodied in three parts of the Act:

Part I – deals with document reform
Part II – provides the authority for computerization of land registration records
Part III – deals with the electronic registration of documents

The province has entered into a joint venture with the private sector to form Teranet Land Information Systems Inc. with the intention of speeding up the conversion of the entire land registration system to computerized records.

"Transfer" now is the term used to cover all conveyances of freehold and leasehold land and the term "deed" is no longer applicable. The term "mortgage" has been relinquished and instead "charge" is used to describe charges given to secure the payment of monies or the performance of other obligations by means of a charge or lien against the chargor's property. Finally, "document" replaces "instrument"

Documents Under the LRRA

Only four basic types of documents are permitted all in prescribed form and are entitled: (A) Transfer/Deed of Land; (B) Charge/Mortgage of Land; (C) Discharge of Charge/Mortgage; and, (D) Document General. In addition, there is a form of 'Schedule' for attachment to other forms. Section 3 of the *LRRA* prohibits registration under either the *Land Titles Act* or *Registry Act* unless these forms are used. Failure to comply with the prescribed form will not affect the validity or effect of the document. The director has the discretionary authority to permit registration to permit registration of a document that is not in the prescribed form.

There are specific rules on how these individuals' names are to be recorded. On every document the last name must be first and provided in block capital letters followed by a comma and the first full name (GUCCIARDO, Francesco). If you are going to put in another name, it must be a full name – initials are not acceptable.

Form A – Transfer/Deed of Land

Under the old system one would require a number of affidavits and statements, such as the age and marital status of the individual signing the document. Now, the "Transferor(s)" section at box 8 provides the following statement: "The transferor hereby transfers to the transferee and certifies that the transferor is at least eighteen years old and that…".

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The other type of affidavit that used to be required was the *Planning Act* document stating that the transfer did not contravene the provisions of the *Planning Act*. Now we have box 13 – an optional section of the form. All things are presumed to have been done legitimately until the contrary is proven.

The old system required various covenants to be included on the second page of the transfer. Those covenants, by virtue of section 5 of the *LRRA* and use of the forms, are implied. However, their non-inclusion requires explicit exclusion.

Form B – Charge/Mortgage of Land

In common law, it used to be that when you mortgaged your property you actually transferred title to the mortgage company. This is no longer the case. Today, instead of transferring the 'fee' to the mortgage company, the individual merely gives them a charge/lien on the property. The individual retains title subject to the charge. Box 11 is the chargor(s) box and provides: "The chargor hereby charges the land to the chargee and certifies that the chargor is at least eighteen years old and that…".

In order to cut down on length, all of the covenants of the mortgage are now implied under the LRRA. Also, in order to cut down on length for charge terms etc., box 8 has been included: "Standard Charge Terms" – the parties agree to be bound by the provisions in Standard Charge Terms filed as number [registration number] and the Chargor(s) hereby acknowledge(s) receipt of a copy of these terms". The referral to an instrument number automatically includes those terms. The document also confirms an acknowledgement so the chargor cannot claim ignorance.

Form C – Discharge of Charge/Mortgage

This document can only be used to discharge the lien. In discharging the mortgage or charge, the individual must discharge all the documents that relate to the charge – recitals, assignments, postponements, and amendments.

Form D – Document General

Any other document that the individual wishes to register must be attached to a document general form. Thus, you might find a power of attorney, a court order, a sworn statement, etc., attached to the document general form. Box 3 provides a space for the Property Identification Number (PIN). The document will be registered based on the PIN.

Failure to comply with these rules does not invalidate the registration. So long as the Registrar accepts the document then the registration will be deemed to conform.

Affidavits

A significant change effected by the *LRRA* was the elimination of many previously required affidavits. Affidavits under the *Planning Act* have been converted into statements contained in the body of the document. The reasonable solicitor will be able to rely upon the following maxim of law: All things are presumed to have been legitimately done, until the contrary is proven. The various changes in affidavits are as follows: Age and spousal status; Matrimonial home; and, *Planning Act*.

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Age and Spousal Status

Section 3 of the *LRRA* requires documents to be in the prescribed form, which of course does not include any affidavits as to the age and spousal status of the parties to the document. Such affidavits are no longer required. In the form of transfer, the transferor or chargor is required to certify that s/he is at least 18 years old. There follows a blank space for the purpose of including a statement of spousal status and of the status of the property as a matrimonial home.

Matrimonial Home

Under subsection 21(3) of the *Family Law Act*, a statement verifying the basis upon which a spousal consent is not required for the disposition is necessary for anyone transferring or encumbrancing land.

Planning Act

There is a scheme whereby statements by the transferor, his or her solicitor and the solicitor for the transferee are permitted to be included in a transfer which have the combined effect of ensuring compliance with section 50(22) of the *Planning Act* even if, in fact, there was no such compliance. The person signing believes that there is no contravention of the subdivision control provisions of the *Planning Act*; the solicitor for the transferee must also state that he has investigated title and knows of no contravention. Where the statements are not completed, then the next person dealing with the property will have to satisfy himself that the *Planning Act* has been complied with back through the chain of title.

Seals

Individual

At common law, an estate in land could only be conveyed by a deed. To properly make a 'deed', it was required to be signed, *sealed* and delivered. Subsection 13(1) of the *LRRA* eliminates the need for seals on transfers, charges and discharges for land under the *LRRA*. This is stated to be so 'despite any statute or rule of law' thereby overcoming the common law and statutory requirements for the use of deeds.

Corporations & Indoor Management Rule

Just as individuals are exempt from requiring seals, so too are corporations. If the corporate seal is not used, on must turn to the codification of the indoor management rule in section 19 of the *Ontario Business Corporations Act* and section 18 of the *Canada Business Corporations Act*. If there is a signature on behalf of a corporation with an indication that the signatory is an officer or director of that corporation, then those examining the document may assume that it was duly authorized, executed and delivered. The signature should be followed by the words, "I have authority to bind the corporation". If it turns out that the person who signed for the corporation had no authority or, indeed, was not an officer or director of the corporation, then the execution of the document will be equivalent to a forgery by an individual. A solicitor who relies on its validity in such circumstances cannot be held to be negligent.
Those who know or, by virtue of their position with or relationship to the corporation, ought to have known of irregularities will not be able to rely on the indoor management rule. Both the federal and provincial government give protection where a person is 'held out by a corporation as a director, an officer or an agent of the corporation' and the act taken is 'usual for such director, officer or agent'. A two-fold test should be followed:

1. Has the person been held out as director, officer or agent?
2. Is the action within the usual duties of the position held by him or her?

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The Legal Description

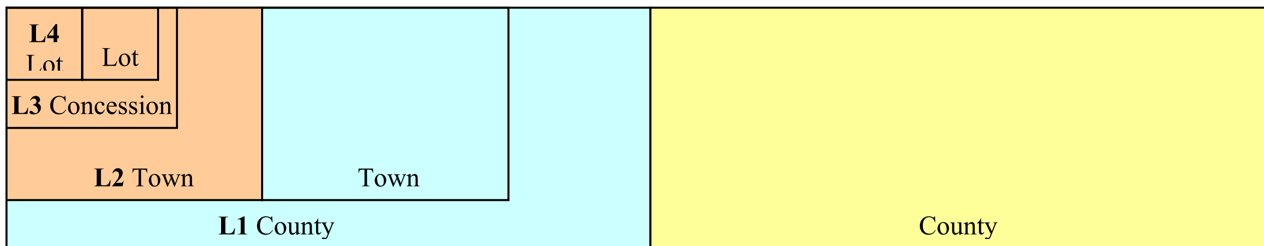
Ascertaining the Legal Description

The results of a search of title are required in order to submit requisitions on title within the time provided in the agreement of purchase and sale. The legal description is usually in the beginning paragraph of the agreement, but it may be obtained by other means:

1. The vendor's solicitor;
2. A survey of the property;
3. An assessment department or realty tax office;
4. The PINfind system; or,
5. Some private companies (ie Teela Marketing Services in Toronto)

The Land Division Scheme

Originally, land was divided into 'counties' or 'districts' and then divided into 'towns', 'townships', 'cities' or 'boroughs'. These were then divided into large parcels called concessions, which were numbered and then divided into lots referred to as either 'township lots' or 'concession lots'. These smaller lots are also assigned numbers. Concessions were generally 100 'chains' wide. Each chain measured 66 feet across.



Level 1 – County Level 2 – Town Level 3 – Concession Level 4 – Concession Lot

All legal descriptions can be traced to the concession lot located on the concession. This statement is true until a plan of subdivision that covers a portion of a concession lot is registered. From that point on, the subdivision lot and plan number become the basic unit of the legal description. It is unusual to deal with a large parcel of land. It is much more likely that the land will be a smaller portion. This 'smaller portion' will either be identified by using a 'metes and bounds' description of a reference plan.

Metes and Bounds Descriptions

A legal description of a smaller portion or subdivided lot is often very complex. These descriptions by words are called 'metes and bounds' descriptions and they often include a reference to bearings. The description must describe the municipality and the county, district, or region. Each description must describe a fully enclosed parcel. The particular description begins with the words:

1. More particularly described as follows:
2. Commencing at a point…
3. Thence…

The use of bearings was a way to help the metes and bounds system of being more efficient. These are not as easy to understand: N3o°16'25"E (North 30 degrees, 16 minutes, 25 seconds East). In these directions, the North and South are always at the beginning because they are the focal point. Each 90° quadrant represents a 60-minute segment while each degree is divided into 60-second segments.

Reference Plans

The more lengthy descriptions are being replaced by reference plans. A reference plan is a plan of survey prepared by a qualified Ontario Land Surveyor who maps out the legal description. The land registrar must approve the plan. The reference plan came into use in 1964 because the metes and bounds descriptions got very convoluted and confusing.

Generally, the reference plan will label the lands in certain parts. Consider the following legal description: *Part of Lot 16, Concession 3, City of Toronto, Regional Municipality of Toronto, more particularly described as Part I on Plan 63R-3729.* The number '63' is the number assigned to the particular registry office in which the plan is deposited. All reference plans have the letter "R". The number that follows is the particular number assigned by the registry office to the plan.

A reference plan simply labels lands for convenience of description; it in no way divides the lands – it is for description purposes only.

Every description has four parts to it: (1) Lot; (2) Concession; (3) Municipality; and (4) County or District. As soon as you are dealing with a part of a lot you need to get to the metes and bounds description or a reference plan.

Registered Plans of Subdivision

A registered plan of subdivision is a survey that is usually registered by a developer who wishes to erect a new subdivision – it will illustrate the proposed development. Prepared by land surveyors this plan subdivides a large piece of land into smaller parcels. Once registered, the plan of subdivision is given a registration number. In Registry, the plan number may be followed by the City or Town, for instance Plan 322 York. In Land Titles, the number is usually preceded by the letter "M". For example, a plan of subdivision might be numbered as 65M-3922. The following consequences flow from the registration of a plan of subdivision:

1. The land is legally subdivided within the meaning of the *Planning Act*; and,
2. The legal description changes – it is only necessary to refer to the lot on the plan. For instance, if the land in question is lot five on registered plan 392, the entire legal description is as follows

Lot 5 on plan 392 York, in the City of "X", Regional Municipality of "Y"

If you end up dealing with only a part of the lot you will need to pinpoint the part by either using a metes and bounds description or using a reference plan.

Registrar's Compiled Plans

Where the Registrar finds the metes and bounds descriptions convoluted and confusing, s/he may take it upon him/herself to create and register a reference plan. A Registrar's Compiled Plan is for convenience and description purposes only – it is not a plan of subdivision and does not create any new conveyable lots or parcels.

Land Titles

All land in land titles is given a parcel and section number. A parcel might consist of one or more chunks of land on a concession lot on a registered plan of subdivision.

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Summary

All legal descriptions must include the Township and the Regional Municipality. A legal description must also refer to a concession lot on a registered plan of subdivision. In either case, the legal description will be complete if you are dealing with the whole concession lot or the whole lot on a registered plan of subdivision. If you are dealing with a part of a concession lot or part of a lot on a registered plan of subdivision, you will need to describe the exact location of lands either by using a metes and bounds description or by referring to a part shown on a reference plan. Never confuse a reference plan with a registered plan of subdivision. The reference plan is merely a tool. The plan of subdivision has the effect of subdividing land. All lands in the land titles system are assigned a parcel and section number, which is included in the legal description.

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Title Searching

Introduction

Importance of Search

The search of title is a critical step in the real estate transaction. The search is required to render to following services:

1. Submitting requisitions;
2. Giving an opinion on Title; and,
3. Properly advising and informing the client

Steps in a Search

The following is a brief summary of the essential steps involved in searching title:

1. Determining the commencement date for the search of title (Register Only);
2. Summarizing all of the documents in the chain (Register Only) and of any other encumbrances or documents affecting title (Both Systems);
3. Conducting a *Planning Act* search (Both Systems);
4. Conducting miscellaneous searches, such as a review of the Crown patent, corporate owners and executions (Both Systems);
5. Review of search by solicitor (Both Systems); and,
6. Preparing a Solicitor's Abstract

Searching title under the *Registry Act* is much more cumbersome than under the *Land Titles Act*.

The Forty Year Search (Registry)

Root of Title

With a few exceptions, the conveyancer needs to search title for the last 40 years. Subsection 112(1) of the *Registry Act* provides:

> **112(1)** A person dealing with land shall not be required to show that the person is lawfully entitled to the land as owner thereof through a good and sufficient chain of title during a period greater than the forty years immediately preceding the day of such dealing, except in respect of a claim referred to in section 113(5)

A person must show that s/he has good title for a period of 40 years. The search will commence on the date 40 years prior to the date of the agreement, otherwise known as the 'commencement date'. The conveyancer looks for the first conveyance of the freehold estate registered after the commencement date. The first conveyance after the commencement date 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)).

