

REAL PROPERTY LAW

Gary M. Yaffe

A. Introduction

B. Case Law

1. Mortgages
2. Receivers
3. Indefeasibility of Title
4. Landlord and Tenant
5. Bare Trusts
6. Developer's Liability
7. Strata Corporation Easements
8. Sale of Land
9. Restrictive Covenants
10. Crown Liability

C. Legislation

1. Excise Tax Act
2. Home Owner Grant Act
3. Property Transfer Tax Act
4. Land Tax Deferment Act
5. Real Estate Services Act
6. Proceeds of Crime (Money Laundering) and Terrorist Financing Act

D. Other Developments

1. Economic Overview
2. Provincial Government Response to Economic Conditions
3. CMHC Changes to Maximum Amortization and Financing Threshold
4. Commercial Tenancy Act Reform
5. Proposed Amendment to Residential Tenancy Act
6. Martin Wirick
7. Superintendent of Real Estate—Amended Policy Statements 5 and 6
8. Land Title and Survey Authority—Waiver of Right of First Refusal

A. Introduction

This chapter discusses developments in 2008 in case law, legislation, and other matters relating to real property.

The author thanks Edie Ryan (articled student) and Nancy Connor (librarian) of Owen Bird Law Corporation for their assistance in preparing this chapter.

First published in the *Annual Review of Law and Practice* (CLEBC, 2009). Reprinted with permission.

B. Case Law

1. Mortgages

In *Homewood Mortgage Investments Ltd. v. Lee*, 2008 BCSC 512, a fraudster impersonated the respondent owner of the subject lands, completed a mortgage application, and granted a mortgage and assignment of rents to the petitioner for \$750,000, the full amount of which was advanced to the fraudster. After the discovery of the fraud, the petitioner applied to the court for a declaration that the mortgage was a valid charge against the land, and the respondent applied for a declaration that the mortgage and assignment of rents were forgeries and unenforceable against the respondent or the land. The court discussed *Credit Foncier Franco-Canadien v. Bennett*, [1963] B.C.J. No. 16 (QL) (C.A.), in which Credit Foncier took an assignment of a mortgage that was determined to be a forgery. In that decision, the court held that a forged mortgage was void and should be discharged because it remained a nullity notwithstanding the registration of the assignment to an innocent party for valuable consideration and without notice of the fraud. The court further stated that, even if the mortgage was a valid registered instrument in the name of the assignee, it would secure nothing, since the mortgagors had received nothing under the mortgage and therefore would owe nothing to the mortgagee or to the registered assignee. In *Homewood*, the petitioner tried to distinguish *Credit Foncier* on the basis that no money was advanced under the mortgage in that case, whereas here there was money advanced by an innocent party. The court rejected this distinction and stated that the mortgage application, being a forgery, renders the resulting mortgage a nullity. The court decided that the mortgage was obtained by fraud and was unenforceable against the respondent's land and the respondent. The court also stated that the respondent's position was stronger than the respondent landowner's position in *Credit Foncier* because the petitioner here, unlike in *Credit Foncier*, had an opportunity to investigate the *bona fides* of the forger, and there was no evidence showing that the petitioner had made any effort to do so.

In 2008, there were two decisions dealing with the troubled "Riverbend" townhouse development in Coquitlam. In *CareVest Capital Inc. v. Chychrun*, 2008 BCSC 201, the plaintiff CareVest, mortgagee to the developer, applied to strike a claim of negligence brought by some of the defendants in a counterclaim to CareVest's foreclosure action. In the foreclosure action, the defendants argued that, while they had entered into pre-sale purchase contracts with the developer at a time when CareVest had agreed to provide a partial discharge of its mortgage in exchange for proceeds at the contract price, CareVest subsequently caused the developer to cancel the existing purchase contracts and re-sell the units at current market value as a condition of CareVest advancing additional funds to complete the project. Some of the existing contract holders declined to enter into new contracts to purchase their units at the then-current market value, and others, being the defendants in the foreclosure action (some of whom were the plaintiffs in the counterclaim and respondents in the subject application), entered into new purchase contracts at an increased price. In the foreclosure action, those defendants sought recovery of the difference between the price they eventually paid and the pre-sale contract price. The counterclaiming defendants/respondents argued that CareVest owed them a duty of care to ensure that the prices in the pre-sale contracts were sufficient to ensure completion of the project and repayment of CareVest. They stated that CareVest failed to take reasonable steps to ascertain the minimum prices required for that purpose, or to take reasonable steps to monitor, review, and revise the prices from time to time as changes in the market required.

The central question that the court had to answer was whether a mortgagee who has lent funds to a developer owes a duty of care to those who enter into purchase contracts with the developer. The court stated that the question of whether such a duty exists does not appear to have yet been judicially considered. The court stated that any harm suffered by the respondents in this application did not arise because of CareVest's inclusion of a minimum discharge price per unit but because of the developer's failure to properly assess market conditions for valuation and costs. The court therefore concluded that it was not reasonably foreseeable that the inclusion of a minimum discharge price would cause harm to the respondents. The court stated that a mortgagee's only recognized obligation to those with an interest in land arises in the context of the mortgagee's realization of the mortgaged property, and that a lender is

entitled to take whatever precautions it considers necessary to secure its loan and ensure that the loan funds will be repaid. The court further put forward a policy reason why any proximity between a mortgagee and pre-sale purchasers should be regarded as too remote to impose a duty of care: in the face of such a duty, a lender would be obliged to monitor and assess market factors, construction budgets, and overall progress of the project with a view to protecting purchasers' interests in addition to its own interests. The court stated that to impose such a duty would adversely affect the orderly operation of lending and credit markets. For these reasons, the court struck out the negligence claim in the respondents' counterclaim against CareVest.

