THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

RESIDENTIAL REAL ESTATE CONFERENCE—2016
PAPER 3.1

Mortgage Lending: Update and Practice Points

These materials were prepared by Timothy J. Lack of Lunny Atmore LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, December 2016.

MORTGAGE LENDING: UPDATE AND PRACTICE POINTS

I. Update on Recent Case Law

As this conference is no much a "nuts and bolts" fundamentals course, but rather a "free for all" of issues faced by practitioners in this area of law, I have taken this opportunity to seek out recent cases looking at various aspects of mortgage lending and thought it wise to bring you the interesting and relevant ones.

A. Ryan Mortgage Income Fund Inc. v. Revesz, 2015 BCSC 1734

This is an interesting case from last fall that examined the principles of equity, what is an interest in land and the ranking of priorities as prescribed by the *Land Title Act*. More specifically, the case revolves around the competing priorities between a newly filed certificate of pending litigation and a mistakenly discharged mortgage.

In short, the facts are that Ryan Mortgage Income Fund Inc. ("Ryan") had a mortgage on the property owned by Ms. Ravesz and even though they had not yet been repaid for that loan, mistakenly discharged their mortgage. When they refiled their mortgage as against her property, Ryan found that a CPL had been filed on the property by Ms. Revesz' employer (Tostenson) who alleged that Ms. Revesz had embezzled $600,000.00 from them.

The employer asserted in their civil claim that the money taken from them had been used by Ms. Ravesz to acquire or maintain the property, and among the relief sought as against her, the employer sought a declaration that Ms. Ravesz held her property in trust for the employer.

Ryan commenced foreclosure and, as part of that action, sought a declaration that their now re-registered mortgage ranked in priority to the employer's CPL. On that point, the Honourable Mr. Justice Rogers sought to determine what was accomplished by the registration of the employer's

CPL against the title to Ms. Revesz's interest in the property. He noted that at the time of Ryan's application, no judgment had yet obtained as against Ms. Ravesz. All the employer had was a series of allegations and a claim for a variety of relief.

Mr. Justice Rogers stated that:

> It is trite law that the making of a civil claim for a mere money judgment against a defendant is not a valid ground for the filing of a certificate of pending litigation against the defendant's interest in real property. That is because a certificate of pending litigation secures the claimant's claim for an interest in land, and claim for money is just that – it is not a claim for an interest in land. It follows that Tostenson's certificate of pending litigation does not and cannot stand to secure for Tostenson a priority position for any money judgment that it may eventually obtain against Ms. Revesz.
>
> It is equally trite law that a certificate of pending litigation pursuant to the *Land Title Act,* R.S.B.C. 1996, c. 250 secures for the plaintiff a priority position for the interest in land that the plaintiff claims in its suit (*Land Title Act,* s. 31):
>
> 31 If a caveat has been lodged or a certificate of pending litigation has been registered against the title to land,
>
> (a) the caveator or plaintiff, if that person's claim is subsequently established by a judgment or order or admitted by an instrument duly executed and produced, is entitled to claim priority for that person's application for registration of the title or charge so claimed over a title, charge or claim, the application for registration, deposit or filing of which is made after the date of the lodging of the caveat or registration of the certificate of pending litigation, and
>
> (b) if proof of service of notice of claim to priority on the subsequent applicant is provided to the registrar before registration is effected, the registration of the title or charge claimed by the caveator or plaintiff relates back to and takes effect from the time of the lodging of the caveat or registration of the certificate of pending litigation, and that time, as well as the time of the application for registration of the title or charge so claimed, must be endorsed on the register.

Mr. Justice Rogers points out that absent the declaration that Ryan sought, s. 31 of the *Land Title Act* would operate to secure the employer's claim for his interest in the property in priority to subsequent chargeholders: like Ryan's re-registered mortgage. Effectively, the CPL allows those allegations and the relief sought to be given the priority established by the filing of the CPL. Mr. Justice Rogers distilled the issue down to whether or not the CPL secures the priority position of the employer's claim for an interest in the property. Mr. Justice Rogers cited *Bank of Nova Scotia v. Titanich*, 2014 BCSC 1129 as an authority most closely on point and noted that in that case, the CPL holder does not have a mortgage or a proven interest in land, but the CPL holder has reserved a priority spot by filing the certificate of pending litigation and is entitled to that position if he is successful in proving his interest in the land. Using that authority as indistinguishable with the Ryan application, the employer CPL holder was entitled to a position in priority to the Ryan mortgage.