Other Claims

Note that any document registered within the title search period still affects the lands being searched. Even if the root of title was registered after a document affecting the land, so long as the document was

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registered within the forty-year period it still affects the land. Any rights arising from a registered instrument expire 40 years from the date of registration unless the claimant registers a notice of claim. For instance, an easement right registered in 1953 will expire in 1993 unless of notice of claim is registered in the prescribed form (sections 111 and 113(1)).

Searching 'Behind the Root'

A chain of title commences with the first conveyance of the freehold estate within the title search period. 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 – this invites the possibility of fraud if someone registers a forged document within the forty-year period long after the genuine root of title long preceding it. The Court of Appeal in *Fire* v. *Longtin* conceded that the application of these section of the *Registry Act* may result from time to time in apparent injustices to persons with claims to real property that are older than forty years. McKinlay for the court added:

> The legislature has weighed the possibility against the expectations of persons more recently dealing with the land. In the final result, it has opted for legislation which, although it may appear to favor more recent grantees, still contains many safeguards of the rights of those claiming under more ancient conveyances.

The SCC adopted McKinlay J's reasons for judgment of the Ontario Court of Appeal in their entirety.

Abstracting Documents

The Abstract Book

The first thing the conveyancer does is to retrieve the abstract book. A separate book is kept for each concession lot. Once a plan of subdivision is registered, a new book is kept with a separate page for each lot. An abstract book contains columns summarizing the following particulars of the document:

Instrument No.	Type of Document	Date of Document	Registration Date	From	To	Consideration	Legal Description

If you are searching the whole of a concession lot or a lot on a registered plan of subdivision, every entry in the book will be relevant. When reviewing a document check for the following:

1. Check the names of the parties involved – ensure that the names are consistent from one document to another;
2. If there are any recitals, ensure that the recitals are accurate – a 'recital' is simply a paragraph that begins with 'whereas'. A recital might provide the linking information when there is a name change;
3. Check the legal description – this is where most of the problems are found. Ensure that there are no encroachments on the land from abutting lands;
4. Ensure that the documents were signed by the right people; and,
5. Ensure that the lands have access to a public road – the parcel cannot be land blocked, if it is it means that there is no right of access to it

Going Behind the Plan

A plan of subdivision is registered to subdivide lands located on a particular concession lot. Once the plan is registered, the underlying concession and concession lot number are not referred to. For instance,

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assume Lot 5, York Plan 392 only has entries from 1962, the date that the plan was registered. However, the commencement date is December 31, 1952. A search must still be conducted behind the plan date of 1962 back to the commencement date. The conveyancer must identify the legal description of the lands prior to the registration of the plan and continue the search in the appropriate abstract book until the full 40-year title search period has been covered. This is called 'going behind the plan'.

In reviewing the plan of subdivision one of the first steps is to obtain a copy of the plan of subdivision.

Abstracting

After going through the abstracts, the conveyancer will have a list of all the instruments that affect title. The process of summarizing the contents of the documents is often referred to as 'abstracting'. The purpose of abstracting is to provide the solicitor with enough information to ensure that there is no title defect or disruption. The solicitor must ensure that the conveyance is in the proper form, that the lands are properly described, that there is no gap in the chain of title, that the document was properly executed and, when required, witnessed and that those affidavits and other statutory requirements which affect the validity of the document have been met. The solicitor will be concerned about checking the following matters:

1. Note the names of the parties to the instrument and ensure that the names of the parties are consistent from one document to the next;
2. Check the contents of any recitals to ensure they are accurate, in particular references to the dates and numbers of other registered instruments;
3. Always ensure that the legal description is accurate;
4. Confirm that the document is signed by the appropriate parties;
5. In a registered plan of subdivision, check to see if a 'one-foot-reserve' has been given to the municipality by the developer and whether a by-law has been passed by the municipality dedicating the reserve as a public highway, otherwise the municipality can technically block access from the road to the property; and,
6. In a deed/transfer of land, ensure that the following four covenants are included:
    - (i) The grantors have the right to convey the lands;
    - (ii) The grantee will enjoy quiet possession of the lands;
    - (iii) The grantors will execute further assurances of the lands as may be required; and,
    - (iv) The grantors have done no act to encumber the lands

Searches Under Land Titles

Guaranteed Title

The Land Titles system is a register of titles. This means that the state of title is guaranteed: a searcher is entitled to rely on the fact that the party who appears as owner is the register does in fact have good title to the property (there are some exceptions). There is no need to conduct a 40-year search nor is there a need to produce a chain of title to the property.

Once the conveyancer pulls the appropriate book s/he need only obtain a copy of the pages in the register book that relate to the parcel in question. The registrar will cross everything that no longer affects the lands off. You only need to worry about those entries that are still outstanding. A conveyancer will obtain copies of all instruments that still affect the lands. This includes a plan of subdivision, which must be examined for the items referred to earlier. Many lands are transferred from the Registry to the Land Titles system. This is referred to as "first registration" and any outstanding interests will be noted on the beginning of the parcel page.

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Exceptions to Guaranteed Title

Section 44 of the *Land Titles Act* sets out a number of exceptions to the guaranteed title, the most significant of which are:

1. Crown Claim – the conveyancer must conduct a search of all corporate owners throughout the chain of title to that a corporate search can be performed;
2. *Planning Act* Violations – A search of all adjoining owners back until 1967 is still required. Note: it is difficult to identify the legal description for all adjoining owners in Land Titles;
3. Executions – under section 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. It is not necessary to search the names of the predecessors in title.

POLARIS

POLARIS under the Registry Act

POLARIS (Province of Ontario Registration Information System) is designed to computerize the searching process replacing the parcel register and the abstract index by a Title Index. Each chunk of land that is owned by one party is assigned a Property Identification Number (PIN).

In Toronto, Registry lands have been parcelized and assigned a PIN based on the last apparent change of ownership. Any document registered subsequent to the last change in ownership has been 'brought forward'. That is to say that they too have been entered into the computer system. For instance, if the last registered change in ownership occurred in 1970, all instruments registered since 1970 have been entered into POLARIS.

Parcelized Day Forward Registry

Some registry offices have begun automating their records under what is known as the "parcelized day forward registry" (PDFR). Under PDFR parcels are created for Registry lands and PINs assigned based on the last apparent change of ownership document. However, no interests have been 'brought forward' to the day the record was computerized. All documents subsequent to the computerized date are entered into the computer system. This is what is meant by the term 'day forward'. For instance, assume that the last apparent change in ownership occurred in 1970 and five subsequent documents were filed. Under PDFR the 1970 change in ownership document would be filed and only those documents filed subsequent to the date of computerization would be entered into the system. Those document filed subsequent to the change and ownership, but before the computerization date would not be entered. Therefore, it is very important to realize that a gap exists and that you must search not only the computer, but also the abstract book for the intervening documents.

To conduct a search you must locate the PIN. In order to come to the PIN one would go to the property index map and locate the block number. The property identification number is the block number followed by a hyphen followed by the parcel number.

When looking at the property index map you can decipher the ownership of certain adjoining properties as of the date of the index – dashed lines indicate the boundaries of adjoining parcels owned by the same individual or group of affiliated individuals. When there is no dividing line behind strips of land it indicates that the entire strip is under one ownership as of the date of the index. A parcel of land on a plan of subdivision that is not a lot must be called something else, most commonly a 'block'.

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The PIN is entered and a printout of the title can be obtained. Any instruments that have been deleted from the record because they no longer affect title to the property will not show up unless you change the default print parameters on the computer so that they do. The computerized abstract index is simply a record of all registered and deposited documents and helps you locate them; the documents themselves must still be examined to determine their legal effectiveness.

Land Titles Absolute (LTA)

When you find your PIN and print out the register, you do not need to look at anything else. The only qualifications you have for an LTA are those under section 44 of the *Land Titles Act*. For instance, if there was a *Planning Act* problem on the property before it went to Land Titles, it is not guaranteed. Also, if a corporation owned the land and defaulted on its taxes, that land would have escheated back to the Crown.

Land Titles Conversion Qualified (LTCQ)

The province itself is undertaking the transfer the documents from Registry lands to Land Titles. Conversion has already occurred for the most part. Those converted by the province carry the title "Land Titles Conversion Qualified" and are noted as such on the computer abstract page under the heading "Estate/Qualifier". Because these former Registry Lands have been converted based on the paper records, but no actual physical surveying of the lands have been done, the guarantee of title is limited by certain qualifications, which are printed on the abstract sheet.

Basically, these lands are guaranteed against such potential concerns as *Planning Act* violations and corporate escheats to the Crown, but not against such concerns as encroachments, adverse possession, and extended boundaries. Because these titles are still subject to the section 44 exceptions of the *Land Titles Act*, except subsections (11 – *Planning Act*) and (14 - Escheats), it is wise to make it very clear in the title opinion that the opinion is subject to any description that may have occurred before it went to the LTCQ.

Summary of Title Search Variations

Registry System Search – This refers to the conventional, non-automated 40-year search.

Parcelized Day Forward Search – A search where conversion from Registry to Land Titles has not taken place. The title searcher must search both the automated and paper records to ensure the completion of a full 40-year search.

Automated Registry Search – A full 40-year search must be conducted on these properties.

Land Titles System Searches – Title searchers must obtain copies of the pages in the register book. The search involves the review of the documents that are currently shown on title. Titles are subject to the qualifiers listed in subsection 44(1) of the *Land Titles Act*.

Automated Land Titles Search (LT Absolute) – Titles to these properties remain subject to the qualifications listed in subsection 44(1) of the *Land Titles Act*.

Land Titles Conversion Qualified (LTCQ) – Where lands have been converted by the Ministry they are referred to as LTCQ. In respect to such lands, the title qualifiers listed in section 44 apply with the

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exception of some of the qualifiers listed in subsection 44(1) and there are additional qualifiers relating to adverse possession, prescription, misdescription and boundaries.

Immediately prior to the registration of the deed or mortgage, a sub-search must be conducted to ensure that there have been no intervening registrations from the date of the original search.

Electronic Registration

There are a number of counties and districts that are already using electronic registration. In electronic registration there are no signatures required. The registration can be done from any office equipped with a computer with the appropriate software and Teranet subscription. The second option is to proceed to the registry office to use some of the common computers. There is still an exchange of some documents, but not the paper documents.

Potential for Fraud

If a written document is signed and conflicts with an electronic registered document, the electronic registered document prevails. This is an area that is ripe for fraud. Consider:

1. Where an owner has owned property for over forty years how likely is the owner to register a deed from himself to himself in the forty-year period? There is nothing to stop an individual from registering a document in the form of a deed to him

2. On a mortgage basis, a fraudulent party who sees houses for sale may search the property and find that there are no mortgages. The fraudulent party might transfer a deed from the owner to himself.

Fire v. Longtin (199?) ON CA

Facts	Holding
○ Somebody without title to a five foot strip of property gave title to it	○ This was the only registered root of title within the 40 year period

Solicitor's Abstract

The conveyancer's search of title will include the following:

1. A list of the instrument numbers that affect title (Registry System);
2. A copy of any plan of subdivision or reference plan survey or sketch referred to in the legal description of any documents on title that can assist in reviewing a legal description;
3. Copies or abstracts of each instrument affecting title;
4. A chain of title (Registry);
5. A sketch of the property, which will identify the adjoining lands and their legal descriptions;
6. A search of adjoining lands;
7. A list of all corporate owners from the Crown patent;
8. Details of the Crown patent;
9. The names of all owners on title for the lands forty years for an execution search or an actual sheriff's certificate for these names (Registry); and,
10. Notation of the last instrument number registered on title

In Land Titles, the conveyancer will provide a copy of the parcel register. If the lands are in the POLARIS system, copies of the POLARIS printout will be included.

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Claims Affecting Title

Encroachments and Planning Act Violations

There are two reasons to search adjoining lands:

1. To ensure that there is no encroachment; and,
2. To ensure that there has been no *Planning Act* violation

In terms of encroachments, ideally there will be no overlap between the lands. However, any discrepancy could signify a cloud on title or a potential dispute. The purpose of the *Planning Act* is to control the manner in which land is divided. A violation of the *Planning Act* means that no interest in land passes. Section 50 of the *Planning Act* provides that a person cannot enter into certain transactions unless the person does not retain an interest in the abutting lands (such as an ownership interest). Therefore, a purchaser must search title to make sure that there was never any common ownership between the subject lands and the adjoining lands. There are a number of exceptions to the *Planning Act*, for instance a search is not required if the lands in question constitute the whole of a lot on a registered plan of subdivision. Also, all violations prior to June 15, 1967 were forgiven.

Corporate Ownership

If a corporation involuntarily dissolves while owning lands, the lands 'escheat' to the Crown. This is an exception to the rule that a person need only show entitlement to the lands for a 40-year period. The conveyancer should list all the corporate owners in title and then order a corporate search to ensure that the corporation was in existence during the period it owned the lands. If a corporation voluntarily dissolves, its shareholder are entitled to distribution of its assets.

Executions

A creditor with a judgment will file its writ of execution with the sheriff. The execution binds the debtor's interests in lands. A search of executions should be made and updated on the day of closing against the current owner: a mortgagee will be reluctant to advance monies in the face of a writ against the borrower.

Under the Land Titles system you only need to search the names listed on the abstract. Under the Registry System you must search all names that appear on the register in the previous 40 years. The date you need to look at is the date the execution was filed. Any execution filed while the individual owned the property will apply. If it is ambiguous whether or not the individual selling the property is the person listed in the filed execution then the solicitor would be wise to obtain a sworn affidavit from the person denying the execution and have it deposited on title. To life an execution you can:

1. Pay off the execution; or,
2. Ask the execution creditor to lift the order until the deal closes

Access to Lands

It is important to ensure that the property is not land-blocked, otherwise it is of no value. If there is no public access, then look into whether there is private access. There are many times when old roads (even concession roads) did not make sense to put a road in the location where the allowance was prescribed. In order to get rid of a road allowance, the municipality must formally close it. Your client cannot improve an area for a road allowance without the permission of the municipality.