In *CareVest Capital Inc. v. Chychrun*, 2008 BCSC 1138, within the foreclosure action on the aforementioned "Riverbend" development, the court had to answer the question of whether CareVest's mortgage security ranks in priority to any unregistered equitable interest the defendants may have acquired under their cancelled pre-sale contracts. After advancing a certain amount of funds to the developer under the initial commitment letter, in response to the developer facing significant cost overruns, CareVest issued a new commitment letter for advancing additional funds to complete the project, with one of the conditions being a change in the partial discharge provisions requiring each lot to be sold at fair market value as determined by CareVest, thereby compelling the developer to cancel the existing pre-sale contracts. As noted above, some of the purchasers walked away with their deposits returned, and some entered into new purchase contracts at increased prices. In an earlier application in the foreclosure proceeding (see *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146), for those pre-sale purchasers who proceeded with unit purchases, the court ordered the receiver to create a fund (the "Fund") comprising the difference between the actual sale price of the units and the pre-sale contract prices, and the subject application dealt with the disposition of the Fund as between CareVest and those purchasers (the defendants).

The defendants argued that, by requiring the developer to cancel their contracts, CareVest committed equitable fraud and as a result did not merit priority to the Fund. However, the court concluded that it was not necessary to decide the equitable fraud allegation because the net proceeds raised under the receivership unit sales were less than the balance owing to CareVest at the time before the defendants had entered into their pre-sale contracts, combined with the fact that CareVest's mortgage secured a current and running account. If the receivership recovery had been greater than the amount advanced by CareVest prior to the pre-sale contracts, the court may have had to consider the defendants' claims to an unregistered equitable interest and the allegation of equitable fraud against CareVest, but under these circumstances it did not. Accordingly, CareVest was entitled to receive the entirety of the Fund.

2. Receivers

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd., 2008 BCSC 897, dealt with two residential strata developments in financial difficulty due to escalating construction costs (for another example, see *CareVest Capital Inc. v. Chychrun*, above). Since the unit prices on the existing pre-sale contracts were not sufficient to allow the completion of the two projects, the receiver appointed in the petitioner's foreclosure action applied for directions to either disclaim certain of the existing pre-sale contracts or allow it to sell the units at the then-current fair market value, free and clear of any of the developers' obligations under those contracts. The court stated in para. 58 that: (a) the receiver was not bound by the contracts entered into before the receivership unless it decided to be bound by them; (b) the receiver properly sought the leave of the court before disclaiming the contracts; (c) the developers would remain liable for any damages resulting from the disclaimer of any contracts; (d) any duty to preserve the goodwill of the developers was owed to those entities only and not to the creditors (that is, the contract holders) of the developers; (e) the ability to disclaim contracts applied even if the party contracting with the developers had an equitable interest as a result of the contract; and (f) if the receiver decided to be bound by the contracts entered into before the receivership, then the receiver would be liable for the performance of those contracts.

On the question of the pre-sale contract holders having an equitable interest in the strata lots that would preclude the receiver from disclaiming the contracts, the court gave effect to the clear provision in the

contracts creating contractual rights only and not any interest in land. However, on the possibility that the court was wrong on its reliance solely on the contractual terms in deciding the question of an equitable interest, the court stated that a necessary condition in establishing an equitable interest in the property is the availability of specific performance as a remedy to the contract holders. In cases in which construction is not complete and stratification has not taken place, specific performance is not available as a remedy because the property that is the subject matter of the contracts does not yet exist. Therefore, in such cases the contract holders have no equitable interest in the property. With respect to certain of the contracts, the court further stated that even if equitable interests could be established, there remained sufficient other grounds for the receiver to disclaim the contracts.

(Note: In the foreclosure action pertaining to the Sophia residential strata lot project in Vancouver, British Columbia, the court order appointing the receiver also gave the receiver the right to disclaim pre-sale contracts (see *Bancorp Growth Mortgage Funds Ltd. and Bancorp Financial Services Inc. v. 0722051 B.C. Ltd.* (25 March 2008), Vancouver S081219 (B.C.S.C.))

3. Indefeasibility of Title

In *Gill v. Bucholtz*, 2008 BCSC 758, the plaintiff was the true owner of the subject property. The defendant John Doe impersonated the plaintiff and conveyed the property to his partner, defendant Gill, who then mortgaged the property twice to two separate defendant mortgagees. Both mortgagees were unaware of the fraud that Gill had perpetrated, both relied on the state of title when they agreed to advance the mortgage proceeds to Gill, and both had taken steps to confirm Gill's identity. The plaintiff sought restoration of the title to the property free of both mortgages. The court held that there was no dispute as to the plaintiff's ownership of the property and ordered the title restored to the plaintiff. As to the status of the mortgages, the court considered three principles that emerge from certain sections of the *Land Title Act*. The first principle is the indefeasibility of title as set out in s. 23(2). The second principle as set out in s. 26(1) is that the *Land Title Act* does not give charges the indefeasibility afforded to fee simple ownership, and on registration of a charge the holder is merely "deemed" to be entitled to the interest contained in the instrument. The third principle is that of *nemo dat quod non habet*—that is, that one cannot validly or effectually give that which one does not have, as set out in s. 25.1. With respect to the purported tension between the *Land Title Act's* preservation of the *nemo dat* principle in relation to charges and the indefeasibility of title, the court stated that it seems the tension is more apparent than real, because the *nemo dat* principle can be preserved while at the same time providing the registered owner with an indefeasible right to deal with the property. From the perspective of a mortgagee dealing with the registered owner *bona fide* and for value, the registered owner owns that which is transferred, and therefore a registered owner who acquired title through fraud can still grant a valid charge on the property. By the operation of s. 23(2) of the *Land Title Act*, the title is conclusive evidence both at law and in equity of the mortgagor's entitlement to the property, and the plaintiff's action as to cancellation of the mortgages was dismissed. The court's decision has been appealed but not yet heard.

