



## **Real Estate Report to Plenary May 2021**

### **BACKGROUND**

The ongoing COVID pandemic has affected us all including all of us who practice real estate. FOLA has been actively engaged in distributing up-to-date details to the bar as information is received from the Ontario government, the LSO and others.

We continue to work with the LSO through the Real Estate Liaison Group to examine the state of real estate practice and any problems faced by the real estate bar, with the objective of developing a plan to address identified problems in the long-term interest of the public of Ontario. The RELG was established in 2014 at the initiative of FOLA and it continues to bring issues concerning real estate matters to attention of the decision makers.

We are pleased to report on the continued progress on real estate issues.

### **COMMITTEE INVOLVEMENT**

Our Real Estate Co-Chairs are members of several committees.

#### ***Real Estate Action Committee***

The Real Estate Action Committee (REAC) is a committee of FOLA and the Ontario Bar Association, chaired by Meredith MacLennan, which meets to set the agenda and develop a unified position on issues impacting the real estate bar for discussion at the Real Estate Liaison Group.

#### ***Real Estate Liaison Group***

The Real Estate Liaison Group (RELG) was created in 2014 in response to the unanimous resolution passed at the November 2013 Plenary and is a committee of the Law Society, comprised of Benchers, Law Society staff, LawPRO, FOLA and OBA members. It is as a forum for the bar to work with the Law Society and LawPRO to discuss issues impacting the real estate bar. We have been concerned of late with the lack of experienced real estate lawyers on staff at the Law Society and continue to push to have that experience reflected in Law Society staff.

#### ***Working Group on Real Estate and Lawyers***

The Provincial Working Group on Real Estate & Lawyers was created in 2003 with members from the OBA, FOLA and the now defunct Ontario Real Estate Lawyers' Association (ORELA). This group was created to raise awareness amongst all stakeholder groups about the valuable legal advice and representation lawyers provide to consumers/lenders and to assist the bar in developing a viable practice while maintaining the high standards which the public is entitled to expect. This Working Group has taken the lead on a number of issues, including obtaining access to the standard OREA forms for lawyers, developing a set of standardized real estate closing documents and condominium guides, and publishing a suggested fee schedule for residential transactions. See the Working Group website [here](#) for further details.

## **UPDATE ON CURRENT ISSUES**

We have been busy since our last Plenary Report and have been trying to keep everyone updated through our real estate updates sent to the local real estate representatives.

### **1. Virtual Reality: Virtual Notarizing is Likely to Become Reality**

Virtual Commissioning was temporarily permitted last year when the global pandemic caused by the spread of the Covid-19 virus forced many into isolation or remote work environments. [O.Reg 431/20](#) came into force on August 1, 2020 permitting virtual commissioning on a permanent basis. See our prior update [here](#) for further details.

Now, the provincial government has indicated its intention provide for virtual notarizing. FOLA has participated in the consultation process. The new regulations will likely permit remote Notarization similar to the current rules involving remote commissioning. There may also be new rules permitting the remote notarizing of physical and/or electronic documents.

### **2. Law Society Review of “Lending Client”**

Following lengthy consultations and lobbying by FOLA and others the Law Society passed amendments to clarify the meaning of ‘finance company’ in the Rules of Professional Conduct.

The amended Rule 3.4-13 can be found [here](#).

In essence, the Rules now confirms that in order to be considered a “lending client” for the purposes of having the same lawyer act for the lender and borrower, the lender must be a bank, trust company, insurance company, or credit unit, or a publicly traded finance company whose material business involves lending money, or a corporation or partnership that has been designated as an approved lender under the National Housing Act (Canada), or a Community Futures Development Corporation, a federal, provincial or municipal corporation or agency affiliated with or funded by a federal, provincial or municipal government.

Commentary has also been added to confirm that a mortgage investment company it not considered a finance company unless it satisfies the criteria in Rule 3.4-13.

At the same time the \$50,000 monetary limit requiring two lawyers was increased to \$75,000 in Rule 3.4-14.

### **3. Updating the DRA**

A small sub-group of lawyers from FOLA and the OBA has worked with Ray Leclair from LawPRO since the last Plenary and has now submitted proposed new wording for the Document Registration Agreement (DRA). The proposed updates to the DRA and multi-party DRA reflect current practices, including the requirement to exchange closing documents following closing and to correct documents returned for correction.

