



Focus On



REAL ESTATE LAW

Lawyers undaunted by economy Silver lining brightens real estate gloom

BY DARYL-LYNN CARLSON
For Law Times

Meagre holiday sales and manufacturing layoffs notwithstanding, the Canadian economy remains markedly stronger than its United States counterpart.

So say lawyers whose practices are largely focused on facilitating real estate transactions both residential and commercial; they are for the most part collectively relieved the subprime market implosion ravaging the sector south of the border has had a relatively mild impact here.

If at all, any detectable downturn in business serves as means to sharpen one's skill set and exert adaptability rather than languish with a depleting client list.

"Things are not critical yet," asserts Steven Pearlstein, a real estate law specialist at Minden Gross LLP. "We will see declining house prices and there is a glut of condos that are coming online. If people don't have jobs this inevitably results in a decreasing [of] the volume of purchases and sales."

But he points to the economic malaise 15 years ago that in Canada had a significant impact on the real estate market, spawning the emergence of insolvency as a dedicated practice area of law.

In the current downturn, which hasn't been officially labelled a recession, perhaps the most noticeable change has been an evident dearth of lenders, says Pearlstein.

"In the commercial market, banks are lending but more strictly enforcing their lending criteria," he says.

Mortgage-backed securities are no longer a source of funds as a result of market conditions south of the border, and many of the other traditional real estate lenders are sitting on the sidelines

as a result of asset allocation requirements, he says. "So it feels like people aren't lending."

Pearlstein says he expects it will be another year before such lenders resume activities in real estate investments although that's not necessarily going to have a detrimental impact to any measureable degree.

Even foreclosures aren't poised to ravage the market as severely as they have in the U.S.

Pearlstein recently delivered a continuing education seminar for lawyers on mortgage enforcement and observes "in Ontario it hasn't gone crazy yet. Historically, there are a lot more defaults than there used to be, but I think overall it's not that huge a factor just yet."

He doubts that mortgage defaults will ultimately become a driving force behind an economic implosion as it did during the 1990s, although Pearlstein doesn't dismiss the impact sourced real estate deals could have cumulatively over the coming year.

At another continuing education session hosted by the Ontario Bar Association scheduled for June 9, Pearlstein will preside as chairman in a discussion entitled Restructuring Distressed Real Estate.

The program will address significant changes in the law and practice that have occurred in recent years, and moreover will prepare lawyer attendees with analysis and strategies to properly advise clients and guide them to take the appropriate steps to meet their concerns. "As the flow of real estate transactions has decreased it is even more important to broaden your practice and gain the potential to generate new files in this expanding area," Pearlstein writes in an outline describing the session.

In this vein, he emphasizes the need for lawyers to be adaptable and enhance their expertise



'Things are not critical yet,' says Steven Pearlstein.

beyond basic property conveyance.

"Lawyers, even those who have experience in real estate, really don't have that multi-discipline ability to think on both sides and see how they fit together," he says referring to insolvency and restructuring.

Douglas Klaassen is a partner at Strikman Elliott LLP's Real Estate, and Structured Finance and Financial Products groups and has morphed the focus of his practice to adapt to market changes over the years.

Although he began doing basic real estate work, he soon migrated to concentrate on commercial transactions, then commercial mortgage lending and in recent years became one of the first lawyers in Canada to plug into mortgage-backed securities and mortgage securitization.

Amid the current downturn, Klaassen again retooled his practice in a move back to more traditional real estate work.

"Diversification is important," he says. "The tendency towards specialization can only go so far and the broader range your skill set is the better off you'll be."

He too is optimistic that the economic impact of world financial markets won't be as detrimental to Canada's economy as in the U.S.

"Unlike our American friends, I think the impact of this recession will be relatively benign in this country compared to south of the border," says Klaassen.

He notes that U.S. lenders are moving towards recourse lending and lower leverage "which is what Canada has been doing for the last 100 years."

There are also opportunities for the emergence of private lending

funds, such as the new KingSerr Canadian Real Estate Income Fund LP, that will fill the gap of other lenders who are either currently sitting on the sidelines or tightening their credit requirements.

"Someone is going to have to come in and take their place and whoever comes in and sets this up is going to see a tremendous return," says Klaassen.

"We look like a safe haven compared to other countries. Going forward I think Canada will continue to be viewed as a good place to invest and I expect there will be renewed interest in that" once current market apprehensions subside.

In sum, Klaassen says the downturn ultimately will have an upside in the long term and his prognosis for real estate is optimistic. "There's no systemic Canadian real estate problem. The bad news is that our major trading partner has a systemic real estate problem and until they work that through and decide how much damage that's done to their economy, we're not going to know what consequential impact that will have on the Canadian economy. But I think it's going to be an interesting year."

New definition is narrow, say lawyers

BY DARYL-LYNN CARLSON
For Law Times

Effective next month, real estate developers will be added to the list of parties and institutions that are subject to requirements under the federal Proceeds of Crime (Money Laundering) and Terrorist Financing Act, or Bill C-25.

The Bill, originally passed in 2001 and amended to expand its jurisdiction in 2006, is administered under the Financial Transactions and Reports Analysis Centre of Canada. Its extended jurisdiction over developers, effective Feb. 20, means most real estate lawyers will need to

familiarize themselves with the law to be able to thoroughly serve developer clients.

According to the new law, a developer is by definition any client who has overseen the construction, or sold or purchased at least five new houses or condominium units — or just one new commercial or industrial building — inside of a calendar year, which perhaps broadens the potential client base beyond the notion of a traditional, real estate tycoon.

"Once you're defined as a real estate developer you're always defined as a developer," points out Sylvia Adriano, a partner at WeirFoulds LLP.