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If there is no public access, you need some permission from the adjoining property owners to cross over. You should have a formal right of way document registered on title that allows access over the relevant lands. *Road Access Act* – prohibits anybody from blocking a private road that has been used by other people. There is no specified time period – so long as the private access has been used by others, the private owner cannot block access unless s/he has the consent of all the relevant parties.

Adverse Possession

Adverse possession simply means that the individual's possession of the property is adverse to the owner's title – commonly called possessory title or squatter's rights. In order to get adverse possession you have to have:

1. The possession must be actual possession and not constructive;
2. The possession must be open possession and not something that you are trying to hide;
3. The possession must be exclusive – this is not a situation where you share possession of the property with the true owner; and,
4. The possession must be notorious

Four special words: actual, open, exclusive, and notorious; 10 years; and, no objection. During those 10 years you also cannot acknowledge anyone else's claim to that property. Also, you cannot have had any objection made by the true owner. If you can establish these criteria, the possessory title can extinguish the landowner's title.

A written acknowledgement from the person possessing the land will stop the effects of adverse possession from taking. It is important to note that the possibility of adverse possession exists only under the Land Registry System. Once in LTCQ there can be no gain or loss due to adverse possession. Note: an individual who has a possessory interest in real property and provides a statutory declaration of that interest may only convey possessory title. Possessory title is still a form of legal title.

Vendors and Purchasers Act

This *Act* provides the practical solution to various problems with title. For instance, any recital in a document that has been registered for 20 years or more will be deemed to be true and there is no need to look behind the recital. In other words, a 20 year-old recital may be relied upon as fact. Section 3 of the *Act* may be used to clear up title problems – allows an application to be made to the court to settle disputes relating to requisitions. Commonly referred to as a 'vendors and purchaser's motion', the respondent must provide a response to the requisition by way of affidavit and the matter will be sent to a judge for summary judgment. The judge will determine whether or not title is clouded and order accordingly. If title is clouded, the judge will provide instructions as to what is required to be done in order to clear title.

Other Considerations

Back Taxes

Section 382 of the *Municipal Act* creates a special lien for municipal taxes that can be applied against the property. This lien takes priority over any other lien. After three years of default on municipal taxes the municipality can register a 'tax arrears certificate'. Once registered the person to whom the certificate is issued as one year to redeem the property and get the clear title back. Otherwise the tax arrears certificate will be processed by the municipality, which involves the sale of the property through tender. The resulting sale results in the issuing of a tax deed to the purchaser, which once registered serves as a good

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root of title. The *Tax Sales Confirmation Act* clarified the law to a certain extent and provided that all tax sales before July 1, 1973 are forgiven.

Veteran's Land Act

This is a federal statute designed to assist war veterans in obtaining property. Veterans were given excellent rates on real property and benefited from a program of monthly payments. Once paid the veteran received title to the land.

Partition Act

Where joint-owners of a parcel of land have fallen out they may apply to have the interests legally divided. This *Act* allows one or more of the owners of the property to make an application to the court requesting a partition or division of the land. On an application, a judge can order the land to be divided on the basis that it is either appropriate or practical. Otherwise, the judge can order the sale of the property and set out the scheme of dividing the proceeds.

Land Near Water Course

If a waterway is considered navigable the Beds of Navigable Waters Act will cover it. Under this *Act* title to a navigable waterway will remain with the Crown unless the Crown Patent itself indicates otherwise. The boundary of the titleholders property will be the low water mark.

Residential Rental Units

If you are purchasing residential rental property the prudent solicitor will ensure that the rents being charged are legal rents as per the *Residential Rent Regulation Act*, which sets out, among other things, the legally allowable annual increase in rent.

Land Transfer Tax

The land transfer tax is a provincial sales tax based on a graduating scale. The percentage changes because on the purchase price and typically runs from 0.5 to 2% payable by the purchaser. Any deed registration will require an accompanying land transfer tax affidavit. GST is another consideration and it must be paid, applicable to all transfers, unless it is explicitly exempt.

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Subdivision Control & Land Use Regulations

Purpose of Section 50

Section 50 of the *Planning Act* affects virtually all transaction involving real property interests. Its purpose is to control the manner in which land can be divided and is the main instrument of subdivision control in the Province. Subdivision control means the control by government of the division of land into smaller parcels. The legislation is necessary because at common law the owner of land could do with it as he wished, subject to possible nuisance actions, and such absolute control is inconsistent with good municipal planning. To the extent that the pattern of land division has tremendous implications for the certainty of boundaries, lot sizes, road patterns, and the provision of services, the main responsibility rests with the municipality.

Effect of Contraventions – 50(21)

Subsection 50(21) provides that any transaction prohibited under section 50 "does not create or convey any interest in land". In the event that section 50 is contravened, the contravening document does not create an interest in land. It is essential that one ensure compliance with section 50 in all transactions. Subsection 50(21) does, however, contain a provision that is available to protect the interest in land created by an Agreement of Purchase and Sale: so long as the agreement is entered into "subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with", the agreement is valid and fully enforceable pending the resolution of the immediate problem. Without the express condition, an agreement contravening the section would not create an interest in land. Thus, an explicit provision should be included in every document involving an interest in land, in order to guarantee protection for the agreement from the effect of subsection 50(21) in the event that an unexpected *Planning Act* problem arises.

The Basic Prohibition – 50(3)

This subsection prohibits a person from effecting a broad variety of transactions relating to land or interests in land. Section 50 is extremely broad and covers virtually all transactions. The following are the prohibited transactions:

1. Conveying land by deed or transfer;
2. Granting, assigning or exercising a power of appointment;
3. Mortgaging or charging the land;
4. Entering into an agreement of sale and purchase of land;
5. Entering into any agreement that has the effect of granting the use of or right in land, directly or inwardly by entitlement to renewal, for a period of 21 years or more. This would include:
    i. Granting a right-of-way or easement in perpetuity;
    ii. Granting a lease with a term of 21 years or more;
    iii. Granting a 15 year lease with an option to renew for 10 years; or,
    iv. Granting an option to purchase

The Exceptions to the Prohibition – 50(3)

There are six situations in which the basic prohibition is not applicable and compliance with any one of the six exceptions makes the transaction permissible. Each exception involves either a transaction where land is not being divided or where municipal or governmental consideration of planning issues is present.

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1. Plans of Subdivision – 50(3)(a)

No transaction is prohibited so long as the land that is the subject-matter of the transaction is 'described in accordance with and is within a registered plan of subdivision'. Land within a registered plan of subdivision has already met the underlying purpose of section 50. However, one must note the application of the 'part lot' control provisions contained in subsection 50(5) of the *Act*, which function as a substantial qualification to this exception.

2. No Abutting Lands – 50(3)(b)

This exception allows a person to carry out the transaction so long as he or she does not retain the fee or the equity of redemption in any land 'abutting the land that is being conveyed or otherwise dealt with', unless the abutting land is the whole of a lot or block on a registered plan of subdivision. If a person deals with all of the land owned so that that person retains no ownership interest in any land having a common boundary with the land being dealt with, such dealing is permitted since it complies with s.50(3)(b). Dealing only with a part of a parcel of land while retaining ownership of abutting land is prohibited – the effect is to divide the parcel into two parcels.

3. Transactions Involving Government – 50(3)(c), (d), and (e)

If the government or a government agency wishes to acquire or dispose of lands in such a way that additional parcels will be created, or that land will be divided, one can only assume that it, as the body with control over planning, has considered the planning implications of the transaction and found them to be satisfied:

Paragraph 50(3)(c) – exception to the general prohibition for the acquisition or disposition of land by federal, provincial, and municipal governments.

Paragraph 50(3)(d) – excepts the acquisition of land or rights in land for the purpose of transmission lines pursuant to Part VI of the *Ontario Energy Board Act*

Paragraph 50(3)(e) – excepts the acquisition of land or rights in land for purposes of flood control, erosion control, bank stabilization, shoreline management or the preservation of environmentally sensitive lands.

4. Consent Obtained – 50(3)(f)

If the transaction is effected with the consent of the relevant governmental body the prohibition will be excepted. "Consent" is defined in subsection 50(1). Often a Committee of Adjustment or Land Division Committee will grant the consent. The consent application is of a specific format as prescribed by the regulations. A consent lapses on the expiry of two years following the date on which the certificate of decision of consent was given, if the transaction approved for consent has not been carried out.

Return of Lands

Where land acquired for the purposes of subsection paragraph 50(3)(d) have been returned to the person from whom it was acquired, the subdivision controls will not apply.

Note: Subsection 50(4) provides that a municipality may pass a by-law deeming a subdivision not to be a subdivision for the purpose of subsection 50(3). This may be done where to originally planned intended use has fallen out of favor.

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Part Lot Control – 50(5)

Purpose

Subsection 50(5) was enacted to deal with the problem of the owner who wants further division of a parcel of land already within a plan of subdivision. Subsection 50(5) addresses the issue of an owner of a lot or block dealing only with part of that lot or block in a manner that would be contrary to the original intentions when the plan of subdivision was approved.

Identical in structure to subsection 50(3), subsection 50(5) prohibits a person from dealing with a 'part of any lot or block of the land', where the land is within a registered plan of subdivision, unless the transaction may be brought within one or more of the six specific exceptions. Once can rely on the paragraph 50(3)(a) plan of subdivision exception only if the land being dealt with is the *whole* of a lot or block on a plan of subdivision. If one is not dealing with the entire lot or block as found on the plan of subdivision, paragraph 50(3)(a) is of no assistance, and one must proceed to find a further exception from the list in subsection 50(5).

Having two abutting parcels of land with two separate deeds is not enough for the separation of title. Since the parcels are abutting the doctrine of merger will apply and the individual owner will have to find an exception under the *Planning Act*.

Exceptions Allowing Conveyances

If one wishes to sell or otherwise deal with a part of a lot within a registered plan of subdivision, one must look to subsection 50(5) for exceptions. The exceptions are essentially the same as those set out in paragraphs 50(3)(b)-(f). The novel exception, applicable to transactions on or after August 1, 1983, is paragraph 50(5)(e), which applies to dealings with the remainder of a lot that has been 'acquired by a body that has vested in it the right to acquire land by expropriation'.

The basic premise of the *Planning Act* is that you have to sell all you own. As long as you are selling all you own in one spot, you can sell. If you are trying to sell part of what you own in one spot, the red flag should go up and you should review the provisions of the *Planning Act*.

Exempting By-Law

A Municipality can pass a by-law pursuant to subsections 50(7)-50(7.5) that exempts specified lands from Part Lot Control provisions. In such instances subsection 50(5) is not applicable.

Horizontal Plane Exemption

Surface rights are separated from other area rights making each alienable. Thus, X may grant mineral or mining rights under his/her land. However, in the case of an easement for a water main some other exemption than the horizontal plane requirement must be found.

Land Use Regulations

Land use regulations are regulations relating to what land is used for. The municipality has an interest in ensuring that all the residential areas are put in one location and industry some place else. The land uses should mix together. The municipality generally passes an official plan, which is a statement relating to how the municipality ought to grow. The official plan is like a policy statement of the municipality, but it

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has no legal binding effect. In order to give some kind of legal effect to the official plan a by-law must be passed. The by-law that is passed is a zoning by-law (restricted area by-law or a land-use control by-law).

The Legal Non-Conforming Use

Many by-laws regulate uses of the property, locations of buildings on the property, front and backyard depths, etc., These by-laws are *not* retroactive. These regulations will only apply from the date of assent forward – if something is there legally before the regulation was passed it will be grand-fathered in and there is no need to comply with the by-law (*legal non-conforming use*). The variance must have been legal before the by-law was passed in order to be deemed a legal non-conforming use after the by-law is passed. This entails reviewing the *previous* zoning by-laws to ensure that the variance was, in fact, legal at that time.

Resolving Non-Compliance Problems

One of the ways to resolve an illegal non-compliance problem is to file a re-zoning application and attain an amendment. A second much less expensive way to resolve the problem is to retain a minor variance to the provisions of the by-law. The entity that does the minor variance application is the committee of adjustment. Section 45 of the *Planning Act* deals with the powers of the committee. An application would be made to the committee to vary the terms of the relevant by-law. If the variance is granted, then the property will be deemed to comply – a minor variance will put you in compliance with the by-law. The best way to determine whether you have a problem is by taking a look at a survey.

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The Survey

What is a Survey?

The only document that can be called a survey is a two-part report prepared by a qualified Ontario Land Surveyor pursuant to the *Surveys Act*. The report must bear the seal of the surveyor. The survey consists of a plan showing the features of the land, such as buildings, fences, and natural features, and a written report indicating any encroachments or other problems revealed by the surveying process. In order to conduct a survey, the surveyor must conduct a title search, get the legal description of the property, and attend on-site to measure the property out. The survey only represents the property at a specific point in time. In other words, ensure that the survey is not outdated by getting an updated one.

A reference plan is a survey generally used for registration purposes. Instead of land being described by way of a metes and bounds description, it will be described as a part on the reference plan. While buildings may be depicted on a reference plan, it may not be a suitable document to rely upon for purposes other than boundary location. Solicitors should be on guard to accept nothing less than a properly prepared survey.

Why Have a Survey

The survey will disclose the extent of title by showing the frontage, depth, and area occupied. The location of the land relative to adjoining property, the boundaries and location of fences, encroachments, and any easement or rights of way will also be shown. A review of the registered title and other documents will allow a solicitor to determine the quality of title; only a surveyor can determine the extent of title. Until both are available, a solicitor should not provide an opinion as to title. Defects on a survey should be requisitioned because they have the possibility of affecting the transaction as a matter of conveyance. Because the matter of conveyance does not go to the root of the title, any requisition must be made within the time period allocated by the Agreement.