Gill v. Bucholtz did not deal with the issue of the plaintiff's entitlement to compensation under the Land Title and Survey Authority Assurance Fund; however, that issue was dealt with in *Oehlerking Estate v. Doe*, 2008 BCSC 1648, decided by the same judge as in *Gill v. Bucholtz*, Barrow J. The facts and decision in *Oehlerking* were similar to those in *Gill v. Bucholtz*—namely, that the plaintiff was entitled to have her title to the property restored after losing it to a defendant fraudster, and the plaintiff's action to have the mortgage granted by the fraudster declared null and void and struck from title was dismissed. However, the court found that the plaintiff satisfied the prerequisites of ss. 294.2(1) and 294.2(4) of the *Land Title Act* to obtain compensation from the Assurance Fund for the damages caused by two defendant fraudsters, those being the principal amount of the mortgage, together with all fees, interest, and penalties owing on it. Note that the court relaxed the conditions of s. 294.2(4), which require a plaintiff who obtains a judgment against a fraudster to take all reasonable steps to recover the damages awarded under the judgment before seeking compensation from the Assurance Fund. Here, given the futility of identifying one of the fraudster defendants and the inability to collect any money from the other fraudster defendant, the court decided that it would certify to the Land Title and Survey Authority that the plaintiff has taken

all reasonable steps to recover on her judgment and has been unable to do so, despite the plaintiff not having taken such steps. This decision has been appealed but not yet heard.

4. Landlord and Tenant

Idle-O Apartments Inc. v. Charlyn Investments Ltd., 2008 BCSC 849, addressed the issue of the retroactivity of s. 73.1 of the *Land Title Act*, an amendment that came into force on May 31, 2007 (see the 2008 *Annual Review of Law & Practice*). In this case, the plaintiff was the registered owner of certain lands, and in 1978 it leased a certain portion of the lands to the defendant. The lease was not registered. In 1999, a dispute arose over whether the terms of the lease required the defendant to obtain the plaintiff's consent for improvements that the defendant intended to construct on the leased lands, and it was at this time that the parties learned that the lease contravened s. 73 of the *Land Title Act*, which prohibits the long-term leasing of an unsubdivided portion of the lands. Relying on the Court of Appeal's decision in *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (C.A.), the plaintiff brought an action seeking a declaration that the lease contravened s. 73 of the *Land Title Act* and was therefore illegal and unenforceable. The defendant sought a declaration that the lease was valid and enforceable, and an order that the plaintiff consent to a subdivision application for the leased lands, or alternatively, an order dispensing with that consent. In May 2007, three years after the subject action was commenced, but before the court gave judgment, the *Land Title Act* was amended by the addition of s. 73.1, which provides in part that a lease or an agreement for lease of a part of the parcel of land is not unenforceable between the parties to the lease or agreement for lease by reason only that (a) the lease or agreement for lease does not comply with Part 7 of the *Land Title Act* (dealing with subdivision approval), or (b) an application for the registration of the lease or agreement for lease may be refused or rejected.

The court agreed with the defendant's position and held that the lease was valid between the parties, and the plaintiff's claim to have the lease declared illegal and unenforceable was dismissed. The court stated that s. 73.1 was remedial legislation addressing the mischief and hardship created by the *Top Line* decision, and was introduced to bring fairness and equity to a situation like the present case, in which the parties clearly intended to enter into a long-term lease. To allow the plaintiff to prevail would result in a serious inequity to the defendant and a windfall to the plaintiff. The court stated that, since the rules of statute construction allow the courts to go beyond strict literal interpretation in order to avoid unfairness, observe the rule of law, and give full meaning to the intention of the legislature, and that since judgment had not yet been rendered at the time s. 73.1 came into force, this case warranted the retroactive application of s. 73.1. This decision has been appealed but not yet heard.

In *Gardiner v. 857 Beatty Street Project*, 2008 BCCA 82, the petitioner tenant appealed the trial court's dismissal of his petition for a judicial review of a dispute resolution officer's finding that the *Residential Tenancy Act* did not apply to the leased premises, and that therefore the officer had no jurisdiction to resolve a rental dispute between the landlord and the tenant. The leased premises comprised a "live/work" studio unit, with the lease stating that the tenant was to use the premises only for the business purpose of using the studio as a working studio and dwelling in the attached unit, and that not less than 70% of the total area of the studio was to be used for the production, display, and sale of the tenant's art work. Furthermore, the development permit issued in respect of the building containing the studio included a condition that the minimum area of space devoted solely to art production be 70% of the combined floor area of the studio and attached residential unit. The chambers judge concluded that the *Residential Tenancy Act* did not apply to the premises based on the exclusion under s. 4(d) for living accommodation included with premises that are (i) primarily occupied for business purposes, and (ii) rented under a single agreement.

The Court of Appeal dismissed the appeal. The zoning, development permit, and lease required that there be a business use of the premises, so the central question was whether the business use of the premises was primary so as to trigger the exclusion of the *Residential Tenancy Act*. The petitioner asserted that from the inception of the lease, for various reasons he had not been producing art for sale in the premises. However, as this use was impermissible under the zoning requirements, the development permit, and the

lease, the court stated that an artist cannot take the benefit of residing in premises zoned to accommodate working artists without at least attempting to earn a living as an artist. The petitioner could not unilaterally choose to use his “live/work” studio for residential purposes and thereby create a tenancy to which the *Residential Tenancy Act* applied. As the only evidence of actual use was of an impermissible use, the Court of Appeal stated that the chambers judge had no choice but to give considerable weight to factors including the zoning requirements, the development permit, and the lease in concluding that the premises were excluded from the application of the *Residential Tenancy Act*.

