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Mortgage and Real Property Law Report

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A Legal Newsletter for the Mortgage and Real Estate Industries

Real Property Appraisals are "Personal Information" Subject to PIPEDA

In a recent matter before the Office of the Privacy Commissioner of Canada, the issue was whether residential property appraisal documents are considered to be the "personal information" of the property owners, and therefore subject to the strictures of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). A related question was whether the release of a property appraisal was mandatory when requested by the owners themselves.

An individual had asked his bank for a copy of a residential property appraisal that had been conducted on his property. The bank refused his request: it did not consider the document to contain "personal information" under PIPEDA because it was information not about the owner, but about the property itself (*i.e.* information such as address, lot and house size, number of rooms, other buildings, services and amenities, and type of construction). In the bank's view, precisely who was living in the house was irrelevant to its value; the appraisal form could be completed without adding any personal information about the owner whatsoever, and was simply a statement about the value of real estate with certain attributes. The bank concluded, however, that the appraisal constituted "confidential commercial information", so it declined to release it pursuant to the PIPEDA provisions which govern such documents.

The Privacy Commissioner disagreed with the bank's assessment. It held that because the property was in the individual owner's name, the information in the appraisal relating to that property (including its market value) was his personal information and therefore the bank was subject to PIPEDA requirements in connection with it.

This being the case, the Privacy Commissioner went on to conclude that the individual had the right to gain access to the appraisal containing his personal information.

However, access by the individual was not unrestricted. The Privacy Commissioner went on to clarify that not all the information in the appraisal was personal to the individual: certain information such as the appraiser's name and contact information, plus data about other neighbouring properties, was considered third-party information which was subject to different treatment under PIPEDA. This being the case, the bank had the right to apply exemptions to certain portions of the appraisal document itself, and to sever the non-personal information where appropriate.

In the end, the Privacy Commissioner held that:

- Residential property appraisal documents constitute the personal information of the property owner under PIPEDA; and
- When responding to access to personal information requests for such documents, financial institutions have the right to sever all non-personal information, and duty to several all third-party personal information.

The full summary of this decision is found on the Office of the Privacy Commissioner of Canada website at: www.priv.gc.ca/cf-dc/2008/390_20080507_e.cfm.

New Federal Borrowing Regulations in Effect

As part of a new initiative to protect consumers of financial products, the federal government has introduced two sets of regulations under the *Bank Act* designed to enhance consumers' access to lending products on fair and clear terms.

Specifically, amendments to the federal Cost of Borrowing Regulations implement a new series of regulations which address disclosure and transparency for consumers of lending products. A second set of regulations, called the Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations, provides guidelines and limits on the business practices of financial institutions in connection with credit cards and other credit arrangements.

This new legislation applies to any federally-regulated entity that extends credit to Canadian consumers; it does not currently apply to credit cards issued for business purposes. For the most part, both regulations come into force on January 1, 2010, although their implementation is subject to a staggered legislated time-frame.

As a result of these new regulatory provisions, federal lending institutions will need to review – and will likely need to revise – their policies, practices and documentation to ensure compliance with them.

The changes are significant. For example, under the Cost of Borrowing (Banks) Regulation, lenders are required to include a detailed summary box in their disclosure statements, outlining specific information that must be provided to consumers. They must also overhaul their standard documentation for credit agreements (which includes all loans, lines of credit, and credit cards). New Electronic Documents Regulations allow for communication with consumers electronically, bringing that ability in line with other provisions of the *Bank Act* and its regulations. In addition, financial institutions will have to amend their practices by January 1, 2010 in connection with:

- charging fees for surpassing credit limits;
- obtaining consent for credit card limit increases; and
- the method and timing in connection with contacting debtors for the purposes of debt collection.

New provisions allow consumers a 21-day interest-free grace period on all new purchases, and implement certain protocols for applying

consumers' payments against their outstanding balances. These come into force later in the year.

Limitation Periods on Mortgage Enforcement (Part II)

In the last issue of our *Mortgage and Real Property Report* we touched briefly on the limitation periods that apply to the enforcement of legal obligations under a mortgage. Because lenders of all types are subject to these strict statutory limitation periods governing how long they have to protect their rights, and because the question arises any time a mortgage goes into default, the issue is certainly worth re-visiting in greater detail.

To begin with, mortgagees have two pieces of legislation to worry about:

- the *Limitations Act* (the "LA") and
- the *Real Property Limitations Act* (the "RPLA").