Reviewing the Survey

The solicitor has an obligation to exercise care in reviewing the survey just as any other legal document. The survey should always be reviewed with the client as the client is best suited to point out discrepancies, encroachments, rights of way, easements and so on. When reviewing the survey the solicitor ought to consider, among other things, the following:

1. The boundary lines – what is the shape, what are the distances, are there any encroachments;
2. The buildings – where are they in relation to the boundaries, there are different regulations and set-back requirements for the various structures;
3. Are there any encroachments; and,
4. What is the maximum allowable lot coverage?

Boundaries/Fences

Start with the apparent boundaries of the land. If the fence is inside the boundary, it may indicate that the adjoining owner occupies a portion of the land being purchased/mortgaged. In most cases the discrepancy between the fence and boundary lines is *de minimus*, and clients will authorize the solicitor to proceed without objection to the discrepancy. Where the discrepancy is substantial the true boundary lines must be determined. If the discrepancy has a major impact on the purchaser's declared use for the property, the purchaser may have a legitimate basis for ending the transaction.

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Building/Structures

The location of buildings and other structures is extremely important for a number of reasons:

Zoning

Municipal by-laws usually provide for minimum setbacks from streetlines, minimum clearances from sides of buildings to lot lines, maximum lot coverage by buildings and many other standards and requirements. Often older buildings do not conform to the current zoning by-laws. Such situations are known as legal non-conforming uses. However, this status is only available where there is appropriate evidence that the non-compliance existed pre-by-law and continued uninterrupted to date.

Utilities/Rights of Way

If a building encroaches upon a right of way or utility easement, it will be necessary to secure the consent of the party enjoying the benefit of the easement to allow it to continue.

Adjoining Land

The building may actually straddle the boundary with adjoining land – the only proper way to deal with this major problem is to acquire title to the land from the adjoining owner. It would be necessary to acquire sufficient land to allow access to maintain the walls of the buildings. Where a building on an adjoining property encroaches the ideal remedy is for the building to be removed. This rarely happens and the purchaser will often require an abatement in the purchase price accompanied by an acknowledgment from the adjoining owner that title is not claimed with respect to the land under the encroaching building.

Access

It is extremely important to ensure that the property enjoys access to a public street or highway.

Variance

Where minor breaches of zoning by-laws are noted or where the solicitor is not satisfied that a property enjoys legal non-conforming status, an application should be made to the municipality's committee of adjustments for a variance to allow these breaches to continue and, in effect, legitimize them.

Release/Quit Claim/Transfers

Where encroachments are of major importance, it is preferable to obtain a more formal release or quitclaim and to register it on title. Where title is being transferred, this will be in the form of a normal transfer with appropriate recitals/statements set out on an ATTACHED schedule.

Title Insurance

Title insurance has provided a potential substitute for the survey. The instructions from many institutional lenders provide for acceptance of such policies in lieu of a survey. Title insurance does not solve any problems buy merely provides coverage against financial loss.

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Title Insurance will protect the owner against minor variances and defects on the title. There are instances where it can be major – such as fraud on a mortgage. Where there is no survey on the property you do not have to get a survey if there is title insurance. If something goes wrong on the title, for instance a discharge on the mortgage or a *Planning Act* problem was missed, instead of making a claim against the lawyer the client will make a claim against the insurance policy.

An insurance policy that the client pays the premium for in order to get an insurance policy for himself or herself. The purchaser or the mortgagee, whoever has the insurance policy in his or her name, is covered. The insurance premium is relatively low ($250 on purchase or $70 on new mortgage).

There are three basic companies that provide title insurance:

1. First Canadian;
2. Stewart Title; and,
3. Title Plus (Law Society Company)

In the past, when a person purchased property s/he would rely upon the solicitor's certificate of title. If there were a mistake found on the title, the individual or mortgage company would sue the lawyer for the mistake. In order to sue the lawyer you would have to prove the lawyer negligent. Title Insurance in the U.S. was something that became very popular because lawyers do not do real estate transactions – title companies do.

One of the big benefits of title insurance is that if you find that on the search of title or on the survey that there is a minor problem you can contact the insurance company and ask whether they would cover it if it came up on the closing. This is called 'insuring over' the problem. If the problem does come up on the sale the Insurance Company will pay to fix it. If there is a zoning problem the company may insure over that.

Title insurance is not always the best option over a survey. For instance, consider a new home purchaser who wishes to construct a deck two years after purchase. Such a project will require a building permit, in which case the building department will require a survey.

Notes on the Obligation of Title Insurance Disclosure

Under Rule 2.02(10)-(12) the lawyer is obligated to talk to his/her client title insurance: that title insurance is available; the benefits and burdens of title insurance; and, indicate the connection between the Law Society, Title Plus, LPIC, and the lawyer. The Rules also provide that a non-lawyer is not to be allowed to talk to the clients about title insurance.

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Status of The Owner, Defects and Liens

The Property Owner

There are different types of ownership and different entities that can own a property. There are different things that need to be done depending on the property owner. One of the things you should look at is the marital status of the property owner.

Matrimonial Home

Under the *Family Law Act* a matrimonial home cannot be conveyed, mortgage, or otherwise dealt with without spousal consent. The consent of the spouse must be evidenced on the deed or on the document (box 9 of the deed) and the spouse *must* sign. This is restricted to married couples – common law spouses do not have the rights in a matrimonial home like married couples do. In box 8, a statement must be filled in with respect to the status of the property owner (certification of being 18 years old *and* spousal status). If the couple separates, then the spousal status etc., must be dealt with in the separation agreement.

Death of the Property Owner (Joint Tenancy and Tenancy in Common)

What happens if one of the registered title owners dies? There are two different ways that you can hold title with more than one person: joint tenancy and tenants in common. When you are a joint tenant there is a right of survivorship, in which case where a property owner dies his/her interest goes to the group. The last standing joint tenant gets fee simple in the property – title to the property is outside of an estate.

If you are not joint tenants you are automatically tenants in common without any right of survivorship with the other owners. In this case the deceased's interest goes to the estate. When an estate gets involved the person to deal with the estate is the estate trustee (used to be called the executor or administrator). You must be sure that all of the debts of the estate have been paid – you do not want to have the debts (liens) come back and haunt you. Also, you ought to take a look at the will, which is registered on title, requiring the estate trustee getting letters probate, and you must see if there is a power of sale in the will. If there is no power of sale they will need other court approvals. Consider whether anyone in particular was given the house in the will. Was there a specific bequest or gift to a specific beneficiary? If there was, that person has to have gotten title to the property or must consent to any sale of the property. All of the interest you get in an estate will vest in the beneficiary three years after the date of death. This means that if the estate trustee has taken too long to process the estate and three years have passed since the date of death an the time the property is sold, the beneficiary might have to sign off.

Power of Attorney

Letters probate and will certificates are generally filed with the general registry and not necessarily with the parcels registry. A power of attorney document must be registered either on title or on the general registry. The power of attorney must ensure that s/he has the authority to deal with a particular piece of property. Box 8 on a deed signed by a power of attorney includes specific recitals – these recitals ought to give the reader a clue that the document was signed by a power of attorney.

Corporations

In many cases a corporation may own the property being transferred. When a corporation owns a parcel of property and looks to sell it, the purchaser does not have to look behind the signature where a corporate seal is affixed on the document or the phrase, "I/we have the authority to bind the corporation" is on the

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document. You can rely on either one of those two things to ensure authority – this is part of the indoor management rule in corporate law.

Suppose the company changes its name or amalgamates with another – what happens to the documents relating to title that list the old company name? The company should file articles of amalgamation (etc.,) in the general registry. When these documents are registered in the general register there should be a recital or a statement indicating the company change. If the corporation does not comply with the law, such as tax law, the corporation may lose its charter. If the corporation loses its charter while it still owns land, that land is forfeited to the government. Thus, you should conduct a status search with the Ministry of Consumer and Business Services.

Partnerships

Partnerships are not a separate legal entity like a corporation is. Thus, if you have partnership property all of the general partners have to sign. Thus, you will require some type of statement indicating that these are *all* of the partners. Those general partners are deemed to own the land as joint tenants – thus, there is a right of survivorship among the partners. If you are dealing with a limited partnership only the general partners of the partnership have to sign.

Trusts

If the property is acquired from another who has the property in trust there will be some indication on title that the registered owner is holding the property in trust for somebody else. If you find the property is held on trust, you may assume that the trustee has the right to sell. In the registry system they allowed you to place on the deed that the land was acquired via trust. In the land title system, the regulator does not like to have any acknowledgment other than true registered owner.

Religious Institutions

A lot of religious institutions are starting to divest themselves of properties. When you purchase from a religious institution you might find the property is in the name of the religious institution or the trustees of the religious institutions. If you buy the property from the trustees, 50 years later those individuals are not around and someone else is signing for the church. Thus, the current trustees are deemed to be the successors of the original trustees who are on title.

Non-Resident Owners

A non-resident is someone who does not ordinarily live in Canada. If you have a non-resident vendor there are certain things you have to watch for. In every transaction there is a clause that says that you are not a non-resident – keep the wording under section 116 of the *Income Tax Act*. If you are not a non-resident you do not need anything special, but you need to know the residency status. There are automatic income tax implications for a non-resident who sells property in Canada. If you are acting for a purchaser you must get a clearance certificate from Revenue Canada – the vendor does this application. With that clearance certificate the purchaser is free and clear from any tax consequences the vendor may have. However, if the clearance certificate is not obtained and the vendor does not pay tax as it is supposed to, the purchaser could be held liable for that tax. The onus is on the purchaser to satisfy himself or herself of the vendor's status – this is why you need residency status on the day of closing.

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Physical Defects

Physical defects are the defects on the building situated on the property being purchased – it may also include a defect on services. There is the inspection clause at paragraph 13 to be wary of, the UFFI provision, and the paragraph 25 provision (four corners of the document provision). Besides these paragraphs in the contract, the basic legal premise is *caveat emptor* – let the buyer beware.

It is up to the buyer to properly inspect the facility and s/he must do so before the agreement is signed. When the agreement is signed the clause at paragraph 13 is automatically applied.

McGrath (1979) ON CA

Facts	Holding
○ Not Done	○ Absent any fraud, mistake or misrepresentation, the purchaser takes the property as s/he finds it

There are two types of defects: (1) patent and (2) latent.

Patent Defects

Patent defects should be easily found by an inspection of the structure by an unsophisticated purchaser. The purchaser is stuck with a patent defect unless:

1. The vendor actively tried to cover up the defect; or,
2. If the purchaser puts a clause in the agreement of purchase and sale about requiring items to be fixed

You don't have to test; instead all you have to do is ask.

Latent Defects

A latent defect is something that an ordinary person is not expected to discover in a routine inspection. The defect generally goes to the fitness of the building for human habitation. Generally, the vendor is not liable for a latent defect if the vendor did not know about it. Thus, if there is a termite infestation and the vendor did not know about it, then there is no liability. However, if the vendor knew about it the court will look at the level of misconduct of the vendor and determine liability there from. If there is an active concealment of the problem the court will rescind the deal and force the vendor to take the house back on account of fraud. Where the vendor knew of the problem, but just kept quiet about it and the purchaser did not ask, then silence is tantamount to deceit.

Jung (1988) ON

Facts	Holding
○ Not Done	○ It is clear law in Ontario that vendor's are required to disclose latent defects of which they are aware ○ Silence about a major defect is the equivalent of an intention to deceive

If the vendor misrepresents the status of the defect, if it is an innocent misrepresentation then the vendor will generally not be found liable and there is little in damages. If it is a negligent or fraudulent misrepresentation the courts will often rescind (purposely made a change or purposely misrepresented).

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The Agreement of Purchase and Sale does not give an automatic right to re-inspect before closing – you should add such a clause for the term immediately before closing.

Harkness (1979) ON Cty. Ct.

Facts	Holding
○ Not Done	○ A purchaser has the right to inspect property immediately before closing

New Homes

Inspections of new homes before closing are required to be done. In order to comply with the *Construction Lien Act* and the *Ontario New Home Warranty Plan Act*, an inspection of the house with the vendor and purchaser together must happen. The purpose of the inspection is to list all those things that need to be finished or fixed before the house can be said to be complete – this is called a certificate of completion and possession. The other document you can get is an occupancy certificate from the municipality – this can be taken in lieu of the certificate of completion and possession. The warranty plan will cover general structural problems with the home. In the first year, the warranty plan covers everything – if there is going to be a claim, encourage the client to make it within the first year. Within the first two years, the plan covers things like basement leaks and mechanical or electrical problems. After that, for the next five years only major structural defects will be covered.

Building Code

The purchaser might look at the building code for some type of protection – it requires the builder to meet particular standards in certain areas. However, one thing that should be done more so than anything else is to get a report from the building department in the municipality that you are in. If the report indicates that certain inspections were done – the municipality gets into trouble. If a work order is listed, it must be fixed and all the permits should include an indication.

Construction Liens

You do not need a new house to get a construction lien – a construction lien might occur for any type of construction, such as a kitchen remodeling or the installation of a septic tank. The lien is in favor of someone who performs some work or service or furnishes material (construction, alteration, or repair). The Construction Lien Act now covers these liens. This *Act* came into force in April 1983. Under the *Act* a lien arises when the first work, services, or materials were supplied. If that person does not get paid, the individual must preserve his/her lien rights. In order to preserve a lien right an individual must register a lien (claim for lien) on the title to the property concerned. This registration must occur within 45 days of the last day that the service or material is provided. Courts will look at these time limits very strictly. The claim for lien is a specific form that is set out by the *Construction Lien Act*. There are also strict consequences if you file a false lien. The lawyer can be subject to damages if s/he assists someone in filing a false lien. The registration preserves the lien right. If the claim is not registered then the right will expire. If the claim is still not paid 90 days after the last date materials were supplied or services were done, the claim must be perfected. Starting a court action perfects a claim – file a statement of claim. As part of the statement of claim you have to ask the court to issue a certificate of action. The certificate of action is issued and must be registered on title.