PRACTICAL TAKE AWAY: While certificate of pending litigation holder does not have a mortgage or a proven interest in land, the CPL holder has reserved a priority spot by filing the certificate of pending litigation and is entitled to that position if he/she is successful in proving his/her interest in the land.

B. R.A.D. v. Campbell, 2015 BCCA 494

This is a case that makes for a great read on the topics of: approaches to statute interpretation, how the *Land Title Act* governs the keeping the of the register, and how courts should look to the *Land Title Act* itself for their powers to make changes to the register. The citation is above, I encourage you all to read the whole decision.

The summary of the case is as follows: Ms. Campbell was counsel for Mr. S. in the unsuccessful defence of a civil action for sexual assault. Mr. S. granted Ms. Campbell's law firm a mortgage over a strata unit as security for legal fees. Ms. Campbell witnessed the mortgage as an officer under the *Land Title Act*, and the mortgage was registered against title. Ms. D., the plaintiff in the sexual assault action, later registered her judgment against the title. She applied to the Supreme Court for a declaration that the mortgage taken by the law firm was void, and for an order discharging it from title. The chambers judge held that Ms. Campbell, as a person with an interest in the mortgage, was not entitled to witness it. He declared the mortgage to be of no force and effect, and ordered it discharged from title. Ms. Campbell and her law corporation appealed. Held: Appeal allowed. Whether or not Ms. Campbell was disqualified from witnessing the mortgage as an officer, the mortgage was valid. There was no basis upon which the judge had authority to discharge it form title.

The Court of Appeal determined that the result of the appeal did not turn on the issue whether the lawyer was disqualified from signing the mortgage on the basis that she was a "party to the instrument" as that phrase is used in the section form the *Land Title Act* below:

> **Witnessing and execution**
>
> 42. (1) The execution by a transferor of an instrument must be witnessed by an officer who is not a party to the instrument.

But, that didn't stop the Court from making this nice concise description of the role of the lawyer witnessing an instrument. I quote from the decision as follows as it provides a great mandate to lawyers:

> The purpose of the witnessing requirements of the *Land Title Act* is to protect the integrity of the system. The provisions envisage witnesses who are independent of the parties, and who are trained in the taking of solemn documents. Witnesses are required by s. 43 to satisfy themselves that the person named in an instrument has actually executed it, and to certify that fact by their signatures. They may also be called upon to provide evidence on matters for which the signed instrument provides *prima facie* proof under s. 42(4): the voluntariness of the mortgagor's grant of the mortgage, the mortgagor's knowledge of the instrument, and the mortgagor's capacity to enter into the mortgage agreement. The statutory goals that are served by the requirement of having an officer witness the execution of a land title instrument would not be furthered by having a person with a financial interest in the instrument fulfill that role.
>
> It is, at the very least, unwise for an officer to witness an instrument in which the officer has an interest, and it is possible that it could even be characterized as an unprofessional practice. The fact that the witnessing officer has an interest in the instrument diminishes the value of the officer's signature as an attestation as the document's authenticity.

But getting back to whether the trial judge exceeded his jurisdiction in cancelling the mortgage, the Court of Appeal concluded that:

> The mortgage in this case, then, was valid as between the mortgagor and mortgagee. It was registered under the statute and, as such, is rebuttably presumed

> to be a valid mortgage. It takes priority over subsequently registered charges in accordance with the statute.

And

> Rather, the section allows the registrar to ignore any defect in the execution of an instrument, as long as the registrar considers that instrument to be legally binding.
>
> It seems to me that ss. 49 and 50 evidence a statutory intention to allow valid charges to be registered, where such instruments are legally binding, even where there are formal defects in the instruments. This is consistent with the role of the register, which is to catalog interests in land and to assist in sorting out priorities between charges.
>
> Notwithstanding any defect in the execution of the mortgage document, it was a valid agreement between the mortgagor and mortgagee, and charged the land. The *Land Title Act* sets out formal requirements for land title instruments, and gives the registrar discretion to refuse to register, and even to cancel, charges that are formally defective. The statute does, however, favour the registration of legally binding instruments, even if they contain formal defects. There was no basis, in this case, to cancel the registration of the mortgage.

Again, I encourage a read of the whole case, it is interesting and enlightening.