The RPLA focuses on real estate and other interests in land, such as mortgages. The LA deals with other kinds of limitations periods – yet these may still affect mortgages and interests in land. It is therefore important to be aware of all of the nuances.

The following is a general – and not exhaustive – list, as there are often exceptions, qualifications and special considerations relevant to each of these time periods, depending on the facts:

- Routine enforcement of mortgage remedies to obtain money secured by land – 10 years (under the RPLA)
- Action for possession or recovery of land – 10 years from the date the last mortgage payment was made (under the RPLA)
- Action on the covenant to pay all or part of the money secured by mortgage – 10 years (under the RPLA)
- Action on other covenants contained in a mortgage – 2 years (under the LA)
- Action by a mortgagee against someone who has been granted the equity of redemption under the Mortgages Act – 10 years (under the RPLA)
- Action against a guarantor under a guarantee in a mortgage – 10 years (under the RPLA)
- Action by a mortgagee or landlord to recover arrears in rent and interest on rent – 6 years from the date the amounts were due (under the RPLA); up to 6 years of back-rent or interest on rent can be claimed.

Also, the legislation stipulates that a limitation period will usually begin to run the moment the mortgagee is entitled to bring "a claim" (which arises from "injury, loss or damage" caused by someone's "act or omission"). This is an important threshold question.

To further complicate matters, additional legal considerations apply to mortgages payable "on demand", and for guarantees and collateral mortgages. Other rules apply to debts under a demand promissory note which have been acknowledged by the debtor, and where there has been part payment of a debt.

Complex as they may be, it is crucial for mortgagees know these deadlines: if they get missed, the mortgagee's action against the mortgagor is statute-barred and can no longer be launched; and the corresponding mortgage remedies are at a permanent standstill.

Effect of City Delay in Permit Applications under the *Heritage Act*

In a recent Ontario decision, later confirmed by the Ontario Court of Appeal, the lower court held that the City's delay in making a decision on a demolition permit application under the *Heritage Act* did not amount to acquiescence, nor did it invalidate the City's eventual permit refusal on the merits of the application itself.

The owner of a heritage property had applied to the City of Toronto for a demolition permit. The City failed to reply to the owner's application within the 90-limit, and ultimately issued a formal refusal about two weeks later. However, even after the deadline had expired, the owner and the City had been exchanging additional information needed by the City to make its decision, and the owner continued to ask about when that decision would be made.

In these circumstances, the court held that the City was aware of the properly-filed demolition permit application, and by its conduct was clearly not intending to strictly comply with the 90-day time limit. However, this did not mean that the City consent could therefore be assumed: simply because it failed to respond within the deadline, this did not mean the City was deemed to have approved the application. Indeed, the court found that there was essentially an agreement between the owner and the City to extend the decision period, and that the City's subsequent refusal of the demolition permit application was a valid one. The owner's subsequent appeal was dismissed; the Court of Appeal pointed out that the owner had essentially shown a willingness to wait for the City's decision even past the deadline, and to abide by the outcome. See *ADMNS Kelvingrove Investment Corp. v. Toronto (City)*, 2009 (ON C.A.).

LEGAL ALERTS

The New HST and Real Estate Transactions

The Harmonized Sales Tax (HST) comes into force in Ontario on July 1, 2010. The HST combines the 8% provincial sales tax (PST) with the 5% federal goods and services tax (GST) to create a single, harmonized sales tax of 13%.

Properties under $400,000 will be exempt. There will also be no HST payable on the sale of a residential resale home, just as there is no GST on such sales now. However, new home purchases that are presently subject to GST will be taxable at the 13% HST level. The new tax will also apply to many real-estate services to which only one or the other form of tax had applied previously. These include :

- legal fees;
- fees for realtor commissions;
- the costs of appraisals;
- property inspections;
- land surveys;
- home inspections;
- landscaping;
- renovations; and
- moving costs.

These taxes are all in addition to the Land Transfer Taxes which exist for both the province of Ontario and (where applicable) the City of Toronto.

Payday loan changes in effect

Under the *Payday Loans Act, 2008* the provincial government had also shored up certain protections for users of payday loan services. Although the Act itself came into force earlier in the year, and included a requirement for all lenders to secure a license as of April 1, Ontario payday lenders are now restricted from charging more than $21 in charges per $100 loan, effective December 15, 2009.

The statements of law and comments contained in this Newsletter are of a general nature. Prior to applying the law or comments to any specific problem, please obtain appropriate legal advice.