Lien rights arise not only for the main contractor, but any sub-contractor who supplies the general contractor. It is best to know whether the main contractor has a sub-contractor who is working for him/her. If you search a title and find a claim for lien registered and nothing else, you have to have the lien removed. In order to have it removed you must obtain a discharge of lien. These are different forms

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under the *Construction Lien Act*. If you have both a claim for lien and a certificate for action registered, once everything it settled and you need to have the documents removed from title, you need to obtain a court order – you need to have the court action dismissed and the court orders that the lien be discharged and then *vacate* the certificate of action. The purpose of the *Construction Lien Act* is to require homeowners or the person getting the benefit of the construction to retain a *holdback* – 10% of the value of the work that is being done. Thus, if you are dealing with progress payments and the total value is $25,000 requiring $10,000 to be paid at a certain stage. You should holdback $1,000 until the contract is done. When it comes time for the next progress payment take another 10% and hold it aside. This holdback is a protection mechanism for the owner who is getting the work done (that person is limited in liability to 10% of the contract) and subcontractors who will have some money that they will be able to make a claim against.

If you have a mortgage holder, and you are advancing money on your mortgage you need to make sure that no liens have been filed or registered against the property. As liens may come up quite frequently you should conduct a sub-search for the registered construction lien. Any lien registered by 6pm the day previous to the closing date is applicable.

There is a difference in the *CLA* for new construction and repairs/additions. If someone is buying the land and the new home at the same time there is an exemption for this new homebuyer and they need not comply with the holdback requirements. In order to be considered a new homebuyer who qualifies for the exception two requirements must be met:

1. Do not pay the builder more that 30% of value of purchase price before closing; and
2. The closing/possession date cannot occur until there is a "certificate of completion and possession" under the *Act* or the municipality issues an 'occupancy certificate'.

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Closing the Transaction

In General

Closing is a standard procedure, which is now changing because of electronic registration process. On the day set for closing, the purchaser's solicitor or his clerk should attend at the Registry Office or the Land Titles Officer before the time fixed for closing to conduct a sub-search. The sub-search must be conducted just prior to registering the documents. The purchaser's second task will be to obtain an execution certificate against the vendor to ensure s/he is not an execution debtor. When the sub-search and execution search have been completed to the purchaser's satisfaction, the purchaser and vendor can meet with each other to close the transaction. The closing procedure involves an exchange of documents, keys and cheques. Once all the documents have been exchanged, the purchaser's solicitor will proceed to the registration desk and the vendor will hold the cheques in escrow. If the documents are in order, they will be accepted for registration, the time and date of registration will be stamped on the instrument and an instrument number will be given. The registration costs and land transfer tax must be paid on registration.

With the advent of title insurance the new procedure involves the title insurance company allowing the release of funds and registering later. The insurance company will cover any problems on title (will clean up any problems and allow completion of sale).

The position of the parties after closing involves case law, is there any relation between such parties: the basic position is that all of the obligations between vendor and purchaser that were set up in the contract merge with the conveyance. Thus, if there are things in the contract not dealt with at the time of closing, the party is deemed to have waived those warranties. If you do not want the doctrine of contractual merger to apply to specific circumstances, such as the UFFI provisions then place an express clause in the contract to the effect that the warranty will survive closing.

The Tendering Process

What happens when a transaction does not close? You find out the other side does not want to close for some reason or another. It may be a good idea to set up a paper trail for any possible future law suit. To set yourself up for the evidence set up a tender. The tender process is then followed. A tender is there to evidence that the innocent party is ready, willing and able to close on the day of closing and any subsequent days up to the day of trial. Therefore prepare and gather all the things the other side has asked you for closing and they all should be signed for possible registration.

The tendering process for the purchaser requires possession of all the necessary documents and a certified cheque for purchase (if have a mortgage, borrow the money for a day to show you are willing, able and ready to close).

Once the appropriate documents are assembled they should be tendered to the other side. The easiest way to do this is through an informal statement "I tender said documents to you…", accompanied by the appropriate documents. The other party will have to sign off on the tender acknowledging that they have seen the documents.

If the lawyer is not designated as the agent in the agreement you need to tender to the individual. If there is a homemade agreement then the tender ought to be made to the individual, otherwise an agent or lawyer. The timing of the tender is important. The agreement may stipulate the closing time: tender must

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be made prior to this time. Not tendering is not fatal as you may still produce evidence in other ways to demonstrate readiness, but it may be more difficult.

In an aborted transaction a lien for both the vendor and purchaser arise. When the agreement is signed and a deposit is paid the vendor has a lien for the purchase price still owing and the purchaser has a lien on their deposit.

Remedies for Non-Closing

1. Rescission

Rescission is where the contract is put to an end by the parties or by one of them. As a result of fraud, mistake or misrepresentation producing lack of consent (where there is no meeting of the minds), there can be rescission *ab initio* and, in those cases, the contract is treated in law as never having come into existence. In this case the parties will be put back into the position they would have been had they not entered the contract. For instance, the purchaser will receive his or her deposit back and the vendor will get title free and clear as he had before.

Where one party has, by that party's conduct, repudiated the contract and the innocent party accepts such repudiation as discharging the parties from any further obligations under the contract you may also have a situation of rescission. In this case the innocent party may claim for damages. For instance, the vendor may retain the deposit. The parties would then sign a release promising not to commence any other action.

2. Specific Performance

Specific performance is an equitable remedy whereby the court orders a party to a contract to fulfill that party's contractual obligations. The purchaser's rationale for specific performance is the 'inadequacy of damages' – pecuniary damages can furnish no adequate equivalent where there has been a loss of the bargain. The Supreme Court of Canada has declared in *Semelhago* v. *Paramadevan* (1996) that specific performance will only be available if the property is truly unique.

The vendor's rationale may be justified on the basis of mutuality – if the remedy is available to the purchaser, it should also be available to the vendor. The vendor may also argue specific performance because s/he does not get the full price immediately.

There are numerous reasons why a party might seek specific performance rather than accept damages:

1. There is no obligation on the innocent party to mitigate damages when seeking specific performance; and,
2. A plaintiff may join a claim for specific performance with a claim for damages in the alternative and may elect his or her remedy up to the conclusion of the trial

Before a party may successfully apply for a decree of specific performance, that party must show that on the date set for closing such party was ready, willing and able to fulfill its obligations under the contract. The readiness must continue right up to the time of the conclusion of the trial. Great care should be taken to ensure that the tender is complete and that the tender is effected upon the defaulting party. Any effective tender requires the tendering on the defaulting party of all things required to be produced by the innocent party at the closing of the transaction.

Some matter that may be considered by the court in determining whether to grant the decree include:

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1. Where there has been misrepresentation by a plaintiff (come with clean hands);
2. The unfairness of the contract;
3. Hardship on the defendant;
4. Inadequacy of consideration;
5. Whether the plaintiff is also in breach of his/her obligations; and,
6. Laches (delay)

Where the vendor is not able to convey all that the agreement calls for him to convey, an abatement of the purchase price may be applied. The rationale is that the purchaser is entitled to take whatever title the vendor has to convey and also take abatement as compensation. When specific performance with an abatement is sought by the vendor, the circumstances under which the vendor will obtain the decree are limited to those where the vendor is able to substantially fulfill his/her obligations and it would be inequitable for the purchaser to withdraw.

Finally, when an action for specific performance has been commenced, a purchaser can obtain and register on title a certificate of pending litigation. This will prevent the vendor from disposing of the land in the mean time.

3. Damages

The innocent party may sue for damages resulting from the breach. The basic contract principles of remoteness of damage will apply with respect to agreements of purchase and sale. Damages available must arise naturally from the breach of the contract itself or must have been in contemplation of the parties at the time of the making of the contract as being the probable result of the breach of the contract. It was an accepted principle that damages were to be assessed at the time of the breach of contract. However, there is authority that the damages may be assessed on a date subsequent to the breach, such as the date of trial. In awarding damages the innocent party is to be put into the position s/he would have been in had the contract not been wrongfully repudiated.

The measure for damages that may be awarded for breach of an agreement for sale of land is the difference between the contract price and the market price of the land at the time of the assessment of the damages. However, if the alleged breach of contract is with respect to a defect in title, the purchaser may be able to only claim the return of the deposit and disbursements associated with the search of title.

4. Relief Against Forfeiture

In some circumstances the vendor will refuse to return the deposit to the purchaser. Likewise, the vendor may not return a portion of the deposit back to the purchaser. The purchaser will have to make an application to the court granting relief ordering the forfeiture of the amount of money owing. Section 98 of the *Courts of Justice Act* provides that:

> The Court may grant relief against penalties and forfeitures, on such terms as to compensation as are considered just

Case law has established two criteria that must be met before an order granting relief under this section will be granted:

1. The amount of the deposit must be out of all proportion to the damages suffered; and,
2. It must be unconscionable for the vendor to retain the deposit in full

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Condominiums

The basic concept of a condo is that you get ownership of the fee simple (fee is title); instead of ownership in land you get ownership of a unit in a condo. That ownership devises a percentage in the ownership of all common areas also. The general percentage of ownership is based on number of units in the condo divided by the number of units you own. Common areas are generally held with other tenants as tenants-in-common.

When you buy a condominium unit you by a specific unit in Corporation 12345 (the number is the condominium number). As an owner of a unit you are considered a member of the corporation with voting rights. Voting rights allow the member to elect a board of directors who generally oversee the corporation and make regular decisions. Special decisions require a special meeting of the members where all members are entitled to vote on a particular proposal.

Members are required to pay common fees for the upkeep of the condo, which are generally paid on the basis of the member's percentage ownership in the condominium. Common fees are paid monthly to the corporation.

Condominium law is embodied in the *Condominium Act*, which was recently changed in May of 2001. Any condominium that existed and sold at least one unit prior to the date the new *Act* came into force is governed by the old *Act*.

Key Condominium Documents

One of the unique aspects of condominiums is the various documents that form part of the 'constitution' of the condominium. In addition to the *Condominium Act* itself, the following documents form part of the 'constitution':

1. The 'description';
2. The 'declaration';
3. The various 'by-laws' of the condominium;
4. The 'rules' of the condominium corporation

1. The Description

The registration of a declaration creates a condominium plan. Upon registration the land are divided into various units and common element. A condominium without share capital is now created. A brief description is prepared by the declarant's surveyor and comprises a pictorial depiction of the boundaries of the units, the common elements and the exclusive use common elements. A purchaser's solicitor should review the surveyor's plans in the Land Registry Office in order to confirm with the client, prior to the time of closing, the location of the residential unit and the parking and locker spaces.

2. The Declaration

The declaration is registered in the Land Registry Office and is the most important of the various documents that comprise the 'constitution'. There are seven mandatory provisions in the declaration, the two most important of which are:

1. *Exclusive Use Areas* – One of the mandatory inclusions in the declaration is a specification of any exclusive use areas of the common elements that are set aside for the use of one or more designated unit owners rather than for all the owners. Balconies, front yards, backyards, patios,

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parking spaces and locker spaces are the typical types of exclusive use areas. A solicitor should be careful to verify that any presumed exclusive use area has been so designated; otherwise, it will not constitute an exclusive use area, but a common element area;

2. *Parking and Locker Spaces* – A parking or locker space may be created as either:
   a. A separate unit;
   b. A part of the principal unit being purchased;
   c. A part of the general common element areas of the condominium; or,
   d. An exclusive use common element area

   It is important for the purchaser's solicitor to ensure that parking and/or locker units are conveyed to the purchaser at the same time that the residential unit is conveyed, to avoid a situation where the purchaser owns a place to live but has no place to park

It is important also to determine from the description where each unit and area is located in the description.

3. The By-Laws

The general by-law of the corporation, By-Law No. 1, regulates the governing and internal functioning of the condominium corporation. The provisions in By-Law No. 1 are standard and contained in the Act.

4. The Rules

Rules may be passed under section 58 of the *Act*. Rules may only deal with the use of common elements and units in the promotion of 'safety, security and welfare of the owners and of the property and assets of the corporation'. The rules need only be passed by the board, which must give notice of the proposed rules to each owner in accordance with subsection 58(6).

Searching Title in Land Registry

A solicitor searching title to a condominium must search each of the following four registers in the Land Registry Office: (1) The Abstract Index; (2) The Constitution Index; (3) The Common Elements and General Index; and, (4) The Unit Register

1. The Abstract Index

This index shows the state of title of the condominium property at the time of registration. Any blanked mortgage, easement, or other instrument in existence at the time will be registered as well.

2. The Constitution Index

This index records the declaration and description and all of the by-laws of the condominium corporation.

3. The Common Elements and General Index

Any documents or instruments affecting all of the units, which would be the documents recorded on the Property Abstract Index, in addition to any documents or instruments created after the condominium's declaration.

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4. The Unit Register

Any instruments affecting title to individual units, such as unit mortgages, transfers, common expense liens and discharges of the blanket mortgage of the Abstract or Common Elements index would be in this index.

Searching Title in POLARIS

Under the POLARIS system there is only one index for each unit in the condominium, and all of the instruments recorded in the four indexes described above are recorded in each unit's own parcel register.

The Execution Search

In addition to searching executions against the vendor, executions should be searched against the condominium corporation. Under subsection 23(6) of the *Act*, a judgment for the payment of money against the corporation is also a judgment against each unit owner at the time of the judgment for a portion of the judgment determined by the proportions specified in the declaration for sharing the common interests.