PRACTICAL TAKE AWAY: Sections of the LAND TITLE ACT evidence a statutory intention to allow valid charges to be registered, where such instruments are legally binding, even where there are formal defects in the instruments. Such registrations are consistent with the role of the register, which is to catalog interests in land and to assist in sorting out priorities between charges.

C. Krayzel Corp. v. Equitable Trust Co., 2016SCC 18

This is a recent Supreme Court of Canada case originating out of a Alberta that deals with that nasty, but seemingly frequent, issue whether there is a distinction between: 1) terms imposing, by way of a penalty, a higher rate in event of default, and 2) terms reserving, by way of a discount, a lower rate in event of no default. This, of course, takes us to sections 2 and 8 of the Interest Act, which read as follows:

> 2. Except as otherwise provided by this Act or any other Act of Parliament, any person may stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed on.
>
> 8. (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.
>
> (2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

Very quickly, in this case, the lender and borrower entered into a renewal agreement on account of a past due mortgage loan, that provided the following:

> *a per annum* "interest rate" on the loan of 25 percent; [the borrower] was required to make monthly interest payments at the "pay rate" of either 7.5 percent or at the prime interest rate plus 5.25 percent (whichever was greater); the difference between the amount payable at the stated interest rate of 25 percent and the amount payable by [the borrower] at the lower rate would accrue to the loan; and if there were no default by Lougheed, the accrued interest would be forgiven.

> Later, [the borrower] defaulted and [the lender] demanded repayment of the loan at the stated rate of 25 percent. The master of the Court of Queen's Bench found both renewal agreements offended s. 8 of the *Interest Act.* The chambers judge of the same court reversed the master's decision, finding that both renewals complied with s. 8. The Court of Appeal was unanimous in finding that the First Renewal Agreement did not offend s. 8. A majority agreed with the chambers judge that the Second Renewal Agreement also complied with s. 8.

The borrower appealed to the Supreme Court of Canada, and in 6 to 3 decision, the appeal was allowed.

The majority held that:

> Section 8 of the Act identifies three classes of charges – a fine, a penalty or a rate of interest – that shall not be stipulated for, taken, reserved or exacted, in a mortgage agreement, if the effect of doing so imposes a higher charge on arrears than that imposed on principal money not in arrears. Section 2 of the Act preserves a general right of freedom to contract for any rate of interest or discount, with the *caveat* that such freedom is subject to what is otherwise provided for by this Act.
>
> The ordinary sense of the words that Parliament chose to include in s. 8, read together with s. 2 and considered in light of the Act's objects, support the conclusion that s. 8 applies both to discount (incentives for performance) as well as penalties for non-performance whenever their effect is to increase the charge on the arrears beyond the rate of interest payable on principal money not in arrears. By directing the inquiry to the effect of the impugned mortgage term, Parliament clearly intended that mortgage terms guised as a "bonus", "discount" or "benefit" would not as such comply with s. 8. Substance, not form, is to prevail. What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used. If its effect is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended.

And:

> The labeling of one charge as an "interest rate" and the other as a "pay rate" is of no consequence, given s. 8's explicit concern for substance over form.

This case is particularly important to note because our British Columbia Court of Appeal had previously concluded that a similar style discount did not offend s.8. (See North West Life Assurance Co. of Canada v. Kings Mount Holdings Ltd. (1987), 15 B.C.L.R. (2d) 376.

PRACTICAL TAKE AWAY: Watch Out! Business as usual in BC with respect to discounts from high rates that disappear upon a default offends the INTEREST ACT, as our SCC holds firm on the concept of substance over form. Section 8 applies both to discounts (incentives for performance) as well as penalties for non-performance whenever their effect is to increase the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

D. Sood v. Kaul, 2016 BCSC 1825

A mortgagee sought to enforce a 22 year-old mortgage and sought to avoid being statute-barred by asserting she was a "secured party in possession of collateral" which is an exemption under the *Limitation Act.*

PRACTICAL TAKE AWAY: The case provides a good analysis of the exemption and reaffirms (from Falconbridge) the rationale for limitation periods, but I thought the real point is that your clients should not be allowed to mistakenly believe that a registered mortgage forever secures the debt as long as the mortgage stays registered.

I will deal more with limitations again a bit later in this presentation.