Practice Guideline 4 which deals with Electronic Closings and the DRA can be found [here](#).

#### 4. Planning Act Amendments

Many of the long-awaited amendments from Bill 88 (originally introduced as a Private Members Bill on March 25, 2019) have re-appeared in Bill 276, *Supporting Recovery and Competitiveness Act, 2021* on April 15, 2021. It has been through first and second reading as is now with the Standing Committee on General Government. The Act will impact over 60 other Acts, including the *Planning Act*. Schedules 23 and 24 contain the proposed changes to the *Planning Act*.

The government has published a summary of the proposed amendments on its [website](#) and is accepting comments until **May 25, 2021**.

Some of the amendments include:

- a) There will no longer be merger as a result of the death of a joint tenant. The following exception will be added to section 50(3) – “the land was previously owned by, or abutted land previously owned by, joint tenants and the ownership would have, but for this clause, merged in the person as a result of the death of one of the joint tenants”.
- b) “Retained lands” (lands abutting lands previously conveyed with consent) can be conveyed without a separate consent. When severing a property into two pieces, there is the “consented” parcel and a “retained” parcel. There were lots of inadvertent contraventions of the *Planning Act* when the parcels were dealt with in the wrong order. To avoid this, it was recommended that application for two consents be made (at additional cost, of course). Provided the consent is an “unstipulated” consent (i.e. does not stipulate that subsection 50(3) or 50(5) applies to any subsequent conveyance or other transaction), the amendments will allow the “retained” parcel to be dealt with without a further consent (new section 50(1.0.0.1) and amended sections 50(3)(b) and 50(5)(a)) and will, in fact, allow an applicant for a consent to request a that a certificate be issued for the “retained” parcel as well so long as they have registerable description for it (new section 53(42.1)). There will be no more worrying about the Achione case.
- c) A purchaser will be able to apply for a consent in its own name if so authorized in the agreement of purchase and sale (new section 53(1.1.)).
- d) The ability to amend an application for consent will be codified allowing applications to be amended. Depending on the amendment sought, the consenting authority could require further consultations be held concerning the amendment (new sections 53(4.2.1 to 4.2.4)).
- e) Applicants will be able to request a one-year extension to the time period allowed for fulfilling conditions on such terms as the consenting authority permits. There is currently no ability to seek an extension and applicants are forced to re-apply for a consent if they run out of time to fulfill the conditions (new sections 53(41.1 to 41.4)).
- f) A consent will be able to be cancelled on a go forward basis. For example, a consent that is preventing a lot addition will be able to be cancelled allowing the lot addition lands to merge with the abutting lands that had the benefit of an unstipulated consent (new section 53(45)). There will be no more need for convoluted work arounds such as set out in the Re Furlong case.
- g) Outdoor rights ancillary to long term leases of parts of buildings like patios and outdoor selling areas and life leases of parts of buildings will be exempt from consent requirements.

## 5. Delivering Mortgage Discharge Payments by Wire

LawPRO has posted an up-to-date list of financial institutions that are accepting mortgage discharge payments by wire, including payment instructions. See LawPRO's Avoid A Claim Blog [here](#) for further details.

## 6. Wire Transfers

The Canadian Bar Association has been communicating with the Canadian Bankers Association with respect to continued issues and delays lawyers are experiencing with the existing wire transfer system. They are looking for specific details of wire transfer timing problems that they can share with the Canadian Bankers Association in an effort to help resolve the reliability of this service. If you have experienced a delay in the sending or receiving of wire transfers and you are willing to share the details, please send an email to Ray Leclair at [ray.leclair@lawpro.ca](mailto:ray.leclair@lawpro.ca) with details including the banks involved, the amount transferred, the timing and any other details that might be relevant.

## 7. Payment of Wire Transfer Fees

The Law Society has echoed FOLA's position that absent an agreement to the contrary, each lawyer is responsible for the wire transfer fees deducted by their own financial institution.

The Law Society FAQs are available [here](#) and [here](#).

## 8. Conveyancer<sup>®</sup>/Unity<sup>®</sup> Fee Increase

We received a large number of calls and emails from real estate lawyers across the province following the January 2021 announcement by Do Process that transaction fees for The Conveyancer<sup>®</sup> and Unity<sup>®</sup> increased to \$129 effective January 18, 2021.

