

Mullin DeMeo Real Estate Update

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Spring is in the Air!

It's spring in Victoria, and the recent cold snap can't keep us from thinking about milder days to come. Flowers are blooming, new construction proceeds apace, and the city prepares itself for the annual influx of visitors, some of whom may eventually become residents.

The real estate market shows signs of reawakening from winter. The Victoria Real Estate Board (VREB) reports a solid start to sales in the new year, with a January increase over both December 2005 and January of last year. The VREB website shows, too, that real estate agents are

considering the implications of a new Federal government, and the effect that a Conservative minority may have on issues such as the GST, capital gains, and government expropriation of private land.

We at Mullin DeMeo will be tracking such issues over the next months, and we invite your comments and input with regard to these and other matters that affect all of us in this housing market. And, as always, we wish to thank you for your positive and constructive comments. We look forward to your response, so that we may continue to improve our service to you.

Heads-Up for Strata Property Owners Stay Involved and Advised of Strata Council Decisions

It can be tempting for busy strata homeowners to resist becoming involved in the management of their strata council. However, strata property owners should be persuaded that it is in their own best interests to keep a careful eye on the basic decisions made by their Strata Council. A group of strata residents, the plaintiffs in *Heliker v. The Owners Strata Plan VR1395* (2005 BCPC 0500), learned this the hard way.

As required under the *Land Title Act*, the defendant Strata Corporation filed a statement of unit entitlement at the time the strata plan was deposited at the Land Title Office, almost 19 years previous to the time the case was heard in 2005. However, over the years, the strata corporation had assessed strata fees and special levies pursuant to a schedule of unit entitlement different from the one filed at LTO. The error was brought to their attention in 2004, and the strata corporation ensured that subsequent fees were calculated in accordance with the schedule of unit entitlement as filed. However, the plaintiff residents claimed that the strata corporation owed them amounts attributable to overpayment of strata fees for the years prior to 2004.

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Transforming Property Interests – Joint Tenants to Tenants In Common

An exception in the *Land Title Act* yields an unexpected result

As you know, there are a number of different ways that a person can hold an interest in real property. Often, couples in a long term relationship or parties who are otherwise related will own property as joint tenants. In such cases, when one of the parties passes away, the surviving party is vested with full rights in the property by “right of survivorship”.

When a relationship breaks down, homeowners who have owned property in joint tenancy will often “sever” that joint tenancy. This eliminates the right of survivorship, pending further activity to either sell or otherwise dispose of each party’s respective interest. A common way to sever joint tenancy is for one party to sign a transfer document, conveying his or her own interest as a joint tenant to him- or herself and the other party as tenants in common. But what is the effect if such a transfer is signed, but never registered at the Land Title Office?

In the case of *Feinstein v. Ashford* (2005 BCSC 1379), Ms. Feinstein and Mr. Ashford had bought a property together, and registered their ownership as joint tenants. Ultimately, they lived together in the property for just a few months over the summer of 2002. When the relationship ended, Mr. Ashford moved all his possessions out of the home. He eventually married another person. He also visited his solicitor, where he executed documents to re-register title to the property so that he and Ms. Feinstein would own the property as tenants in common.

Shortly afterward, Mr. Ashford died unexpectedly, before his solicitor had registered the transfer document. Ms. Feinstein sought a declaration by the court that she was the sole owner of the property as the surviving joint tenant. Mr. Ashford’s estate submitted the signed but unregistered transfer as evidence of the deceased’s intent to sever the joint tenancy and create interests as tenants in common.

The Court ultimately decided in favour of the deceased’s estate, and based its decision primarily on the legislative exception found in Section 20 of the *Land Title Act*. That section provides that an instrument that purports to transfer an interest in land is unenforceable until registered, except as against the person executing the instrument. In this case, the instrument executed by Mr. Ashford transferring his own interest as a joint tenant to himself and Ms. Feinstein as tenants in common was enforceable against Mr. Ashford’s estate, and was sufficient to sever the joint tenancy, even without registration, because of the exception in the Act.

It is important to be aware of exceptions such as this when establishing plans for property ownership. We encourage homeowners to fully explore all possible implications when choosing a form of property interest.



Often, couples in a long term relationship or parties who are otherwise related will own property as joint tenants.

The B.C. Property Tax Deferment Program

The British Columbia Property Tax Deferment Program allows qualifying homeowners to enter into an Agreement to defer the payment of annual municipal property taxes. Homeowners are permitted to deduct the Home Owner Grant and then defer all or part of the unpaid balance of the property taxes for the current year. Deferral penalties, interest, previous years' property taxes, user fees and utility charges cannot be deferred and must be paid to the taxing authority. If part of the home is rented out or is used for business purposes, taxes can only be deferred on the part in which the homeowner is living.



In order to qualify, applicants must be:

- 60 years or older (only one spouse must be 60); or
- a surviving spouse; or
- a disabled person as defined by Regulation; and
- the applicant must be a Canadian citizen or permanent resident who has lived in BC at least one year immediately prior to applying for the deferral.

Home Qualification: The program allows property taxes to be deferred on a principal residence. Second residences such as summer cottages or rental properties do not qualify. The homeowner must have a minimum equity of 25 percent of the current assessed value of the home as determined by BC Assessment. Those who own homes under a long-term lease or who have a life estate in a home may also qualify for the benefit. Manufactured homes must be covered by a current fire insurance policy.