Statutory Protections for Purchasers of New Condos

The Disclosure Statement

Under subsection 72(2) of the *Act*, a purchase agreement for a new condominium unit is not binding on a purchaser until the 'current disclosure statement' is delivered to the purchaser. A purchaser can treat the agreement as not being binding right up until final closing if s/he never receives the disclosure statement. Also, subsection 72(1) provides that the declarant is obligated to deliver to the purchaser a copy of the current disclosure statement. The Old *Act* provided that the purchase agreement was not binding until a disclosure statement was provided to the purchaser of a new residential condominium. The New *Act* applies not just to new residential condominiums, but also industrial, commercial, and retail condominiums.

Statutory Rescission (Cooling Off) Period

Purchasers of new condominium units are given rescission rights under section 73. A purchaser can rescind the agreement of purchase and sale, without any obligation to provide any reason for so doing, within ten days of receipt of a disclosure statement. If the contract is rescinded within the 10-day cooling off period, the purchaser is entitled to a refund of all moneys paid to the developer. Subsection 73(2) clarifies that the 10-day time period commences on the later of the date of receipt by the purchaser of a proper disclosure statement or the date the agreement of purchase and sale is fully executed. There is no similar protection anywhere for the purchasers of non-condominium homes

Contents of the Disclosure Statement

Subsection 72(3) of the *Act* sets out what the disclosure statement must contain. Among other things, the mandatory contents are as follows:

1. A general description of the property, including types and numbers of units, building and recreational and other amenities, together with all conditions applying to the provision of such amenities;
2. The portion of the units that the declarant intends to market in blocks of units to investors;

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3. A copy of the proposed declarations, by-laws, rules, and insurance trust agreement; and,
4. A budget statement for the one-year period immediately following the registration of the condominium plan

Budget Statement Requirements

Under subsection 72(6) of the *Act*, the following additional information is required to be inserted in the budget statement referred to in subsection 72(3):
1. The proposed amount of each expense of the corporation, including the cost of the reserve required for the year, and the cost of a performance audit of the common elements under section 44 of the *Act*;
2. A statement of the projected monthly common expense contribution for each type of unit;
3. The portion of common expenses to be paid into a reserve fund;
4. The amounts of all current or expected fees, rents or charges;
5. The projected amounts in all reserve funds at the end of the current fiscal year; and,
6. A summary of the most recent reserve fund study, if any

The reserve fund study is supposed to assess the structural integrity of the building and the cost of repairs required in the fiscal year. Generally, ten per cent of the common fees are allocated to the reserve fund. However, in the event that the reserve fund and actual costs result in a deficit situation, the owners will be assessed a special levy payable over time.

The Two-Stage Closing

To avoid significant loss of cash flow to a condominium developer by requiring it to keep occupied units, which have been sold, sitting empty until title can be delivered some months down the road, most sale agreements for new residential condominium units require a two-stage closing procedure whereby the purchaser is required to take occupancy as a tenant on an interim basis until the closing date. On closing, the purchaser will be required to pay to the vendor the balance of the purchase price less the deposit monies the purchaser has paid. Once the condominium has been registered, the 'final' or 'title' closing date will be established. The period of time between the interim closing date and the final closing date is usually called the 'interim occupancy period', which can be anywhere from 4 to 18 months in duration.

New and used condominiums differ from each other – there are different processes. For instance, new condominiums come under the Ontario New Home Warranty Program. HUDAC – Housing and Urban Development Program preceded the Ontario New Home Warranty Program. On the purchase of a new condominium we have a two-stage closing.

I. Interim Occupancy

Interim Occupancy – the agreement will require that the purchaser enter occupancy once the condominium is ready. In this stage, some money does change hands when the purchaser pays a portion of the deposit or down payment to a maximum of $20,000. The ONHWP will cover a maximum deposit of $20,000 (will refund to this maximum). If the purchaser pays more than $20,000 the vendor must obtain extra insurance from ONHWP, which is quite expensive. Any extras added to the contract must be paid for at the time of interim occupancy. There is no warranty coverage for the extras.

Occupancy Rent – once the deposit and extras are paid for, the purchaser is entitled to access to the unit. The purchaser must pay monthly occupancy rent, which is set at 1/12th of the estimated municipal tax bill. The purchaser must also pay the estimated common fee. Finally, the purchaser must pay interest on the

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unpaid balance of the purchase price. The interest to be paid is under a prescribed rate under the new *Condominium Act, 2001*. Under the *Old Act* the interest paid was that determined by the builder or the vendor.

You cannot register a mortgage on property until it is owned – this is why there is no mortgage advanced during the interim occupancy stage. At the time of the interim occupancy, the certificate of completion and possession will be done together by the builder and the new homeowner. This certificate becomes a check-list of things that need to be finished on the unit – it is done only for the unit and not the common elements.

The interim occupancy stage can last anywhere from 3 months to 18 months. The reason for taking time is that under the *Act* you cannot register the condominium documents until 90% of the condominium is sold. This is a heavy onus on the builder and, thus, the interim occupancy allows the builder to get some money back in the mean time. Once the condominium documents are registered the building becomes a legal condominium and the builder can then sell the unit. Note: the interim occupancy cannot be waived.

II. Final Closing

At the time that you get your deed you are able to obtain a mortgage and must give the vendor the balance of the purchase price.

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Mortgages

In General

"Indenture" – the word indenture means 'document'. The Standard Charge Terms document is a mechanism used to incorporate the old terms into the new documents. A mortgage is a secured loan tied to real property. This mortgage creates a lien against the property. The mortgage is secured by signing a document, called the mortgage, which is registered on title. The property owner gives the mortgage to the bank in exchange for money to finance the acquisition of the real property.

Pre-1985

Prior to April 1985 there were different terms that were used in the real property mortgage. For instance, under the Land Registry system the documents were referred to as 'mortgage'. The person who gave the mortgage was called the 'mortgagor' – the suffix of 'or' represents the person that is giving. The person that is getting the mortgage was called the 'mortgagee' – the suffix of 'ee' represents the person that is receiving. You also have a discharge of mortgage under the land registry system and assignments of mortgages (mortgage, mortgagor, mortgagee, discharge, and assignment).

The terms in the Land Titles System were different (the terms had there are the ones we use now). Under this system a mortgage was referred to as a 'charge'. Mortgage and charge mean the same thing. A mortgagor is a 'chargor', the mortgagee is the 'chargee', the discharge was called a succasion of charge (often referred to as discharge of charge), and the assignment is called a 'transfer of charge'.

"Equity of Redemption" – before April 1, 1985 when somebody borrowed money and they gave a mortgage for it for security, they were *deemed* to convey the legal estate/title of the land to the mortgagee or chargee. When you deem something it is not an actual transfer, but instead a fictional transfer. Thus, it was as if the mortgagor gave the legal title to the property to the mortgagee, what the mortgagor kept was the right to redeem title to the property once the mortgage was paid. The right to get the title back was called the equity of redemption, the right to redeem the equity in the property once the mortgage is paid back.

There is an entitlement to keep possession of the property during the time that the mortgage is given. You are deemed to have abutting lands if you have ownership in one and equity of redemption in another.

Post-1985

After April 1, 1985 the concept of granting the legal estate to the mortgagee was abolished. You no longer grant the legal estate or title to the mortgagee. Now, the mortgagee only gets a charge or lien on the land. The mortgagor keeps title subject to a lien or charge in favor of the person who has loaned the money to finance the acquisition. The question of priority of liens is dealt with in order of registration. Municipal taxes are the first lien that will take priority despite order of registration.

A first mortgage is a first lien on the property (first priority). If you have a client who has a property to be purchased for $150,000, but can only get a mortgage for $130,000 and does not have $20,000 this person might then borrow the additional money from somebody else. In order to secure this second loan the chargee may demand a second mortgage. If this happens, be sure to register the mortgages in the appropriate order. The order of registration will determine the order of priority – the ramifications are found in a negligence action against the registrant. A judgment will result in remedial attachment to the deed, which will take priority over the first mortgage.

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Vendor Take-Back Mortgages

There are some circumstances where the vendor will loan the money to the purchaser to buy a house. Instead of going to the bank the vendor will loan part of the money. This mortgage is something that is also registered – it used to be thought that the vendor's lien was in priority to everything else. There is case law that indicates that it is the order of registration only that determines priority. There are times where your client may not want to have instructions followed by the mortgage company, but your priority must be the mortgage company. If the instructions from both do not coincide, your client must act to get them to coincide, otherwise you act under the instruction of the mortgage company.

Once the mortgage is paid the mortgage should be taken off title. This is what the discharge form is all about – when the mortgage is paid the purchaser is entitled to a discharge of the mortgage. This discharge releases the property as security for the loan. The mortgagee is going to charge a fee for the preparation of the discharge documents. Once the discharge is registered on the abstract index of the registry office the office should be putting a line through the discharge and the mortgage. This is the office's way of indicating that the discharge was complete in its form and that the mortgage no longer applies.

There are many times that the discharge is not crossed off – sometimes they forget or they get backed up and they do not do it. Sometimes the discharge is not perfectly right (the date might have been wrong etc.,), which is a very common problem. If you come across a mortgage that is not crossed off, but you see that there is a discharge on the mortgage that has been registered and the discharge has been registered for ten years or more, you can require land registry office to cross it off.

When the bank gives a discharge that does not automatically provide the right to collect, a mutual mistake has been made.

Mortgage Broker

Many times you will find a client who does not have the best financial record or credit rating. Mortgages might come through mortgage brokers. A mortgage broker is a person who puts the borrower in touch with the lender for a mortgage loan. This person charges a fee for that service. A mortgage broker will often bring a person to the bank and work out a deal on behalf of the borrower and then presents it to the borrower. A mortgage broker is governed by the *Mortgage Brokers Act*. The case law has found that a mortgage broker has a fiduciary relationship to the borrower. Because of the fiduciary relationship, the mortgage broker must disclose any profits that will be made as a result of the relationship. Also, the broker must get the borrower's consent in making that profit.

Term of Mortgage

The term of the mortgage does not reflect the amortization period – it is simply how long the mortgage lasts. In other words, how long the mortgagor is entitled to have the loan paid to him/her. Under the common law, the mortgagor is not entitled to pay the money back any earlier and nor is the mortgagee entitled to call it in any earlier. The normal term on a mortgage is five years – there was a time in the 1980s when it was longer.

Section 18 of the *Mortgages Act* and the *Interest Act* provide that if a mortgage has a term longer than five years, the mortgagor has the automatic right at any time after the five years to pay off that mortgage. This benefit is accrued in exchange for the compulsory payment of three months worth of interest. This was a legislative response to the situation that occurred in the 1980s economic and interest boom. If the

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mortgagor renews the mortgage for a second five years, that does not count as being more than a five-year term. Renewal starts the clock from zero as far as the mortgage pay-off clauses go.

Guarantor

There is no spot on the charge form for a guarantor – it is usually added to box 12 or through a schedule. The guarantor is not the primary person liable on the mortgage. The guarantor provides his/her financial backing to the bank in the event that the mortgagor does not pay. In the event of default of payment the financial institution may enforce payment against the guarantor – this can be done through automatic litigation.

Implied Covenants & Standard Charge Terms

The implied covenants of a mortgage are found at section 7 of the *Land Registration Reform Act*, which provides that the charge form is deemed to include a number of terms. The form includes clauses such as the mortgagor agreeing to pay the money back and the right to include additional terms. The primary terms are found in the 'Standard Charge Terms'.

The standard charge terms now replace the terms added to the mortgage. The registration number of the terms is added to the charge form for ease of use, document reduction, and electronic registration. Most financial institutions have their own set of standard charge terms.

Standard Charge Terms

The Standard Charge Terms are covenants being made by the mortgagor and include:

Paragraph One – The implied covenants under the *Land Registration Reform Act* are expressly excluded.
Paragraph Two – The mortgagor has the right to put the mortgage on the land
Paragraph Five – The chargor promises to pay the money back and perform all the obligations s/he is supposed to (if the mortgagor defaults the mortgagee will sue on this covenant)
Paragraph Six – The interest that is being charged on the interest now is the same interest that will be charged after default
Paragraph Seven – The mortgage company has no obligation to advance the money (the reason for this clause is if you are dealing with a construction lien situation where the financial institution would not want to advance any funds after such a lien is put on – it is not restricted to the construction lien situation)
Paragraph Eight – If taxes, utility charges, or insurance is not paid the mortgage company has the right to pay those for the mortgagor, the mortgage company is then entitled to add these funds to the principal owing
Paragraph Nine – the mortgage company has a right to sell the property in the event of default of a period of fifteen days (power of sale remedy)
Paragraph Thirteen – The mortgage company may call in the entire amount of a mortgage on a mortgagor who is in default of any payment (there is no time limit)
Paragraph Fourteen – If the property is sold the mortgage has the option of calling in the entire amount unless the mortgage company allows the new purchaser to assume the existing mortgage
Paragraph Sixteen – The mortgagor promises that s/he is going to keep insurance on the property (anything that could damage the building)
Paragraph Seventeen – There is an obligation upon the mortgagor to repair the fixtures and structural elements of the building (keep the property in a good state of repair in order to retain its value)
Paragraph Twenty-Three – When the entire amount is paid the mortgagee will provide a discharge of the charge, but the costs of preparing that discharge will be paid by the mortgagor

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Paragraph Twenty-Four – The obligations of the mortgagor are set out here

While the property is being mortgaged the mortgage company is equally entitled to make decisions, such as additions or internal structural changes. The mortgagor is to receive a copy of the standard charge terms with the charge form before signing off on the mortgage. Without following this process the mortgagor may apply to have the mortgage set aside on the basis of *non est factum*. Section 11 of the *Land Registration Reform Act* provides that the mortgagee is guilty of an offense unless the mortgagor is given a copy of the Standard Charge Terms prior to signing.