We sent a letter to Do Process, a copy of which is available [here](#), and received a response which can be viewed [here](#). We have consulted with the LSO as well and the reality is that DoProcess is a private for-profit business which is entitled to price its products as it wishes. We urge all solicitors to express their concerns directly to the company.

## 9. Teraview<sup>®</sup> Updates

French language documents may now be registered in every jurisdiction in the province through Teraview<sup>®</sup>. Although some jurisdictions previously had this ability, this feature now applies to all counties and districts across the province.

You can now submit documents to be registered under the Registry Act and other documents required to be registered in paper via Teraview<sup>®</sup>. See the Electronic Registration Procedures Guide [here](#) for further details.

## 10. Condominium Buyers Guide

Effective January 1, 2021, purchasers of new construction condominiums must be provided with Ontario's Residential Condominium Buyers' Guide, published by the Condominium Authority of Ontario (CAO). See [here](#) for further details.

## 11. New Regulator for Ontario New Home Builders

On February 1, 2021, the Home Construction Regulatory Authority (HCRA) will assume the registration/licensing responsibilities currently held by Tarion. According to its [website](#):

- The Home Construction Regulatory Authority will be responsible for regulating and licensing the people and companies who build and sell new homes in Ontario.
- The HCRA will enforce high professional standards for competence and conduct in the home building industry, giving new home buyers confidence in one of the biggest purchases of their lives. The HCRA will also improve consistency across the sector, curtailing unethical and illegal builders and fostering a fair marketplace.
- In addition to licensing, the HCRA will provide educational information for consumers on their home buying journey.
- The HCRA will manage the Ontario Builder Directory (OBD) – which is the official source of background information about each of Ontario's more than 5,000 licensed builders/vendors.

## 12. New Residential Lease Form

The province has updated the standard form of residential tenancy agreement required to be used for most private residential rental. Effective **March 1, 2021** the new version (dated December 2020) must be used. The new lease form is available [here](#).

## 13. Standard Closing Documents

The Ontario Standard Closing Documents have been updated as of **February 28, 2019** by the provincial Working Group on Lawyers and Real Estate and are available in French and English on its [website](#).

FOLA strongly believe that the real estate bar benefits greatly from working with a set of standardized closing documents for residential real estate transactions. At the May 2017 Plenary, a unanimous resolution was passed approving and endorsing the use of the standard closing documents prepared by the Working Group on Lawyers and Real Estate.

The idea is to end the repetitions in the old forms and to eliminate any statements, warranties or declarations that were not required to be provided in the agreement of purchase and sale. Vendors, and their lawyers, should not be delivering anything that is not required under the agreement of purchase and sale, as doing so creates liabilities that are not required under the agreement. In addition, the use of standard closing documents can reduce the time a lawyer spends reviewing, revising and negotiating closing documents.

The following additional benefits are noted by the Working Group in the [Rationale Document](#) for the standard closing documents:

1. Less paper, no repetition and more efficiencies, as the content of the documents can easily be confirmed as being either unamended or modified;
2. Less time needed to negotiate the content of closing documents;
3. Adherence to province-wide standards;

4. Client's rights and obligations are protected based on the agreement of purchase and sale;
5. Either party can easily prepare the documents for the other side; and
6. No need to delete inapplicable paragraphs as they are worded conditionally.

Notwithstanding their clear utility to the lawyer and the clients, the standard closing documents have not been fully adopted across the province, and FOLA has agreed to promote their use by all counties and districts in the province.

Letters of Support for this initiative from [LawPRO](#) and the [Director of Titles](#) for the Province can be found at these links.

We are calling on the local real estate representatives of each county and district to encourage the use of the standard closing documents within their association and to notify us once their association has adopted the documents for use.

#### **14. Local real estate representatives**

We have been on a mission to confirm a local real estate rep in each county and district. If a local real estate representative has not been designated or identified in a particular county or district, all real estate information and requests for assistance is sent to the President of the association. If the real estate representative for your association has changed, please let us know by sending an email to [kelly.lovell@fola.ca](mailto:kelly.lovell@fola.ca).