5. Bare Trusts

In *Graham v. Smith*, 2008 BCSC 348, two separate actions (“Fedewa” and “Watters”, respectively) were heard together, each pertaining to a different deceased who was the registered and beneficial owner of a property and subsequently, through a Deed of Settlement, had gifted his or her respective property to named beneficiaries. The Deed of Settlement also included an alter ego trust whereby each deceased became a bare trustee for the beneficiaries of the gifted properties. Neither of the deceased had applied to the land title office (the “LTO”) to reflect that they now held the properties in trust. The Fedewa executors and the Watters administrator applied to the LTO with the necessary estate documentation to have the titles of the respective properties transmitted to them. The registrar of the LTO refused both applications primarily on the basis that both properties had been held in trust and that title first had to be changed to reflect that trust. The registrar reasoned that, since there was no one in a position to transfer the properties into the name of “Fedewa in trust” or “Watters in trust”, a court order was required to vest the properties in their names in trust. The Fedewa executors and the Watters administrator appealed the registrar’s decisions.

The court allowed the appeals. Under s. 260 of the *Land Title Act*, the registrar must be satisfied that an applicant has established a good safe holding and marketable title to a property before allowing a transmission of title. The registrar was not so satisfied because the titles had not been changed upon the creation of the trusts to show that the properties were now being held in trust. The court stated that general legal principles governing trusts and s. 180(1) of the *Land Title Act* do not require that a trust be registered; therefore, the registrar was wrong to conclude that failure to register a trust resulted in the loss of a good safe holding and marketable title. Furthermore, under s. 264(a) of the *Land Title Act*, as of the dates of death of Mr. Fedewa and Ms. Watters, the legal title they held to their respective properties as trustees became vested in their personal representatives, and the applications for transmission of title by the personal representatives was simply to register the change in titles that had already occurred. Accordingly, the court ordered the transmission of titles into the names of the Fedewa executors and the Watters administrator. This decision has been appealed but not yet heard.

6. Developer’s Liability

Strata Plan LMS 3851 v. Homer Street Development, 2008 BCSC 1160, dealt with the issue of the developers’ liability for false statements made in a disclosure statement issued to purchasers of hotel strata lot units. The defendant developers issued a disclosure statement under the *Real Estate Act* of British Columbia (now the *Real Estate Development Marketing Act*) to the plaintiff purchasers at the time the purchasers entered into purchase and sale agreements with the developers. The disclosure statement included financial projections for the units based on occupancy rates for hotels in downtown Vancouver, and it also included an opinion from an independent valuation consultant on the reasonableness of the projections. After the development was completed and the purchasers took ownership of their units, the financial projections turned out to be incorrect, and the plaintiffs brought an action against the developers for misrepresentations made in the disclosure statement. Section 59 of the *Real Estate Act* provided in part that a developer and its directors are liable to compensate a purchaser for any material false statement made in the disclosure statement, subject to certain defences.

The disclosure statement stated that the projected occupancy rates for the subject hotel were equal to the expected average occupancy rates for downtown Vancouver hotels of similar quality (except for the first two years of the hotel’s operation); however, the projected occupancy rates for the subject hotel were in

fact all above the projected average occupancy rates for downtown Vancouver hotels of similar quality. The court stated (at para. 163) that a “reasonable investor would have considered it very material to know” this discrepancy in projected occupancy rates. The court therefore concluded that the representation as to occupancy rates was a material false statement for the purpose of s. 59 of the Act, and the developers and their directors were liable to compensate the purchasers for any losses or damages resulting from the material false statement. In considering the defences under s. 59 of the Act, the court stated that no defence was available to the developers because the statement did not purport to be made on the authority of an expert (that is, the valuation consultant) and the developers had no reasonable grounds to believe that the statement was true.

7. Strata Corporation Easements

In *Shaw Cablesystems Ltd. v. Concord Pacific Group Inc.*, 2008 BCCA 234, the plaintiff and the defendant Novus were telecommunication service providers and the other defendant, Concord, was a real estate developer. In its capacity as owner-developer of strata property, Concord contracted with Novus to give Novus access to most buildings that Concord constructed, as long as Concord controlled the strata corporations as owner-developer. The defendants denied use of that access to the plaintiff’s customers and potential customers and refused to permit the plaintiff to install its cable system in Concord’s buildings, so the plaintiff brought an action for damages for unlawful interference with its economic interests, which required the plaintiff to prove that the defendants had breached the implied easements under s. 69(1)(b) of the *Strata Property Act*. Section 69(1)(b) provides in part that “there exists an easement in favour of each strata lot and strata lot owner for the passage or provision of ... services, including telephone, radio and television, through or by means of any pipes, wires, cables ... or other facilities existing in the common property or another strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of a strata lot”. On a Rule 34 application, the plaintiff argued that s. 69(1)(b) gives a strata lot owner or occupant the right to invite a telecommunications service provider to install infrastructure or access existing infrastructure on the common property, and requires the strata corporation to permit such installation or access. The chambers judge ruled against the plaintiff, and the plaintiff appealed.

The Court of Appeal dismissed the appeal. The court considered one of the objects of the *Strata Property Act* to be the provision of a framework of rules for group living, with the primary feature of those rules being that no owner has complete freedom of action within their own unit or within the common property and that, generally speaking, majority rules. The s. 69(1)(b) easement does not provide joint ownership or occupation of the services and facilities, and the strata corporation, in exercising its rights under the *Strata Property Act*, may install such facilities and services on the common property as it deems beneficial for all the owners. The Court of Appeal further stated that the individual strata lot owner has no absolute right to install services or facilities in the common property any more than he or she has the right to plant a tree in a common garden or pluck its fruit.

The Court of Appeal released reasons in *Shaw* concurrently with those in *Nomani v. Strata Plan LMS 3837*, 2008 BCCA 236, a decision involving an appellant strata lot owner seeking access rights to common property under s. 69(1)(b) (see the discussion of *Nomani* in the 2008 *Annual Review of Law & Practice* pertaining to the appointment of an administrator of the strata corporation). The Court of Appeal dismissed the appeal, and stated that whether an easement is the subject of an express grant, a statutory provision, or by implication from use or convenience, the rights conferred to the dominant tenement under the easement are always limited by what is reasonably required to permit the enjoyment of the rights without imposing undue burden on the servient tenement. Accordingly, the Court of Appeal could not make an order in the appellant’s favour for general or “free” access to the common property.

