



Real Estate Report to Plenary November 2019

BACKGROUND

At the November 2013 Plenary, the Presidents unanimously passed a resolution that urged FOLA to ask the Law Society to establish a working group or committee, including the direct involvement of LawPRO, 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.

At each Plenary since then, we have reported on the progress of our work and we are pleased to report on the continued progress on real estate issues.

COMMITTEE INVOLVEMENT

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.

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 is chaired by Randall Johns and 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, publishing a suggested fee schedule for residential transactions and developing a set of standardized real estate closing documents. 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. Proposed reforms for Commissioners / Notaries

Technology allows us to communicate with clients in a variety of methods. Email has replaced traditional letters or faxes in most cases, and video and chatting tools are readily accessible on smart phones and computers.

We have received several inquiries about remotely meeting with clients. Can lawyers provide legal advice via skype or facetime? Can they witness documents signed by a client on the other end of a video chat? Can a document be commissioned by a lawyer who is not physically present when it is signed by the deponent?

The Ministry of the Attorney General is considering proposed reforms to the *Commissioners for taking Affidavits Act* and *Notaries Act*. We met with Ministry staff in March 2019 to discuss the proposed reforms and submitted written comments to the Ministry in April 2019. Unofficial verbal direction from MAG suggests that its position is that remote commissioning/notarizing is not permitted under current legislation. We have also met with Law Society staff to discuss this issue, and concerns relating to fraud and undue influence.

A copy of our submissions to the Ministry of the Attorney General can be found [here](#).

As we have previously reported, we asked the Law Society last year to provide guidance to the profession on these issues. On Oct 7, 2019, the Law Society published a Best Practices Recommendation to continue with in-person, not virtual, commissioning. The Law Society's Recommendation can be found [here](#).

2. Law Society review of "Lending Client"

The Law Society is considering proposed amendments to clarify the meaning of 'finance company' in the Rules of Professional Conduct.

The specific Rules under review provide an exception to the conflict of interest rules by specifying that a lawyer may act for both a lender and borrower where the lender is a lending client. A lending client is currently defined as "a client that is a bank, trust company, insurance company, credit union or *finance company that lends money in the ordinary course of its business*" (Rule 3.4-13 emphasis added)

Finance company is not currently defined, and the Law Society is proposing the following underlined amendments:

In Rules 3.4-14 to 3.4-16 a 'lending client' is any of the following:

- a) A bank, trust company, insurance company, or credit union;

- b) a finance company that is a corporation or partnership:
 - i) whose material business involves making or refinancing loans, or entering into other similar arrangements for advancing funds or credit; and
 - ii) whose shares or ownership interests (or another person or entity with which it is affiliated) are listed on a stock exchange within or outside Canada that is a Designated Stock exchange for the purposes of the *Income Tax Act (Canada)*; or
- c) a person who is designated as an approved lender under the *National Housing Act (Canada)*.

The Law Society's consultation paper can be found [here](#).

FOLA responded to the Law Society's call for comment and our response can be found [here](#). In essence FOLA's position, having heard feedback from the bar, is that the proposed definition is too restrictive and results in additional costs being incurred to protect lenders who are sophisticated and not in need of protection. Recently discussions also touched on whether the current \$50,000 limit should be re-examined.

2. *Planning Act* proposed amendments

A private members bill was introduced in March 2019 by Doug Downey to amend the *Planning Act* relating to subdivision control. Prior to entering politics, Doug Downey was a practising real estate lawyer in Orillia for many years and was actively involved in the OBA Real Property Section. Mr. Downey worked with Sid Troister and Ray Leclair to draft legislation that would address concerns and include proposed reforms that Sid had been suggesting for at least a decade.

FOLA reviewed the proposed changes in detail and wrote a letter of support for the proposed reforms prior to the enactment of the private members bill, and then also wrote a letter of support for Bill 88 itself. FOLA also encouraged real estate lawyers to contact their local MPP to support the Bill.

Over 300 lawyers across the province wrote to their local MPPs in support of the draft legislation, and MPPs of all parties spoke in support of the bill during first reading. The bill passed 2nd reading on May 30, 2019 and was referred to the Standing Committee on Finance and Economic Affairs prior to the summer recess.

Doug Downey was appointed as Attorney General for Ontario on June 20, 2019 and while it is terrific to have an AG who practiced real estate for close to 20 years, it turns out that a private member's bill dies when the private member is appointed to cabinet. However, Mr. Downey has confirmed that he is committed to ensuring these changes to *the Planning Act* are made and it is expected that they will be re-introduced in a government bill.

FOLA is urging the bar to lobby their local MPP's to ensure passage of this legislation in the very near future.

Some of the key proposed amendments include:

- Creation of a new 20 year rolling curative provision – s. 57.1.