II. Collateral Transactions

A. Guarantees and Covenants to Pay

I appreciate that this will be a mini recap of a topic I touched on last year but on more than one occasion in this past year, I saw private lender documents from law firms where the term guarantor and covenantor were used inter-changeably, and incorrectly, in the various documents. I venture that this error in terminology seems to occur in private lending transactions more frequently because of the unsophistication of the instructing lender/broker and that the documents are not those mandated and prepared by a large financial institution.

In the section of the 'Documentation' chapter of the Mortgages Practice Manual entitled 'Gathering Information', one of the matters that must be considered by the lawyer is 'The Guarantor/Covenantor'. That section states:

"The lender may require persons other than the registered owner of the property to be liable for repayment of the mortgage loan and observance of the mortgage obligations. These persons are described as guarantors or covenantors. While these terms are sometimes used interchangeably, there is a legal distinction between a guarantee, which creates only an obligation as a surety, and a direct covenant or indemnity. A direct covenant or indemnity is usually required by the lender. "

A lawyer should seek information determining the requirement of covenantors/guarantors in a mortgage transaction and seek to determine in what capacity a person is to be liable for repayment of the mortgage and observance of the mortgage obligations. Where instructions request a person to sign as a guarantor, a lawyer ought to clarify those instructions to ensure that (as I referenced above) the terms have not been used interchangeably by the lender giving the instructions.

All of which information gathering and retainer confirmations are performed and done with the intent that solicitor is assisting the client in avoiding foreseeable risk in the mortgage transaction.

At this time, and for good order, the distinction between a covenantor and a guarantor should be set out in order that the reader be aware that there is a distinction and the importance thereto.

A covenantor is, in the Prescribed Standard Mortgage Terms, expressed to be "…a primary debtor to the same extent as if the covenantor had signed this mortgage as a borrower and is not merely a guarantor or a surety, …".

On the other hand, a guarantor is that person that enters into a collateral contract called a guarantee and the guarantor "…undertakes to answer for the debt or the obligation of the principal debtor to the creditor. In other words, the guarantor promises to the creditor that "if the debtor does not pay, he [or she] will." (from Bennett in "Creditors' and Debtors' Rights and Remedies")

The distinction between a contract of indemnity and a contract of guarantee is simple in principle: (i) in a contract of indemnity, the obligation is an independent undertaking to make good a loss. The indemnitor assumes the primary liability, either alone or concurrently with the principal debtor; and (ii) in a contract of guarantee, the guarantor assumes a secondary liability to answer for the principal debtor who remains primarily liable. If the true meaning of the contract is that the promisor will pay only if a third party does not, then the agreement is a guarantee. If the promisor

is liable to pay in any event, then the contract is an indemnity" (see *Credit Foncier Trust Company v. Zatala Holdings Inc.*, (1986), 4 B.C.L.R. 25 (C.A.).

The collateral nature of a guarantee distinguishes it from other forms of contract which are often employed to serve similar goals. The simple guarantee is predicated on the principle that the debtor shall first be liable and that once the liability has been established, the guarantor then becomes liable along with the debtor for the guaranteed obligation. Many guarantees, however, make the guarantor *directly* liable with the debtor. Therefore, the term "guarantee" may be a misnomer, as the person who signs the document may in effect be signing a direct contract to pay the creditor irrespective of whether the debtor can pay. This is especially so with bank guarantees. (again, please see Bennett)

Please note that with the use of specific language, either by the lender or the lender's solicitor, a guarantor can be effectively elevated to being a primary obligant directly liable with the debtor.

The Mortgages Practice Manual makes this clear:

> 7. GUARANTEE/CONVENANT [§5.25]
>
> Many institutional leaders have included guarantor or covenantor provisions in their filed standard mortgage terms. A covenantor provision is included as section 15 of the prescribed standard mortgage terms. The *Land Title Transfer Forms Guidebook* states that a covenantor or guarantor may sign the Form B Mortgage in Item 12. The covenantor's or guarantor's name is to be typed or printed below the signature. It should also be indicated in Item 12 that the person is signing as "guarantor" or "covenantor", using the appropriate defined term from the filed standard mortgage terms. Note that the filed standard mortgage terms must include a guarantor or covenantor provision for this procedure to be followed. Ensure that the reference to the parties reflects the definition of the parties in the application mortgage terms (filed or otherwise); see *Kalsiv. Achary*, 2012 BCSC 361.
>
> A separate guarantee and covenantor's agreement that refers to the mortgage may also be used to obtain the required covenant or guarantee.