8. Sale of Land

The 2008 *Annual Review of Law & Practice* section on specific performance included a discussion of three decisions appealed and decided in 2008.

In *Basi v. Levert*, 2007 BCSC 196, the defendant tenant had an option to purchase the subject property from the plaintiff owners. The defendant gave written notice of the exercise of the option one day before the option expiry date, but the notice included a condition that the defendant be given unrestricted access to the property for the purposes of inspection. In an application under the main action, the plaintiffs sought a discharge of the caveat and certificate of pending litigation that the defendant had registered against the property, in addition to a dismissal of the defendant's counterclaim for specific performance of the purchase of the property contemplated by the option. The trial judge concluded that the notice was not a valid exercise of the option because it included the access condition, and ordered the discharge of the caveat and certificate of pending litigation. The court also found that the defendant had no interest in the property (hence no right to specific performance). The defendant appealed.

In *Basi v. Levert*, 2008 BCCA 156, the Court of Appeal dismissed the appeal as to the defendant's claim for specific performance, stating that specific performance is a special remedy available when a person seeks to enforce a contract to purchase a unique property. In this case, the defendant, having imposed the access condition into his notice and so not having properly exercised the option, did not have a binding contract. Although extinguishing the defendant's right to specific performance, the Court of Appeal left it open for the defendant to pursue a claim for damages for other matters.

In *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1375, prior to the registration of the subdivision for a new waterfront strata project and in a rising market, the defendant developer cancelled a number of pre-sale contracts entered into with the plaintiff purchasers and entered into contracts with other parties at considerably higher prices. Despite a clause in the pre-sale contracts that limited the purchasers' remedy in the event of default to a return of their deposits, the court ruled in favour of the plaintiffs and ordered specific performance of the sales on a finding of fundamental breach, saying the purchasers had relied on representations made by the vendors' representative, even after the vendors had decided to breach the contracts, to the effect that the sales would be completed. The decision was affirmed in *Carlson v. Tylon Steepe Development Corp.*, 2008 BCCA 179, in which the Court of Appeal stated that it was the defendant's intention to continue the plaintiffs' contracts only for so long as was necessary to secure its financing and complete the development approval process, and that it was inconceivable that the parties would have intended the deposit clause to benefit the defendant by virtue of its egregious deception of the plaintiffs. Alternately, the deception was sufficient to render the deposit clause unenforceable without vitiating the entirety of the contracts and thereby precluding the remedy of specific performance.

(Note: Compare the order for specific performance in *Carlson* with the decisions in *CareVest*, *bcIMC*, and *Bancorp*, discussed above, in which the court permitted the cancellation of pre-sale contracts. Perhaps the basis for the distinction is revealed in the Court of Appeal's comment (at para. 28 of *Romfo*) that this was "not a case where the vendors faced financial exigencies which caused them to repudiate the contracts. Their motivation was simply to take advantage of a rising market by reselling the lots to third parties at substantially higher prices".)

In *Paradigm Holdings Ltd. v. Ngan & Siu Investments Co. Ltd.*, 2007 BCSC 762, the plaintiff entered into a contract of purchase and sale with the defendant for the purchase of two commercial strata lots. The purchase price of \$480,000 was based on negotiations of \$150 per square foot for 3,200 combined square feet for both strata lots. The contract contained a price adjustment clause that stated:

The purchase price ... is based on a total square footage of 3,200 square feet for the two units combined, and is to be verify [sic] by the Buyer. In the event of any discrepancy, the purchase price shall be adjusted according to the actual size of the property registered as per Strata Plans for subject strata corporation on a pro-rata bases [sic] upon Completion.

Subsequent to the execution of the contract, the strata plan was registered and noted the square footage for one of the strata lots as being almost one-half of the actual size. Based on the size of the strata lots as shown on the strata plan, the plaintiff demanded a reduction in the purchase price, and the defendant refused. The trial judge stated that both the wording of the adjustment clause and the extrinsic evidence supported the conclusion that the parties' intention was to tie the purchase price to the area of the two

strata lots as indicated on the strata plan. The trial judge ruled in the plaintiff's favour and ordered specific performance of the contract at the reduced price. The defendant appealed.

In *Paradigm Holdings Ltd. v. Ngan & Siu Investments Co. Ltd.*, 2008 BCCA 172, the Court of Appeal allowed the defendant's appeal and set aside the order for specific performance. The Court of Appeal stated that if the meaning of the words in a contract is unambiguous, the intention of the parties must be determined solely from the interpretation of the contract. Only if the words of a contract are ambiguous should a court consider extrinsic evidence in determining the intention of the parties. In this case, the Court of Appeal felt that the natural and ordinary meaning of the adjustment clause was perfectly clear: if the area of the units was determined by the plaintiff to be less than 3,200 square feet, only then was the purchase price to be adjusted in accordance with the measurements on the strata plan. The reference to the strata plan was only to be a "tiebreaker" in the event that the plaintiff determined the actual size of the units to be less than 3,200 square feet. The trial judge therefore made a mistake in considering extrinsic evidence of the parties' intentions. The Court of Appeal further stated that this interpretation is more in keeping with a sensible commercial result, and that to adhere to the plaintiff's interpretation would result in a windfall to the plaintiff.