"So if you sell five houses in one calendar year, See Law, page 10

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Law grows to target developer

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you're a developer and if you sell one house the following year, you're still subject to the requirements. You don't file annually but the requirements involve record-keeping."

Adriano was a guest speaker last month at an Ontario Bar Association continuing education session providing lawyers with insights into what the new regime involves for their clients.

Her presentation generated discussion and questions regarding some of the requirements and how lawyers can best assist developers with their clients.

The legislation was phased in as a requirement first for financial institutions, then for real estate agents and brokers, before becoming effective for developers.

Federal authorities have determined that developers are vulnerable to money laundering schemes and real estate investments have been used by criminals to hid money and assets.

Adriano outlined the require-

ments of the legislation, which are generally threefold.

First, FINTRAC mandates that developers establish a compliance regime with which they must undertake a risk assessment of their vulnerabilities based on their geographic location, client relationships, suppliers of products and services, and implement means to track money handled by staff.

The second aspect is an obligation to report transactions involving cash amounts exceeding \$10,000, or any transactions a developer deems to seem suspicious.

Third, developers will be required to identify individuals, corporations, or legal entities that purchase a new home or building, or any party that provides funds in any amount as part of a property purchase.

The identification information that FINTRAC requires is specific: name and address, date of birth, and all parties' occupations.

They must also keep receipts



"Once you're defined as a real estate developer you're always defined as a developer," says Sylvia Adriano.

for transactions of any amount and ensure they hold on to them for at least five years and provide the requisite records to FINTRAC upon request.

"People were concerned that this would be very paper intensive for real estate developers," says Adriano of the lawyers in attendance either in person or who logged on to the session

by web cam.

"Every time they receive funds they have to keep a record," she says of developers. "So lawyers were asking 'What will my clients have to do in order to comply?'"

She acknowledges that for developers, "It's quite a bit of work initially in setting that up."

Some lawyers have raised questions about the requirement to confirm the identification of purchasers or sellers, along with their occupations.

"My friends who are real estate agents are having a lot of grief, probably everyone is," observes Jeffrey Schwartz, of Schwartz & Schwartz who currently presides as chairman of the OBA's real property section. "People have clients who've been friends for 10, 15 years, and they're now required to ask them for ID."

Schwartz says for lawyers, however, the law "is not as bad as it sounds. Lawyers such as real estate lawyers have been

battling money laundering, terrorism, and fraud for some time," he says.

Referring to his law practice as relatively general and one of fundamental conveyance when it comes to real estate deals, Schwartz emphasized no lawyer is necessarily immune from having a brush with a fraudulent transaction.

"I was part of a file where when we dug enough into it and a fraud was discovered and the lawyer on the other side who was representing the borrower [appeared] to have been duped," he shares.

"So this is not new to us," he says of the real estate bar. "It's just spreading out that obligation a little bit further into our practice."

To assist clients, many firms, especially those that are larger, have notified their developer clients and provided information to assist them with compliance requirements.

Adriano also says FINTRAC professionals are particularly helpful in assisting developers, lawyers, and any parties requiring help with compliance.

Stephen Karr, a partner at the boutique commercial/real estate law firm of Harris Sheaffer LLP, agrees that the requirements will present a challenge for developer clients at the outset as developers establish new administrative routines and train their staff.

"Just as with any other legislative change, it will ultimately become just part of the ordinary operating and sales procedure," he says.

Karr adds that it will be interesting to see how developer clients will fare with identifying what could be "suspicious transactions" under the legislation.

"We live in a global village and many units here in the GTA are often sold to investors, both here and abroad, through agents, friends, and relatives. Some buy one unit, others may buy several units," he explains.

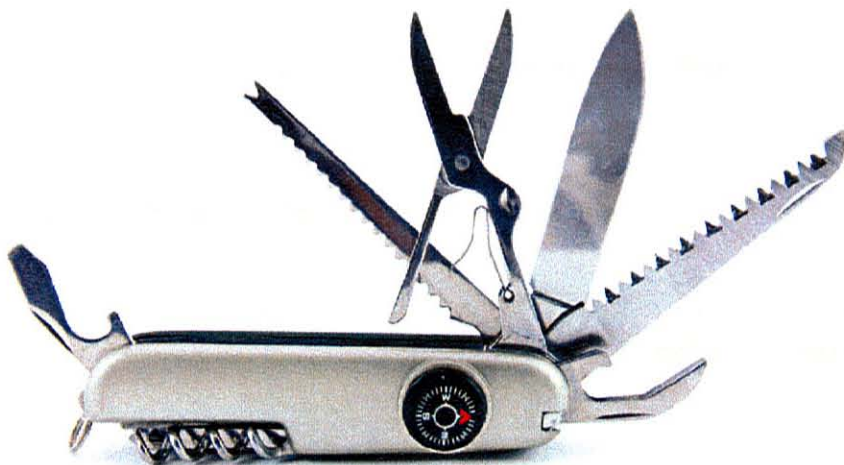
"With few exceptions, the transactions are very ordinary and have typical deposit structures. So, absent some very unusual or suspicious behaviour on the part of a buyer, how that will actually manifest itself in a practical sense at a condominium sales pavilion where in-house marketing staff are trained to sell units and seal the deal as quickly as possible, we have yet to see."

"The procedures to be put in place, such as identifying buyers who are not physically present, or sourcing the funds, must be complied with by developers and will likely slow down or delay the process of 'sealing the deal,'" says Karr.

"All of it just makes the art of the deal that much more complicated and nuanced," he acknowledges. "That's just the new reality."

His firm has provided its clients with a memorandum in a form that spells out the requirements of this legislation to assist them with compliance.

The new compliance requirements can be found on FINTRAC's web site at www.fintrac.gc.ca. **11**



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