Accordingly, lawyers should clarify in what capacity certain persons, are to be liable for the repayment of the mortgage loan and for the observance of the mortgage obligations.

In the case of a covenantor, the language necessary in bringing such person into the role as a primary debtor is found in the Prescribed Standard Mortgage Terms. A solicitor has the necessary language to bind the covenantor readily available without having to produce his or her own terms or receiving them from the lender client.

In the case of a guarantor, the main requirement is that [the guarantee] be set out in writing in order to be enforceable. Further, "[i]n establishing the validity and construing guarantees, many of the basic rules that developed in the construction and interpretation of contracts are applicable." (from Bennett) Simply put and for practical purposes, the terms of the guarantee need to be established, in writing. Therefore, be sure to seek instructions from the lender in order to produce the guarantee, or otherwise have the lender's form of guarantee signed by the guarantor.

PRACTICAL TAKE AWAY: Watch your instructions. Be careful not to "willy-nilly" interchange the terms covenantor and guarantor in your documentation. The Prescribed Standard Mortgage Terms uses the term covenantor and sets out such a person's obligations therein. It doesn't use the word the word guarantor so be careful not to reference a guarantor unless you have specific guarantee language in your documents.

B. Personal Property Security Agreement

Right out of the CLE Mortgage Manual, we are also reminded that the lender may require a security interest in any personal property of the borrower that is used in connection with the mortgaged property as additional security. This is taken by means of a security agreement under the *Personal Property Security Act* ("PPSA") and the protection of the *PPSA* with respect to the security agreement obtained by filing a financing statement.

I know that in my "non-bank" transactions, the lawyer is often playing more of a role in the document generation of both the security and the final reporting. And, unfortunately, there seems to be some expectation of an "on-going awareness" of the loan transaction as it proceeds to payout.

But my concerns and caution here is that in the standard mortgage reporting letter (from the same Mortgage Manual or otherwise), a lawyer may not sufficiently address the PPSA filing and in particular, may not reference the expiry of the Personal Property Registry filing of the financing statement. In the CLE Practice Manual for the PPSA, the authors have included an important paragraph in their suggested report to the client. It reads:

> The registration will expire and the Security Interest will cease to be perfected on _____, _____, unless registration is renewed on or before that date. Renewal is your responsibility. The PPR does not remind secured parties when registrations expire and we will not keep a record of the expiry and we will not keep a record of the expiry date or remind you to renew. Accordingly, you should diarize this matter to ensure that the registration is renewed if any obligation remains unpaid or has not been performed at the expiry date. Renewal is required notwithstanding seizure, repossession or commencement of litigation.

I recommend that whenever a security interest is part of your security, you remain mindful of your reporting to your client in respect of the expiry of such filing and incorporate some sort of warning in your report. You don't have to re-invent the wheel. The CLE Manual gives you the ready language.

PRACTICAL TAKE AWAY: Don't treat security interest in personal property as an afterthought in your mortgage transactions. Be thoughtful as to the length of registration and use the language or similar language from the PPSA Manual precedent for reporting on PPSA filings in your mortgage transaction reporting.

As for the expiration of the PPSA filing, I caution that mortgage security also "expires" and will deal with that later in my presentation.

C. Modifications and Extensions of Mortgages

Mortgage transactions do change as between the lenders and borrowers and from the initial instructions. Lawyers must be careful as to how they assist their clients in documenting these changes. The CLE Mortgages Manual is an excellent source in providing guidance in documenting these changes and I draw your attention to this passage from the Manual:

> Many changes do not require registration in the land title office. These amendments are usually made in informal agreements without the use of legal counsel or other formalities. See FP 79 for an example of such an informal agreement.

And according I include that example (FP 79) as noted above in the passage:

RENEWAL AGREEMENT [FP 79]

See §10.14. This form is not included in the disk product.

MORTGAGE RENEWAL AGREEMENT

REFERENCE NUMBER

PROPERTY ADDRESS

PARTICULARS OF MATURING MORTGAGE

OUTSTANDING BALANCE (P&I) $
- Includes Renewal Fee of $
- Includes Arrears of $

APPROXIMATE TAX BALANCE $

AMORTIZATION REMAINING MONTHS (APPROX)

COMPANY hereby offers to renew your mortgage subject to the following terms and conditions.