- Exemption of the merger of abutting properties caused by the death of one joint tenant – s. 50(3)(b)(v) and 50(5)(a)(v).
- Clarification of the retroactivity of “once a consent, always a consent” and making a consent for a mortgage also a consent for transfer - s. 50(12)
- Permitting the dealing with remainder lands after consent conditions are met – s. 50(6)
- Creation of efficiency by removing need for consent for partial discharges where part of land already discharged – s. 50(16)
- Clarification of the prohibition to narrow the joint owner release section to apply only where both parcels have identical ownership – s. 50(19)
- Treating lenders the same as owners by removing special provisions which in practice are treated on the same standard – deletion of s. 50(18) and subsequent changes – s. 50(1.1); s. 50(1.2); s. 50(1.3); s. 50(1.4); s. 50(1.5); s. 50(17); s. 50(18.1)
- Permitting owners the right to deal with remaining lands after consent, as lenders can (reversing case law) – s. 50(3)(b)(iv)
- Providing greater flexibility in granting validation certificates while incorporating same criteria as for a consent – s. 57(6); s. 57(7)

3. Electronic Funds Transfers

FOLA has been consistently advocating for a reliable, accessible, timely and irrevocable system of moving funds between lawyers. While it is clearly desirable and perhaps even necessary for a more efficient process to be developed, we have been disappointed by the response of the financial services industry to this market need.

We were pleased to learn that the Law Society has written a comprehensive submission to the Payments Canada requesting improvements to allow for real time, irrevocable funds transfers to accommodate residential real estate transactions. Payments Canada is made up of the major financial institutions in Canada involved in funds transfer.

Payments Canada is modernizing its entire system, and while the real estate bar and the Law Society were not originally consulted, the Law Society reports that Payments Canada is taking its suggestions seriously and that there seems to be a genuine desire to develop an electronic funds transfer system for real estate that involves large sums of money. It appears that this modernization process will be a multi-year project, and it is driven entirely by the banks and other payment companies who are responding to market demand, so it would be premature to expect immediate or short-term changes, but we are pleased that our ideas are being heard and that progress is being made.

Given the realities of closing today, we have asked the Law Society to review the practice guidelines regarding the payment of mortgage funds in real estate transactions that were last updated in 1992.

We will continue to work with the Law Society and LawPRO in trying to find solutions for the real estate bar in dealing with closing funds.

4. Condominium Document Sub-Committee

The Working Group on Lawyers and Real Estate established a sub-committee to consider the work undertaken in the purchase of a condominium and has drafted standard documents to assist with the purchase of a condominium. We are part of the sub-committee conducting a final review of these drafts, which will be available to practitioners shortly.

5. OREA Clause review Sub-Committee

We also participated in the Working Group on Lawyers and Real Estate's sub-committee that reviewed the standard OREA clauses available for insertion in an agreement of purchase and sale and provided comments to OREA last summer.

6. E-Reg Fee Increases

Registration fees increase each November. Bulletin [2019-02](#) confirms the new registration fees as of November 4, 2019.

7. Standard Charge Terms

As of December 2018, all Standard Charge Terms registered after January 1, 2007 are now available for download – for free – from the OnLand [portal](#).

8. Mortgage Discharge Escalation List

When a lawyer provides an undertaking to discharge a mortgage, it is a personal undertaking of the lawyer, so lengthy delays in receiving a discharge is a matter of concern and should be pursued.

The Canadian Bankers Association publishes a [contact list](#) for mortgage discharge requests and for escalations if discharges are not received in a timely manner. This list is updated from time to time – the current version is dated January 28, 2019 and can be found [here](#).

9. 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. You can contact Merredith MacLennan at merredith.maclennan@stewart.com or Kelly

Lovell at kelly.lovell@fola.ca. We will be contacting those identified and asking for their specific commitment to assist us in reaching the real estate bar in a timely fashion.

We recently hosted our first conference call with several local real estate representatives where we discussed issues of concern to the provincial real estate bar. The intent of the calls is to ensure there is an easy forum for local reps to discuss issues of mutual interest and to provide feedback to FOLA. We plan to hold two or three calls per year with the local real estate reps.

10. 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:

- Important Renewal Form Discipline Disclosures
- Timing and Sequence Matters: A Case Study
- Password Protection in Teraview®
- How to Check the Certification Status of Instruments on Teraview®
- MGCSA Bulletin 2018-04 OnLand Application Release
- Practice Management Tips from the Land Registry Office

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 January 28, 2019.

- **OnLand – Historical property information**

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.

The first phase of the web portal offers customers the opportunity to test out the historical land registration book search and view option only. Customers will still be required to visit a land registry office to print any records. For more information on Historical Books click [here](#).

This feature is useful to confirm prior concession lots for unregistered hydro searches.

- **OnLand – PIN Corrections, Pre-Approvals, Override requests**

The second phase of this [web portal](#), introduced in December 2018, added a new process for communicating with the Land Registry Office - submitting pre-approvals, override requests and PIN correction requests. Under the “Support” tab, select “Contact Us” and then “Request Forms”. See LRO [Bulletin 2018-04](#) for further details.

h) **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.

i) **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](#).

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

News and information from Teraview.

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

- City/Town cross reference list

- Instrument prefixes
- Condo PINs

k) **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.

l) **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.

FOLA recognizes the importance of the practice of real estate to a high number of our members. We are continuing to work toward increasing the focus of the Law Society on real estate issues and are pleased with the progress that has been made since the 2013 resolution of the Presidents. Making changes requires the support of the bar and we encourage the local association to maintain active real estate committees at the local level.

Respectively submitted,



Merredith MacLennan
FOLA Real Estate Co-Chair



Eldon Horner
FOLA Real Estate Co-Chair