Other Terms – Bonus Due on Late Payment & Pre-Payment

The mortgage company may add a number of other terms to the mortgage. Additional provisions are added through box 10 of the charge form, which may refer to a separate schedule:

1. *Bonus Due on Late Payment* – if the mortgagor has defaulted they cannot require the mortgagee to accept payment bringing it back into good standing. In other words, where there is a default if the mortgagor wants to 'catch up' on the payments and get back to where they should be there may be a term to this effect. The mortgagor cannot force the mortgagee to let them return to good standing without making a three-month interest payment/bonus together with the arrears. Section 17 of the *Mortgages Act* allows this to happen. Section 8 of the *Interest Act* provides that a penalty cannot be added that will have the effect of raising the amount of interest being paid. The Ontario Court of Appeal has upheld the three-month bonus payment (*Mastercraft Properties* 1993 32 RPR 2nd 312) – the bonus is not a punishment or a fine, but instead a charge for the privilege of paying the arrears;
2. *Pre-Payment Privileges* – some mortgage companies offer pre-payment privileges. As long as the mortgagor is not in any kind of default s/he can prepay all or part of the principal balance without notice or making the three months bonus. These privileges are of various types:
   i. Some companies allow for a certain percentage of the remaining principal allowed to be paid;
   ii. Some companies allow an increase in the monthly payment by a certain percentage;
   iii. Making bi-weekly payments

   These terms must be somewhere in the written document with the mortgage company – if they are not expressly provided then there will be no entitled to such privileges.
3. *Tax Accounts* – some mortgages call for the mortgagee to pay the taxes on the property. The mortgagor will agree to pay the taxes to the mortgagee – these tax payments will form a tax account to the credit of the individuals. Note that as municipal taxes increase so to will the tax amount payable to the mortgagee by the mortgagor. The mortgagor is entitled to interest at the same rate as the mortgage on any surplus in the tax account.

Transfer of a Mortgage

Transfer by Mortgagee

A transfer by a mortgagee used to be called an assignment of the mortgage. This may occur in the situation where a mortgage company has provided a mortgage to the mortgagor and the debt is sold to a third party. The third-party to whom the charge is transferred to becomes the one that collects the monthly payments. There is really no difference from the mortgagor's point of view when the mortgage is transferred form the mortgagee. The reason that a financial institution would do this is because they need liquidity. The financial institution will sell the debt at a discount rate in exchange for the benefit of liquidity immediately.

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The mortgagee must register a document in the registry office for a transfer of a charge. This is so that the landowner knows that the person from whom the discharge is to be obtained is from a new person. Notice of the transfer must be given to the mortgagor. A lawyer acting for a person who is going to purchase property with an assigned charge should retrieve a statement from the mortgagor with respect to the status of the mortgage. This is a method of ensuring that your client is getting value for his/her consideration.

Transfer by Mortgagor

This transfer occurs where there is a sale of the property with the mortgage being assumed. When the mortgagor sells the property s/he then transfers all of his/her obligations to pay over to the new person, who has assumed the mortgage. The vendor is transferring his/her equity of redemption (the right to redeem the property back from the mortgage company once paid back in full). This transfer cannot occur without the permission of the mortgagee. Unless there is a full release from the mortgagee, the signing party remains at risk and is bound to the charge because of the covenant at paragraph five of the Standard Charge Terms. Thus, a lawyer acting for a vendor who is to transfer the mortgage to the purchase ought to retrieve a release of the obligation from the mortgagee in contemplation of the future adverse effects of paragraph five. If there is a guarantor on the mortgage, s/he has to be dealt with in the same fashion as the mortgagor, otherwise s/he may remain liable upon default of the *new* purchaser.

The Discharge Process

A number of rules have developed because there have been circumstances where lawyers have not paid the mortgage funds from the trust and leave the country. The Law Society has since developed a process for discharges. These rules are set out at paragraph 12 of the Agreement of Purchase of Sale.

Conventional Mortgage

If you are dealing with a conventional mortgage (bank, trust company, credit union) and you are acting for a vendor needing to obtain a discharge you must follow the following steps:

1. Obtain Mortgage Statement – Obtain a *mortgage statement* from the mortgage company, which shows how much money is owing to pay the mortgage off in full on the date of closing and the *per-diem* rate (the daily rate of interest) and the status of any applicable tax account;
2. Send Statement to Purchaser's Lawyer – Send a copy of the mortgage statement to the purchaser's lawyer. The purchaser's lawyer ought to make a cheque payable to that bank for the amount of money disclosed as part of the closing; and,
3. Provide Undertaking – Provide to the purchaser's lawyer an undertaking (a promise by the lawyer personally – personal liability attaches to the lawyer's undertaking) to take the cheque and pay the bank and obtain a discharge of the mortgage and register it. Note: never give an undertaking over something of which you do not have control.

As long as this process is followed the Law Society will not find the lawyer negligent. The process is different where the mortgagee is not a conventional one.

Unconventional Mortgage

The steps to follow in order to obtain a discharge on an unconventional mortgage:

1. Obtain a discharge statement;
2. Send the discharge statement to the purchaser's lawyer with instruction to pay;

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3. Produce the actual discharge on closing – instead of providing an undertaking on the time of closing the lawyer must produce the actual discharge

If the discharge is not available on closing the purchaser has the legal right to back out of the deal. If you have a private mortgagee, you do not want to take the risk by undertaking that you will obtain a discharge because you have no control over the private mortgagee that s/he will sign the discharge.

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Default on Mortgage

Default occurs where the mortgagor has not complied with some term of the agreement. Most commonly default occurs when the mortgagor misses a payment. Breaching any of the covenants, such as keeping the property in a good state of repair, keeping fire insurance, or the obligation to pay taxes, may result in default. Even failure to pay the balance on maturity is default. Note that the standard charge terms provide the mortgagor, in the event of default, can accelerate payment on the principle. Once this is done, the mortgagor has various options of enforcement:

1. Mortgagee performing on the convenant;
2. Starting a court action on the covenant;
3. Taking possession of the property;
4. Power of Sale; and,
5. Foreclosure

What can the mortgagor do to cure a default? The mortgagor has a number of options:

1. Section 22 of the *Mortgages Act*;
2. Section 23 of the *Mortgages Act*; and,
3. Section 17 of the *Mortgages Act*

Mortgagor's Remedial Options

I. Section 22 Mortgages Act

If the mortgage company accelerates the principle amount, section 22 of the *Mortgages Act* gives the mortgagor the right to bring the mortgage into good standing (to bring it back to where it was as if there was no default). All the mortgagee has to do is pay the arrears or perform a covenant and also reimburse the mortgagor for any expenses incurred as a result of the default.

The qualification on this is that this right is available to the mortgagor only before an action is started by the mortgagee to enforce its right and there must have been no sale of the property. In order to know how much is owed, the mortgagor has a right to ask the mortgagee for a statement. The mortgagee must provide that statement within 15 days of the request otherwise the mortgagee's proceedings will be stayed until the statement is given.

II. Section 23 Mortgages Act

This section allows the mortgagor to bring the mortgage into good standing even after a court action has been started. The mortgagor needs leave of the court to do this. The mortgagor must make an application to the court and the application is for relief under section 23 of the *Mortgages Act*. As part of filing the application the mortgagor must pay $100 into the court for costs. The court is looking to get an indication from the court that the mortgagor is serious about bringing the mortgage back into good standing. This application must be made while the court is in action – there cannot have been judgment.

If there has been judgment, but there has not been a sale of the property, the mortgagee has not taken possession, and there has been no foreclosure order, as long as these three things have not taken place the court has the option of staying these proceedings. The mortgagor will then pay the arrears and any relevant costs into the court.

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In any of these instances, if the mortgagor is disputing the amount of costs to be claimed, the costs can be assessed by the court, which is done in the same manner that an assessment is done in a normal court proceeding. Once the assessment is done the mortgagor must pay those costs within ten days.

III. Section 17 Mortgages Act

The mortgage company is obliged to accept payments to cure the default if the mortgagor agrees to pay an extra three months of interest. Other than paying back the entire amount, these are the only options the mortgagor has. Otherwise, when you have a full amount of the mortgage called due, the mortgagor has to refinance the loan.

Mortgagee's Remedial Options

I. Mortgagee Performing on the Covenant

In essence, default is a breach of contract situation. The first option the mortgage company has is to perform the covenant that was breached. For instance, if the mortgagee does not pay the taxes, the mortgagor can pay them. The mortgagor can place fire insurance on the property for the mortgagee. If any money must be paid out in doing this it is treated as the mortgagor loaning the mortgagee that money and the sum is added on to the principle balance. In the most extreme of cases the mortgagor may enter the home and instigate repairs.

Note: The importance of paying taxes to the mortgagor are in order to keep the mortgage interest as the first priority. If taxes are not paid they take priority over the mortgage.

II. Starting a Court Action on the Covenant

The standard charge terms at paragraph 5 provides the essential covenant term – the essence of the mortgage is that it is a contract on the repayment of a loan. Because it is a contract the mortgagee has a right to start an action on the contract. The mortgagee has the option of suing on the arrears only or suing on the arrears plus the accelerated principle amount. It is not very often that the bank will sue just for the arrears. The right to sue arises the first day after default occurs – there is no time delay.

Section 20 of the *Mortgages Act* permits the mortgagee to sue the current owner as well as the original mortgagor. Most often this is the same person, but in the situation where a mortgage has been assumed the two may be separate. The mortgagee may also commence an action against a guarantor. Once the mortgagee gets to the point that they are close to getting a judgment, if they sue the original mortgagor and current owner and they are not the same person, they must choose who they want to get judgment against. It is not uncommon for the mortgage company to get default judgment on the breach. Once the mortgage company gets a judgment they file a writ of seizure and sale with the sheriff – this is referred to as an execution. Besides going after the house, the bank can go after any of the assets owned by the person. From a practical point of view this is not often the case.

An action on the covenant is used often in conjunction with the power of sale proceedings.

III. Taking Possession of the Property

The mortgage company can take control of the property. This means that if the mortgagor is living in the house s/he has to leave. When this happens the mortgagee becomes a mortgagee in possession. The action on the covenant and the action on possession are typically combined. There are reasons why the

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mortgage company would want to go into possession. The most obvious is to put pressure on the mortgagor to get the mortgage back into good standing. Another reason for going in possession is to allow the mortgagee to sell the property with vacant possession.

Commercial Tenancies

Sometimes the property that is being mortgaged is a rental property. If the property is a rental property the mortgagee will want to be a mortgagee in possession to collect the rent. When you are dealing with tenants that are in a commercial property, the mortgage company can only proceed depending upon whether the tenant or the mortgage was there first. In a commercial tenancy, if the mortgage was in place before the tenant went in the mortgage comes first and vice versa. The only way the commercial tenant can be protected is if a non-disturbance clause is included in the lease. A non-disturbance clause is an agreement between the tenant and the mortgage company that if the mortgage company goes into possession, the tenant can stay.

Where the mortgage comes after the tenancy, the tenancy takes priority and the mortgagee takes the property subject to the tenancy. The only thing the mortgage company can do with the tenant is force it to comply with the rental agreement.

Residential Tenancies

Residential tenancies are governed by the *Tenant Protection Act*, 1997. The *TPA* removes the right of the mortgage company to terminate a tenancy regardless of when it started. As long as the tenant is complying with the terms of the tenancy, the tenant can stay. The only thing the mortgage company can do is give the tenant notice that rent is to be paid to the mortgage company. Mortgage companies are not often happy with this because they become landlords – laws dealing with landlords are very strict. If the tenant pays the money to the wrong party, the tenant will have to pay the money twice.

The process of obtaining possession is twofold:
1. Starting the action and getting the judgement; and,
2. Make an application to the court for a writ of possession

The writ is to be brought to the sheriff's office, who is the person who will approach the premises and evict the tenants. The writ is obtained under Rule 60.10 of the *Rules of Civil Procedure*. There are no special rules that deal with the action on the covenant.

Mortgagee's Obligations and Rights

There are different obligations and rights that a mortgage company will have when they go into possession. In *Capsule Investements* (1990), the Ontario High Court laid out the following principles:
1. The mortgage company must manage the property as a prudent owner would manage it;
2. The mortgage company must account for any actions taken;
3. The mortgage company must not make improvements that are not necessary;
4. The mortgagee can collect rent and re-lease the property if it is appropriate

When the mortgagee collects money (rent), the first thing that must be paid out of the rent are the current repairs on the property. If any insurance premiums or taxes have been paid then those should be paid. Any money left over is used to pay the interest owing. Any balance left over goes to principle.

Sometimes when a mortgage company goes into possession they will appoint a receiver – an individual who will take possession and manage the property. A receiver can be either a private or court-appointed

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receiver. This receiver is the agent for the mortgagee in possession, but the receiver does not have any obligation to the mortgagor. Although the receiver is managing the property and taking care of it there is no nexus or connection between the receiver and the mortgagor or borrower. A court-appointed receiver is an officer of the court, thus their relationship is a fiduciary one to the court and to all of the parties.

IV. Power of Sale

Under the power of sale provisions of the agreement, the lending institution (chargor) may force the sale of the chargee's property upon default of the mortgage. Notice must be given to all subsequent encumbrancers and the proceeds of sale must be applied against the debt. There is an order in which the sale proceeds will be applied:

1. Pay the expenses on the sale itself;
2. Interest and the costs owing on the mortgage (legal costs for notice of sale, taxes, insurance premiums etc.,);
3. Principal amount on the mortgage (there should be nothing left);
4. Subsequent encumbrancers by order of priority; and,
5. The mortgagor

V. Foreclosure

In a foreclosure the chargor (mortgagor) forecloses on the title to the property. S/he is not obligate to sell the property. In the event that the mortgagor does sell the property, s/he is not liable to account the profits of the proceeds of sale. However, should there be a deficiency s/he cannot automatically demand payment from the mortgagee.