NEW TERM	NEW INTEREST RATE	OPEN / CLOSED	NEW MANURITY DATE	PRINCIPAL - INTEREST	TAXES	LIFE INSURANCE	NEW MONTHLY PAYMENT	INITIALBESIDE OPTION REQUESTED
6 MO								
1 YR								
2 YR								
3 YR								
4 YR								
5 YR								

COMPANY also offers a one year open mortgage for residential, owner-occupied properties. Call your local Mortgage Manager for details.

A revised side agreement has been enclosed for any account previously set up with weekly, bi-weekly or semi-monthly payments. If applicable, please sign and return with this renewal agreement.

EFFECTIVE DATE OF RENEWAL FIRST PAYMENT DATE AND MONTHLY THEREAFTER

CONDITIONS

1. This offer is subject to the condition that all payments due to the Effective Date of renewal, including any arrears noted above, are paid and honoured and that all realty taxes relative to this property have been paid in full. Interest will be calculated semi-annually, not in advance.
2. Where the monthly payment provides an allowance for municipal taxes, nothing shall obligate the mortgagee to pay taxes more often than annually. Any tax deficit will be payable on demand. Until demand, interest will be charged at the mortgage rate. No interest shall be payable on any credit balance unless noted in the original mortgage document.
3. Upon request, the mortgagor(s) agree to execute such further documents evidencing this renewal as are required for registration. Such registration shall be at the mortgagor's costs and expense.
4. When not in default, we will permit a non-cumulative 10+10 annual prepayment provided that the property secured is owner occupied and contains not more than three family units. No other prepayment will be accepted prior to maturity.
5. All the covenants, conditions, powers and matters in the said mortgage shall apply to and form part of this agreement, except those amended herein.

This offer is to be accepted by signing and returning one copy of this agreement to our office on or before _____ failing which, this offer may be revoked at the sole option of _____ and the balance in full demanded.

SIGNED for COMPANY

AUTHORIZED OFFICER

ACCEPTANCE BY MORTGAGOR(S)

I/We hereby accept this offer to renew

Registered Owner (Mortgagor) Registered Owner (Mortgagor)

CONSENT OF SPOUSE – I, _____, spouse of the registered owner, hereby consent to the renewal of the said mortgage.

SIGNATURE OF SPOUSE ADDRESS OF SPOUSE

CONSENT OF GUARANTOR – I, _____, hereby acknowledge, consent and agree to be bound by all of the above terms and conditions and I further acknowledge that my obligations under my guarantee remain in full force and effect.

SIGNATURE OF GUARANTOR ADDRESS OF GUARANTOR

PLEASE RETURN THE ORIGINAL OF THIS AGREEMENT TO _____COMPANY AT THE ADDRESS NOTED ABOVE AND RETAIN THE DUPLICATE COPY FOR YOUR RECORDS.

A seemingly straightforward document, but I know of many lenders who use something similar to document their renewals, without the use of counsel. So , while I appreciate that mortgages do continue and change and that the lender may elect to do this on their own, I know that lenders often look to the lawyer when things go wrong. I am also aware that as the "sailor in the crow's nest" watching out for seemingly every foreseeable risk, lawyers are dragged into issues even where the client takes matters into their own hands.

In the case of renewals, I see in my private lending practice, instances of elaborate written renewals and other occasions where the renewals are much more informal. The concern of course is that registered mortgages are subject to the *Limitation Act*, and while we may be aware of that and when the date for such limitation begins, the client may not.

On that note I refer you to:

Kong v. Saunders, 2014 BCCA 508

The respondents lent a sum of money to their son and the appellant, his former spouse, to assist them in purchasing a matrimonial home. The loan was evidenced by a promissory note which was expressed to be payable on demand. After the breakdown of the marriage 14 years later, the respondents demanded repayment of the monies they asserted owing under the promissory note and commenced the underlying action to recover them. In ordering that the respondents be repaid the funds out of the proceeds of the sale of the house, the trial judge held that the action was not statute barred because there was an understanding that demand would not be made until the house was sold. Held: appeal allowed. The claim is statute barred. As the loan was payable on demand, the limitation period began to run when the loan was made and expired before the action was commenced. There was no agreement that demand would not be made prior to the sale of the house, and a unilateral understanding to that effect by the respondents is not sufficient to prevent the running of the limitation period.

See also: C*anada Mortgage and Housing Corporation v. 447136 B.C. LTD.*, 2014 BCSC 480 where it was not the borrower, but rather, a subsequent charge holder that raised the limitation issue as against the mortgagee.