#### **15. Real Estate Resources**

We have found the following resources to be helpful for real estate practitioners:

a) **A Lot from the DOT** – [click here](#)

Notices from the Director of Titles can now be found on the Teraview® website under the “News and Info” tab. Current Notices include:

- Powers of Attorney
- Re-Opening of LTCQ to LT Absolute Plus Applications
- Zombie Deeds are Dead!
- Land Registration During Covid-19
- Do Not Discharge the Mortgage Before Transferring Under Power of Sale

b) **AvoidAClaim** - [click here](#)

AvoidAClaim is LawPRO's blog that offers regular insights on claims prevention and practice management, and warnings about current frauds targeting lawyers.

c) **CCLA weekly newsletter** - click [here](#)

The weekly email newsletter regularly contains a “Did You Know” section from the CCLA Real Estate Lawyers Committee. You don't need to be a CCLA member to subscribe to the newsletter.

d) **Condominium Forms** – [click here](#)

Find prescribed forms under the *Condominium Act, 1998*.

e) **Electronic Registration Procedures Guide** – [click here](#)

Electronic Registration Procedures Guide published by the Ministry of Government and Consumer Services.

f) **Land Registry Bulletins** – [click here](#)

Bulletins issued by the Ministry of Government and Consumer Services, ServiceOntario, Regulatory Services Branch.

g) **Mortgage Discharge Escalation List** - [click here](#)

The Canadian Bankers Association updated the contact list for matters involving mortgage discharges as of June 22, 2020

h) **OnLand** – [click here](#)

Teranet, in partnership with ServiceOntario, has built this web portal to deliver key statutory services relating to land and property ownership in Ontario to land registry professionals and the public.

Through OnLand you can search for historical land registrations and communicate with the Land Registry Office for pre-approval, override or PIN correction requests. Under the “Support” tab, select “Contact Us” and then “Request Forms”. See LRO [Bulletin 2018-04](#) for further details.

i) **Sid Troister’s email updates** – click [here](#)

If you aren’t already on his list, send Sid an email or subscribe on the website and ask to be added to his real estate update list. He periodically circulates useful and interesting information about real estate matters.

j) **Teraview Issues** – click [here](#)

The provincial Working Group on Lawyers and Real Estate maintains a list of matters which are brought to its attention regarding Teraview® and/or Land Registry Office procedures. The Working Group brings these matters to the Director of Titles, the government and/or Teranet and posts updates as it receives further information. The latest list of issues and updates is on the Working Group [website](#).

k) **Teraview Newsletters** – [click here](#)

News and information from Teraview.

l) **Teraview Search Tools** – [click here](#) (select Search Tools)

- City/Town cross reference list
- Instrument prefixes
- Condo PINs

m) **Virtual Signing Resources**

The following resources are also available on this topic:

- Ministry of the Attorney [General Guide for Newly Appointed Commissioners for Taking Affidavits](#)
- Law Society of Ontario [Remote Commissioning Information Page](#)
- Law Society of Ontario [Best Practices for Remote Commissioning](#)
- Law Society of Ontario [Remote Commissioning Checklist](#)
- LawPRO Avoid A Claim article [New Rules for Virtual Signing and the Winding Down of Remote Signing of Wills and Powers of Attorney](#)
- LawPRO/PracticePRO [Video Conferencing Checklist](#)
- FOLA – [Sample Authorization for Virtual Meetings](#)

n) **Working Group on Lawyer and Real Estate** – [click here](#)

The provincial Working Group on Lawyers and Real Estate has updated its website. Check it out for the latest version of the Ontario Standard Closing Documents, access to the OREA standard forms, suggested fee schedule and much more.

o) **Working Group on Lawyers and Real Estate – Mentoring Initiative** - [click here](#)

The Working Group launched this initiative to mentor real estate lawyers on best practices. Because it does not have the resources to individually mentor, the concept is to create survey questions about various aspects of the work in a real estate transaction and then provide a comment in response to the survey results. It is hoped that this will generate discussion about the practice, encourage ideas to be shared and create an atmosphere to suggest best practices to better serve our clients and possibly create more efficient practice.

We encourage you to share this report with the real estate lawyers in your associations. Copies of our Real Estate Updates are available at <https://fola.ca/real-estate-law>.

Respectively submitted,



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