9. Restrictive Covenants

In *Save the Heritage Simpson Covenant Society v. Kelowna (City)*, 2008 BCSC 1084, the City of Kelowna had acquired lands in 1946 from the Kelowna Sawmill Co. Ltd. for the purpose of building a new city hall and civic centre. The principal of Kelowna Sawmill, Simpson, imposed conditions on the sale that the City use the property for municipal purposes and that the City not at any time sell the lands or use them for commercial or industrial purposes. The conditions were included in the deeds of transfer and also registered on title to the lands as restrictive covenants. In 2004, the City obtained a legal opinion that the restrictive covenants were not enforceable and obtained the consent of the purported successor company to Kelowna Sawmill to discharge them from title. The Save the Heritage Simpson Covenant Society was formed by citizens wanting to see the covenants enforced, and it argued that the covenants were enforceable as (1) valid restrictive covenants, (2) a trust imposed on the City in favour of its citizens, or (3) personal covenants binding the City and the heirs of Simpson.

The court concluded that the covenants were not enforceable for a number of reasons, one of them being that the prohibition against selling the lands did not touch and concern the lands but was only personal to the covenantee. The sale prohibition permitted Kelowna Sawmill to decide who could buy the lands but did not speak to how the lands were to be used for the benefit of the dominant tenement. The court also noted that there was nothing in the deeds of transfer identifying the dominant tenement—that is, the lands to benefit from the covenants. The court stated that the identification of the dominant lands must be certain, or it is impossible to determine who can enforce the covenants. The Society argued that if the covenants did not satisfy the legal requirements of a valid restrictive covenant, the City should be estopped from enforcing its strict legal rights, based on the City's conduct from 1946 up until 2004 being consistent with the belief and reliance by all parties that the covenants were valid and enforceable (for example, the City having sought the consent of Simpson's heirs on a number of occasions for uses deviating from the covenant terms). The court said knowledge of the existence of one's rights appears to be an essential element of proprietary estoppel, and since the City only discovered in 2004 that the covenants might not be enforceable, the estoppel assertion could not succeed. Furthermore, even if a claim of proprietary estoppel could be established against the City, only the successor company to Kelowna Sawmill could enforce such a claim, and since the Society did not represent that corporate successor, it had no standing to do so.

Despite the covenants failing as restrictive covenants, the court upheld the enforceability of the covenants as a trust. The court first addressed the common-law requirement that a trust with the object of carrying out a purpose (as oppose to a trust for the benefit of identified persons) must be for a recognized charitable purpose. The court concluded that use of the lands for "municipal purposes" constituted a charitable purpose. The court then turned to the question of whether there was certainty in the parties' intention to create a trust. The court determined that the very elements that made the covenants deficient

as restrictive covenants supported the creation of a trust. The prohibition on the sale of the lands indicated that the City intended to be bound by the covenants in perpetuity, and the absence of a defined dominant tenement underscored the parties' intention that the covenants would benefit other persons rather than other lands.

10. Crown Liability

Strata Plan VR 2275 v. Davidson, 2008 BCSC 77, dealt with a non-profit housing development that sustained considerable water ingress damage and membrane failure. Canada Mortgage and Housing Corporation ("CMHC") and the province of British Columbia, through its agent B.C. Housing, had entered into agreements for the delivery, administration, and cost-sharing of social housing programs. B.C. Housing was responsible for the assessment, selection, inspection, development, and administration of the programs, while CMHC's role was of a more passive nature limited to financing. The plaintiffs in the main action sued the architects on the basis that their designs, plans, and specifications were inadequate to prevent water ingress damage. The architects brought a third-party claim against CMHC, asserting that CMHC, based on its extensive building envelope research in British Columbia, owed the architects and the plaintiffs a duty of care to advise them of the inadequacies in the architects' designs, plans, and specifications pertaining to water ingress prevention. CMHC brought a Rule 18A application to have the claim against it dismissed.

As the architects had no contractual or other direct relationship with CMHC, and following the reasoning of earlier decisions involving claims against CMHC (see discussion of *McMillan v. Canada Mortgage and Housing Corp.*, 2007 BCSC 1475, in the 2008 *Annual Review of Law & Practice*), the court concluded that the relationship between CMHC and the architects did not fall into an existing category of cases in which a duty of care has been found. Therefore, the court was left to investigate whether any other factors gave rise to proximity in order to establish a new ground for a duty of care, and the court stated that such factors must be established by the legislation creating CMHC and setting its mandate. The court determined that there is nothing in the *CMHC Act* or the *National Housing Act* that creates a duty of care on the part of CMHC to architects or other professionals in the housing construction industry. The construction technology research that CMHC undertakes as part of its mandate is intended to benefit the public generally and not any particular class of persons. Accordingly, the court concluded that CMHC did not owe a duty of care to the architects. However, the court did find that the relationship between CMHC and B.C. Housing was sufficiently close and direct by virtue of the non-profit housing agreements entered into by them to give rise to a *prima facie* duty of care owed by CMHC to B.C. Housing (the extent of which to be determined at a future hearing). This duty of care could extend to the sharing of information gleaned by CMHC through its research of construction technology. Furthermore, based on CMHC's potential liability to B.C. Housing, even though B.C. Housing did not pursue a claim against CMHC, the court left it open to the architects to pursue a third-party action against CMHC for a declaration as to the degree of fault attributable to CMHC for the water ingress damage.

C. Legislation

1. Excise Tax Act

As noted in the 2008 *Annual Review of Law & Practice*, the rate of the goods and services tax ("GST") was lowered from 6% to 5% effective January 1, 2008. With respect to real estate transactions subject to GST, transitional rules were implemented as follows:

- (1) For new housing transactions transferring title and possession on or after January 1, 2008:
 - (a) if the purchase agreement was entered into before May 3, 2006, the GST is 7%, less a 2% transitional rebate (for which the purchaser must apply to Canada Revenue Agency);

- (b) if the purchase agreement was entered into between May 3, 2006 and October 30, 2007, the GST is 6%, less a 1% transitional rebate (for which the purchaser must apply to Canada Revenue Agency); and
 - (c) if the purchase agreement was entered into after October 30, 2007, the GST is 5%.
- (2) For real estate transactions other than new housing, the GST is 5% if both title and possession are transferred on or after January 1, 2008, regardless of the date of the purchase agreement.