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Power of Sale

Encumbrance – an encumbrance is some kind of lien. An encumbrance can be a mortgage or an easement – it is legally there, but the title is not completely free and clear. For instance, taxes and construction liens are an encumbrance. The encumbrancer is the person to who's favor the lien applies.

When you are dealing with mortgages and enforcement, the question turns on whose rights are being affected in each proceeding. A power of sale is a process where the mortgagee is permitted to sell the mortgage property and when the property is sold the proceeds are applied to the mortgage debt.

There are two general ways to enforce the power of sale:

1. By contract (Part III); and,
2. By statute (Part II)

If there is a power of sale clause in the mortgage, the mortgagee is permitted to sell by contract, but they must comply with Part III of the *Mortgages Act*. Most mortgages have a power of sale clause in them. If there is no power of sale clause in the contract, the mortgagee may still sell the property, but compliance must be with Part II of the *Mortgages Act.*

If the sale proceeds are less than the mortgaged debt, the mortgagee can sue for the deficiency. Whether the mortgagor, guarantor, or current owner is sued will depend upon what is actionable under the covenant. The power of sale will affect the mortgagor and the rights of all subsequent encumbrancers.

Priority rights on a mortgage are very important – priority of registration is by instrument number. For instance, if you have two mortgages that you are supposed to register in the same day, if you register them in the wrong order, the mortgage that was supposed to be primary will be secondary.

The power of sale procedure is the most common procedure – it is quick and relatively inexpensive. It is also a very specific process. There are certain things that must be done at certain times etc., you must be careful to follow the specific process otherwise the power of sale may be held invalid or the mortgagee can be held liable to whoever has suffered damages as a result.

Process

In order to bring the power of sale process there must be a default in payment for 15 days, either under contract of by statute. Once there is default for 15 days the mortgagee must send out a demand letter (a demand must be made on the mortgage by the mortgagee to the mortgagor). The letters should specify:

1. The amount of money required to bring the mortgage into good standing (this would include, taxes, legal costs etc.,);
2. The deadline date for that payment;
3. The place and the method for payment;
4. Date at which legal proceedings will commence should the mortgage not be brought into good standing

Under section 42 of the *Mortgages Act* the mortgagee is prohibited from starting any other proceedings during a demand period without leave of the court. The reason for this is to prevent unnecessary costs from being added onto the mortgage. If the mortgagee does do other things during the demand period, the demand itself will remain valid but the other proceedings will be set aside.

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If you do not get paid from the demand, then you issue a notice of sale. The notice of sale must provide 35 days of notice before the sale of the property (section 32 of the *Mortgages Act*). If the times are not strictly complied with the process is a nullity. Until that 35 days has lapsed, as a mortgagee, there is no right to sell because the mortgagor has a right to redeem.

There are also specific provisions as to who it is that you have to give notice to. Notice must be given to each mortgagor and it ought to be given to each guarantor – if the guarantor has not been called upon to pay any money, then notice does not have to be given. The safest course of action is to serve the guarantor. The spouse of each mortgagor must be served as well. The notice should be sent to any subsequent encumbrancers – look to the execution certificates and the title. If you fail to notify the subsequent encumbrancer, the power of sale will not affect their right. Only those who are served with the notice have their rights affected. If there are tenants in the property you should also serve the tenants.

Service of the notice must be by registered mail – it must go to the last known address of each of the companies or individuals being served. If the notice is not served by registered mail it can be served in person. If service is by registered mail the notice is deemed to be served on the date that it has been sent.

If you look to the abstract index, anybody who was registered and has any interest as of 5pm before the date of sending the notice is the person who the notice should be sent to.

During the 35 days notice period the mortgagee should do absolutely nothing. Taking any step is a fresh step, which will violate and nullify the notice of sale.

Notice of Sale Under Mortgage

Under the *Mortgages Act* if you are going to perform a sale you should provide notice as per the form provided by the *Act*. This is not a strict requirement – you may use other notice forms, but this is recommended.

Important Sections of Notice

1. All parties to whom the notice shall apply;
2. The date on this document ought to be the signing date;
3. The legal description of the property;
4. Correctly identify the system in which the property is identified;
5. Details of every aspect the mortgage (list all of the documents, such as an amendment or assignment, that relate to the mortgage that have been registered);
6. A break down of the amount owing on the mortgage (principal, interest, insurance premiums, taxes, common fees etc.,) – a notice of sale may be invaliditated if the mortgagee does not provide the break down, the mortgagor is entitled to know and challenge each cost
7. The notice must be completely up-to-date. The interest specified in the breakdown is the interest owing as of the date of the notice;
8. Identify the sum for costs – the average costs for a notice of sale is $1,500;
9. Identify the amount of interest in the mortgage (rate) to be applied from the date of default to the date of payment;
10. The date of deadline (must be at least 35 days from the date of default) – Notices of Sale have been found to be invalid because of the improper amount of days (you should really make this 42-43 days to cover all your bases i.e. *Family Law Act* requirements);
11. "Under the provisions contained in it" must be changed to "Under Part II of the *Mortgages Act*" if there is no Power of Sale clause in the contract;

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12. The date of the notice of sale; and,
13. A penned signature along with the name of the person signing and his/her position

If the mortgagee has another address for any of the persons other than the address shown in the mortgage document, notices have been found to be invalid where the notice is not sent to all known addresses. The courts require absolute adherence to the process because the stakes are so high for the individual.

The Power of Sale proceedings do not have any effect on prior registered documents. In other words, if there is a prior document that affects the title before the mortgage the power of sale will not take priority. Priority is determined by order of registration determined by date. Those holders who come after the mortgage must be given a notice – if they are not given a notice they are not affected.

Construction Liens

A construction lien is a lien right that a person has, preservable by the registration of a claim for lien, for supplying materials or services for construction. As soon as the lien is registered, if the mortgage company makes an advance the lien takes priority over the amount advanced subsequent to that date.

Nothing is shown on title about mortgage advances. By law the construction lien takes priority over an outstanding advance on the mortgage. When you are dealing with a power of sale on a property with a construction lien, do not assume that it has been taken care of – a court order is required to remove the construction lien.

Curing Defects on the Notice of Sale Under Mortgage

A defective notice of sale can be cured in three ways:

1. *New Notice* – Serve a new notice – this is expensive and embarrassing;
2. *Court Order* – Apply to the court for an order dispensing with the Notice of Sale: Section 39 of the *Mortgages Act* – granted where there is no prejudice that is likely to result against subsequent encumbrancers (for instance, referral to the wrong date of the mortgage);
3. *Release* – Obtain a release or a quit claim deed from the mortgagor (they are releasing any rights they may have on the property to the person listed). You will often get this co-operation if you can prove there is no money in it for them anyway.

It depends on the nature of the document that determines what type of release you will need.

Rights of Mortgagor & Subsequent Encumbrancer

The rights of the mortgagor and subsequent encumbrancer are the same under the *Mortgages Act*. The primary right this group has is to redeem the mortgage.

The mortgagor may redeem a mortgage and bring it back into good standing. This stays the same until the property is sold. Just because the notice has been served it does not mean that this right is taken away – the right continues until the property is sold.

The property is considered to be sold once the mortgagee has signed an agreement of purchase and sale. Note: the mortgagee cannot do anything during the 35-day period. Any activity done under the notice period will then cancel the notice of sale and they will have to start over again.

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The mortgagee in an agreement of purchase and sale or an offer to purchase may try to protect him/herself by adding the condition of the mortgagor not redeeming the property before closing. This, in fact, extends the mortgagor's right to actually redeem it until the date of closing.

Once the notice of sale amounts has been paid off, that will put a halt to any sale proceeding. If there is any dispute relating to the costs, the mortgagor may have them assessed and has 10 days from the date of assessment to pay.

The right to redeem will be stopped if the mortgagee goes into possession – the mortgagee cannot go into possession until 35 days after the date of first notice.

Sale of the Property

The sale of the property is the very reason that we are doing the notice of sale. In doing the sale, when acting for a mortgagee, the mortgagee should get a minimum of two appraisals. An appraisal is an evaluation of what the property could sell for. An accredited appraiser must conduct the appraisal. The property should be listed for slightly more than the appraised amount. When selling the property the mortgagee has a duty to act *bona fide* – they must be honest and fair in acting on a sale. They must take reasonable precautions to get a fair price. The mortgagee cannot just sell it to the first offer that comes.

The mortgagee has a duty to behave as a reasonable person would behave in selling his/her own property. The property can be sold by auction, tender, or listing. Once the property is sold the monies are allocated in the following order:

6. Pay the expenses on the sale itself;
7. Interest and the costs owing on the mortgage (legal costs for notice of sale, taxes, insurance premiums etc.,);
8. Principal amount on the mortgage (there should be nothing left);
9. Subsequent encumbrancers by order of priority; and,
10. The mortgagor

If we are dealing with a rental property with tenants, if the tenants had paid a rental deposit they will get their rental deposit back before the mortgagor gets his/her money back.

Closing Documents

If you are acting on behalf of a purchaser who is buying under a power of sale, there are certain things that you must have upon closing. For instance, when you are looking at your search of title ensure that you look at all of the documents to ensure that the entire process (i.e. notice of sale) was done correctly. The closing documents should contain:

1. *Statutory declaration* – a sworn statement under oath under section 35 of the *Mortgages Act* done by the mortgagee or the solicitor for the mortgagee. There are three declarations:;
   (i) The fact that default occurred along with the details;
   (ii) The service of the notice of sale (add post-office receipts); and,
   (iii) The sale of the property complies with Part III of the *Mortgages Act*
2. *Deed recitals* – the deed will have a number of recitals relating to the mortgage registration, the default of the mortgage, and the serving of the notice of sale. These recitals give a history to connect the authority of the person giving the deed back to the mortgage;

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As long as you have these declarations, they are conclusive evidence that Part III of the *Mortgages Act* has been complied with. This means that the new purchaser acquires good title from the mortgagee subject to prior encumbrances – liens before the mortgage. That conclusive evidence only applies as long as the new purchaser does not have notice of an irregularity – without notice the irregularity will not affect the new purchaser. If an irregularity exists on a registered document, that will be considered deemed notice to the new purchaser.

Note: the mortgage that has gone into default has not been discharged. It is through that mortgage that the bank receives its authority to act. The legal effect of the mortgage gets wiped out so long as the proper notice of sale procedure is followed.

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Foreclosure

Introduction

This is the last of the processes of mortgage procedures that a mortgagee can realize on the security of the mortgage. The mortgagee wipes out the owner's interests, claims, and claims of subsequent encumbrancers. This is no different than the power of sale proceedings. In a foreclosure, however, the mortgagee actually gets title to the property. When the mortgagee gets title and then sells the property, if there is any profit then the mortgagee keeps it. There is no requirement for a mortgagee who goes by way of foreclosure to account for the proceeds of the sale. If there is a deficit, the mortgagee does not have the right to sue the mortgagor for the difference. The benefit of the foreclosure is that you get to be the owner and have the opportunity to keep the proceeds fully.

The foreclosure might be conducted where the value of the property is much higher than originally thought and they anticipate nobody will file a desire to sell (D.O.S.)

Foreclosure Proceedings

The *Rules of Civil Procedure* governs the foreclosure proceedings. It is a court proceeding and we are dealing with Rule 64.03. The action is begun with a statement of claim just like any other proceeding. The statement of claim requires a claim for payment on the mortgage (debt owing) and for possession of the property.

The statement of claim must be served upon everybody who is a subsequent encumbrancer including the mortgagor. All of these persons become defendants to the main action.

Notice D.O.R.

Once a statement of claim is issued and served, then any of the defendants can file the Notice D.O.R. (desiring the opportunity to redeem). When a defendant serves a Notice D.O.R., then all of the defendants have 60 days to redeem the property. If the notice is served and the sums are not paid, the court can issue a final order of foreclosure. The final order of foreclosure is shown on the abstract as F.O.F. – Final Order of Foreclosure.

Notice D.O.S.

The defendants also have the opportunity to file a Notice D.O.S. (desiring the opportunity for sale). By filing this notice they can change the foreclosure proceeding into a judicial sale. A judicial sale is one that will be monitored and governed by the court. The mortgagee never owns the property. The sale under these proceedings are very different than the sale under the Power of Sale. If a Notice D.O.S. is filed then the mortgagee never becomes the owner of the property and the mortgagee must account for the sale proceeds just like under a Power of Sale. If the mortgagee has paid in full, then the proceeds go down the filtering line through the subsequent encumbrancers and finally to the mortgagor if there is enough left.

If there is a deficiency on the sale there is no automatic right for the mortgagor to sue on a deficiency. There are a number of points at which things can change in a foreclosure. If a mortgagee decides to sue for the difference, as soon as this is done the entire foreclosure proceeding is opened up and the mortgagor may actually redeem on the property.

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Timing

Power of Sale requires 15 days default and then the notice under the Power of Sale is a further 35 days. A foreclosure can begin immediately. However, a Notice D.O.R. filed by the mortgagor will set the mortgagee back 60 days automatically upon filing. Also, the defendant has 20 days to respond to the Statement of Claim. The cost of a power of sale is much less expensive than a foreclosure. Any time you do anything on a foreclosure action you are in court to do it. The statement of claim must be served by personal service whereas the power of sale notice may be served by registered mail. Also, you have to ensure that you comply with all of the steps. Also, you cannot stop a foreclosure proceeding without the court's permission. The big difference is that under the Power of Sale the mortgagee never becomes the owner while under foreclosure they are.

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