I note that the precedent reporting letter for mortgages in the CLE Mortgages Manual does not have the same style caution that the reporting letter for PPSA registrations has about "expiring" security. I think that it may be prudent to include a warning about limitations in your mortgage reporting letter.

PRACTICAL TAKE AWAY: Mortgages are subject to the Limitation Act and lawyers need to wary of that and be watchful where the client wrongly thinks registration creates enduring and endless security no matter how lender behaves. We are the watchdogs of foreseeable risk and knowing that a mortgage loan may carry on beyond the balance due date (or some other trigger under the Limitation Act) dictates some warning to clients.

III. Special Mortgages

This is my favourite topic, as a great deal of my practice involves second mortgages and ensuring that the second mortgage isn't squeezed out of recovery as against the property on account of a prior mortgage taking all of the equity out of the property. It sounds easy enough to confirm the first and send a "section 28 notice notice letter", but there are no ready or standard precedents for this task. Although I do think the Act sets out the minimum of what needs to done sufficiently

clear, I urge you to grab some of the past CLE's on this subject, and get up to speed on the correct manner in confirming the first and giving notice to that prior mortgagee after your second is registered. But, for good order and because people do call me on this matter I will leave you with a practical take away.

PRACTICAL TAKE AWAY: Seek the first mortgage balance yourself and directly from the prior mortgagee. Send your Section 28 notice letter, even if the prior mortgage is not identified as a "secured and running account" in the Form B. Send the notice letter in a manner that ensures receipt by the prior mortgagee.

I am still waiting for the definitive case on this matter, but until then, I think that an overabundance of caution, confirmation and notice is in order. For the sake of all my second mortgage lender clients , and my own practice, I really want that first real "on-point" case to rule in favour of that second mortgage lender.

IV. Priority Issues

For a careful and skilled review of the deemed trust issue, please see the paper written and presented at this same conference in 2014 by Alan Frydenlund and Scott H. Stephens. Deemed trusts are increasingly becoming a concern for lenders, particularly those private lenders who do not have the time or resources to perform comprehensive due diligence. Deemed trusts result from unpaid income tax, Canada Pension Plan contributions and employment insurance premiums. If an individual or their employer does not remit these monies to the Receiver General, the individual becomes a tax debtor.

The *Income Tax Act*, *Excise Tax Act*, *Employment Insurance Act* and the *Canada Pension Plan* act all contain sections that deem the tax debtor's property, as well as any proceeds therefrom, are held in trust for the Crown up to the value of the tax debt. Pursuant to the deemed trust, the property of the tax debtor is considered to be beneficially owned by the Crown regardless of any registered security interests. This includes the proceeds of the sale of real property.

The concern for lenders as a whole is that the lender has no ability to perform any due diligence to determine if there is a deemed trust or what the amount of the deemed trust is without authorization from the borrower. Even with the authorization in hand, it can take weeks to obtain the information from the CRA, a length of time that lenders typically do not have.

So in light of the time crunch in getting tax information prior to funding a mortgage, I now have lenders who attempt to get this confirmation after funding but prior to discharging their mortgage. I have been requested to insert clauses in the Schedule E such as this:

> Condition of Discharge:
>
> As a condition of discharge of this mortgage and all related loan security documents, and in addition to full payment of all costs due and owing to the Lender including principal and interest, interest on interest, protective disbursements and all costs and other amounts, as provided for under this Mortgage, the Borrower will provide the Lender with current and up to date clearance letter from:
>
> (i) Canada Revenue Agency, Income Tax Act (deemed statutory trusts) section 227(4) (payroll deductions);
>
> (ii) Excise Tax Act (G.S.T.) collected under Section 222(1); and

(iii) Employment Standards Act, RSBC 1996.

Such clearance letter must be in form acceptable to Lender and dated not more that thirty (30) days before the date that the Mortgage is repaid in full. This clearance letter process can take a considerable time to obtain and, accordingly, the Borrower is advised to make arrangements for obtaining this clearance letter as soon as possible in advance of the anticipated repayment and discharge of this Mortgage.

PRACTICAL TAKE AWAY: While I see the intent behind this clause, and have inserted it in some of my mortgages, I have received serious push back from borrower's counsel on occasion and it puts the lender's lawyer in the awkward spot of trying to explain this issue to a private lender.