(For more information on the GST, see Canada Revenue Agency's website at <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/menu-eng.html>).

2. Home Owner Grant Act

For 2008, the regulations to the provincial *Home Owner Grant Act* increased the threshold assessed-property value for full-grant eligibility from \$950,000 to \$1,050,000, and reduced both the basic and additional grant by \$5 for each \$1,000 of assessed value over \$1,050,000. The basic grant was eliminated on homes valued at \$1,164,000 or more, and the additional grant was eliminated on homes valued at \$1,219,000 or more.

The Act was also amended by the enactment of ss. 5.1 to 5.4, to aid homeowners or occupants who cease to occupy their principal residence either due to property damage or destruction from fire, flood, or natural disaster, or due to reasons relating to medical needs, travel, work, or education. These homeowners or occupants may be eligible for a home owner grant or low-income grant supplement for up to two taxation years.

3. Property Transfer Tax Act

For all property purchases registered after February 20, 2008, a buyer is no longer required to meet any financing requirements in order to qualify for the tax exemption under the provincial First Time Home Buyers' Program. Those buyers who bought their property prior to February 20, 2008, still had to meet the financing requirements in place when they bought the property. However, effective February 20, 2008, all buyers (including those who purchased property prior to February 20, 2008) are permitted to pay down any amount owing on their mortgages at any time.

Also effective February 20, 2008, the threshold of fair market value for property under the First Time Home Buyers' Program was increased from \$375,000 to \$425,000. There is a partial exemption available for property with fair market value of up to \$25,000 more than the \$425,000 threshold.

4. Land Tax Deferment Act

On November 1, 2008, the provincial government made amendments to the Act, creating a new temporary property tax deferment program. The program will allow people with at least 15% equity in their homes and who are experiencing serious financial difficulties as a result of current economic conditions to defer their property tax payments for 2009 and 2010. The application and eligibility details for this program will be made available before the 2009 notices are issued.

5. Real Estate Services Act

The regulations to this provincial Act now permit individual real estate professionals to incorporate as "personal real estate corporations", effective January 1, 2009. Thus, real estate professionals can take advantage of the various tax, income planning, and limited liability benefits associated with incorporation. Note, however, that, under s. 10.6(1)(e) of the regulation, a personal real estate corporation may only conduct the business of providing real estate services and ancillary services (that is, those services supporting real estate services).

6. Proceeds of Crime (Money Laundering) and Terrorist Financing Act

In 2008, the Financial Transactions and Reports Analysis Centre of Canada made a series of changes to this federal Act and its regulations. The Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Regulations Amending the Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations implement these changes.

Effective June 23, 2008, there were further obligations imposed on reporting entities with respect to records and client identification. These reporting entities include real estate brokers and sales representatives, who must now keep records for receipts of funds, whether in cash or not, and records related to the entity providing the funds. They must record client information for every purchase or sale of real estate, and comply with various client identification and verification requirements. There are also obligations with respect to developing compliance policies and procedures to ensure the new regulations are being followed.

Effective February 20, 2009, real estate developers were subject to the Act and regulations, obliging them to comply with the client identification and reporting requirements. Under the regulations, a real estate developer means any person or entity who, within the previous year or in any previous year after 2007, has sold to the public:

- (1) five or more new houses or condos;
- (2) one or more new commercial or industrial buildings; or
- (3) one or more new “multi-unit residential buildings each of which contains five or more residential units, or two or more new multi-unit residential buildings that together contain five or more residential units”,

but who was not acting in the capacity of a broker or sales representative.

The regulations were further amended with respect to administrative monetary penalties for violations of the Act and regulations. These include monetary penalties for both real estate brokers (or sales representatives) and real estate developers who do not comply with the scheme. Those affecting real estate developers were effective February 20, 2009, while those affecting brokers were effective December 30, 2008.

D. Other Developments

1. Economic Overview

In 2008, the sub-prime mortgage meltdown in the United States in part triggered global financial turmoil. Though the Canadian real estate markets did not suffer the same declines as those in the United States, sales volume and prices began softening in the middle to latter part of 2008. Canada Mortgage and Housing Corporation has forecast for British Columbia in 2009 declines in housing starts, sales volume, and prices (Canada Mortgage and Housing Corporation, *Housing Market Outlook—Canada Edition* (Fourth Quarter 2008)).

In 2007, developers experienced troubles engendered by rising construction costs (for example, the “Riverbend” project in Coquitlam and the “Sophia” project in Vancouver), and 2008 brought the additional burden of a collapsing credit market for construction financing. Many developers have abandoned projects, while other projects that were in progress face uncertainties in their lenders’ ability to proceed with financing. Projects afflicted by this state of affairs include Millennium Development’s Olympic village, with the City of Vancouver providing a substantial loan to Millennium and a loan and completion guarantee to Millennium’s main lender, Fortress Investment Group, and Jung Development’s Infinity 2 project in Surrey, which was forced into receivership by the collapse of the project’s main lender, Lehman Brothers (note: developer Concord Pacific has now taken over the Infinity 2 project).

In light of anticipated reversals in the real estate market, it is of interest to note the effect of the amendment made to the *Property Transfer Tax Act* in 2004 concerning pre-sale strata lots. Given the length of time between the execution of the contract and the transfer of title to the buyer, in the midst of a rising market buyers rallied the provincial government to provide relief from paying tax based on fair market value at the time of the transfer that, in most cases, was significantly higher than the contract price. The government responded in 2004 by changing the base for calculating the tax from fair market value of the strata lot at the time of registration of the transfer to the consideration paid under the pre-sale contract. This amendment works in the buyer's favour in a rising market; however, in a declining market, a buyer of a pre-sale strata lot would be better off under the old regime of the tax being calculated on the fair market value at the time of the transfer.

2. Provincial Government Response to Economic Conditions

As noted above, the provincial government has implemented a temporary property tax deferral program to assist people facing financial difficulties due to the downturn in the economy. Also, in an effort to "provide stability and predictability to British Columbians in response to the downturn in the real estate market" (see BC Assessment website, www.bcassessment.bc.ca), the provincial government will also be basing the 2009 assessment roll on the lower of the July 1, 2007 or the July 1, 2008 assessed values.

3. CMHC Changes to Maximum Amortization and Financing Threshold

In response to concerns voiced over a weakening housing market, CMHC reduced the maximum permitted amortization on its insured mortgages from 40 to 35 years, effective October 15, 2008. CMHC originally introduced the 40-year amortization in 2006 as a means to reduce monthly mortgage payments, viewed as a key obstacle to housing affordability. However, in fear that this program was extending mortgages to buyers who could not afford the debt servicing, and thereby further destabilizing an already precarious housing market, CMHC implemented the change. Effective October 15, 2008, CMHC also reduced the minimum down payment on its insured mortgages from 0% to 5%, increased the minimum credit scores required of borrowers, and proposed new loan documentation standards (see *British Columbia Real Estate Law Developments*, August 2008, No. 268 [CCH]).

4. Commercial Tenancy Act Reform

In August 2007, the British Columbia Law Institute formed the *Commercial Tenancy Act* Reform Project Committee to identify and address deficiencies in the current legislation pertaining to commercial tenancies. As part of its mandate, the committee studied major legal issues in commercial leasing and considered options for reform, culminating in its *Consultation Paper on Proposals for a New Commercial Tenancy Act* released in September 2008. The paper advances two main arguments for reform: (1) enacted in the 1890s, the *Commercial Tenancy Act* is badly out-of-date (for example, modernization of the distress remedy set out in s. 7 of the Act is needed), and (2) since not all participants in the commercial leasing sector have the sophistication or resources to create leases that address the complexity of contemporary lease issues, the main statute in this field must provide a clear and comprehensive legal framework to all parties, while maintaining sufficient flexibility to allow sophisticated landlords and tenants to draft leases dealing with their particular issues. The recommendations for a new *Commercial Tenancy Act* will be set out in a final report scheduled for publication in June 2009 (See *Consultation Paper on Proposals for a New Commercial Tenancy Act*, British Columbia Law Institute, September 2008).

5. Proposed Amendment to Residential Tenancy Act

In response to the concern that landlords are using the "eviction for renovation" provisions in the *Residential Tenancy Act* to conduct cosmetic renovations to their suites, and to then increase the rents far beyond the 4% per year permitted under the Act, the City of Vancouver Council resolved in part at its December 18, 2008 meeting to ask the provincial government to amend the *Residential Tenancy Act* to:

- (1) require landlords to allow tenants evicted for the purpose of renovations to re-occupy their units once renovations are completed at the same rent as they were paying prior to the renovations, with the next annual increase limited to “inflation + 5%” per year;
- (2) extend the notice period for evictions from 60 to 90 days;
- (3) require that all municipal building and other permits be issued and that the Residential Tenancy Branch approve a termination of tenancies for the purpose of renovations before eviction notices can be issued; and
- (4) require that landlords report rent rolls, rent increases, tenant turnover, number of evictions, and reasons for evictions annually to the Residential Tenancy Branch, and that the Residential Tenancy Branch publish an annual report on rents, rent increases, turnovers, and evictions.

Media reports have noted landlords voicing strong objections to these proposed amendments, one of the grounds being that landlords conducting necessary renovations beyond cosmetic repairs may end up subsidizing tenants for part of the amounts expended on the renovations.

6. Martin Wirick

On August 26, 2008, the RCMP arrested disbarred lawyer Martin Wirick and his former client Tarsem Singh Gill on allegations of theft, fraud, uttering forged documents, and possession of stolen property related to multiple real estate transactions that took place between 2000 and 2002. To date, the Law Society has paid out approximately \$38 million to victims of the misappropriation of funds in connection with those real estate transactions. Mr. Wirick was released on bail and is awaiting his next court appearance (see *Benchers' Bulletin* (Law Society of British Columbia), October 2008, p. 14).

7. Superintendent of Real Estate—Amended Policy Statements 5 and 6

As noted in the 2008 *Annual Review of Law & Practice*, amended policy statements 5 (“Early Marketing—Development Approval”) and 6 (“Adequate Arrangements—Utilities and Services”) under the *Real Estate Development Marketing Act* came into effect on January 30, 2008. The amended policy statements allow the Superintendent of Real Estate to issue a “cease marketing” or other order to a developer if the developer does not immediately confirm in a written undertaking that marketing ceased upon expiry of the nine-month period contemplated in the policy statements, or that it filed an amendment to the disclosure statement within the nine-month period noting the satisfaction of the conditions. The amendments also require the developer to promptly notify the Superintendent if the developer has entered into binding purchase and sale agreements for all the units in the subject development within the nine-month period, or if the developer has decided not to proceed with the development.

8. Land Title and Survey Authority—Waiver of Right of First Refusal

The old practice under the *Land Title Practice Manual* required a waiver of a right of first refusal to be in the form of a Form C charge and contain a Part 2 Terms of Instrument. Effective August 28, 2008, the Land Title and Survey Authority amended the practice to prohibit the registrar from registering a transfer to any party other than the holder of the right of first refusal unless:

- (1) the registrar receives a discharge of the right of first refusal; or
- (2) the holder of the right of first refusal waives the rights under it to the extent necessary to permit registration of the new freehold title in the name of that other person (which waiver must be in a Form C and contain prescribed language as to the continuation of the right of first refusal on the title of the new owner).

For more information, see §16.50 and §16.51 of the *Land Title Practice Manual*, 3rd ed., looseleaf (Continuing Legal Education Society of British Columbia, 2007).