The Interest Rate: The current interest rate charged on deferral accounts is 2.25% annually, with the rate being set every six months. Interest is charged from the later of the date the property tax is due, or the date of application to the Program. The deferred taxes and interest may be repaid in whole or in part at any time and without penalty.

The Deferral Period: Property taxes can be deferred for as long as the applicant owns and continues to live in the home and continues to qualify for the Program. The deferred taxes and interest must be fully repaid before the home can be transferred to a new owner, other than to a surviving spouse; or upon the death of the Agreement holder(s).

Deferred Taxes are a Charge on Title: Once an application is approved, a certified copy of the Agreement is registered as a lien in the Land Title Office, or in the case of the manufactured home, in the Personal Property Registry. The Program then pays the property taxes on the homeowners' behalf and the lien remains in effect until the account is paid in full. If, for *any reason*, a deferral application is withdrawn, cancelled, or denied after the tax due date or before the Program pays the taxes on the homeowners behalf, the taxes are overdue and late payment penalties will apply. Changes to the titled ownership (e.g., adding or deleting owners, subdivisions, refinancing) must be completed before applying for the deferral benefit. Title changes made thereafter (other than to a surviving spouse) may require repayment of the deferral account. Because the deferral is registered as a charge on title, a mortgage holder may require full payment of the deferred taxes before refinancing.

Heads-Up for Strata Property Owners (cont'd.)



Strata Residents should stay involved in Strata governance and be aware of Council decisions!

The first issue considered by the Provincial Court was one of jurisdiction. As you may know, matters involving strata corporations, their governance and decision making are typically brought before the B.C. Supreme Court, in accordance with the *Strata Property Act*. In this case, however, the claimants, characterizing their claim as one of “debt”, attempted to obtain an order from the Provincial Court. The court declined to grant the plaintiff residents any relief in this regard. The Court held that the question was clearly one related to strata decision making, and section 164 the *Strata Property Act* provides that such questions are to be brought before the Supreme Court. Thus, the Court determined it did not have jurisdiction to hear the complaint.

In the event that its finding regarding jurisdiction was wrong, the Court went on to address the second issue which was with regard to calculation of strata fees. The court emphasized the idea that, unless a strata council has acted unfairly or in a way that is contrary to the *Act* or to the by-laws of the corporation, then strata residents and the strata corporation are to be viewed as one and the same. The court refused to assign blame to the strata corporation, of which the plaintiff residents were a part, for a mistake that all residents would be deemed to have condoned over the years.

In such cases, where residents failed to exercise due diligence, routinely accepted miscalculations in strata fees, and made no effort to cause the strata corporation to file a new schedule of unit entitlement, then they could not complain of the action of the corporation in a manner that requested a rebate from “them” to “us”. The court held that its decision was appropriate in light of the circumstances. A number of residents of the strata had bought and sold over the years, and it would be impossible to calculate at the time of the decision if those who were assessed should have paid less or more, and who should be responsible for such payment.

The message of the Court is clear. It will be difficult for those who take no part in the strata council process to later complain of the actions of Strata Council, unless those actions are unfair, contrary to the *Act* or contrary to the by-laws of the Strata.

MDM Profile: Bob Fahlman

Associate counsel Bob Fahlman joined Mullin DeMeo in 1998. After completing an undergraduate degree in economics here in Victoria, Bob obtained his law degree from the University of British Columbia. His legal career has taken him around this province and into the Territories as well. Bob maintains a busy real estate and corporate/commercial practice, and has special expertise in guiding the subdivision and conveyance of large residential developments. Bob also acts on a regular basis for a number of locally owned companies in share, asset and financing transactions. When he has a chance to be away from the office, Bob enjoys fishing for lake trout near Atlin B.C. Those who have attended at our office can confirm that Bob is a skilled fisherman: Bob’s office “mascot” is a mounted trophy-sized trout that weighed in at a whopping 25 pounds when it was taken out of Gladys Lake in 1994. Bob also enjoys travel, and participates in that perennial Victoria pastime, home repair and renovation.

Builder's Lien Only For Those Who Physically Construct Property

With continued high levels of new development in Victoria, builder's liens are a fact of life for both commercial and residential clients. A builder's lien provides assurance for the trades involved in the physical construction of a building. It is clear, however, that in large developments, there are considerable contributions made to the progress of the development by non-trade workers. Such workers include consultants who are hired to ease the development process along in a timely and efficient way. When disputes arise between such consultants and developers, can a builder's lien be used in the same way to provide any assurance for the consultant?

The B.C. Supreme Court recently addressed this issue in *Tuscany Village Holdings Ltd. v. Conquest Development Corporation* (2005 BCSC 1392). Conquest, the defendant consultant, had filed a builder's lien against the Tuscany project, and Tuscany Holdings, the plaintiff developer, applied to the court to have the lien declared invalid. Conquest had provided a number of services related to the progress of the development. In the contract between the parties, it was agreed that Conquest would receive payments of 1% of any financing

or funds advanced to Tuscany Holdings to bring the project forward. Conquest received a number of payments under this arrangement, and the dispute arose with respect to one particular financing package that had yet to be advanced at the time the lien was registered.

Tuscany argued that the lien was invalid and the Court agreed. The court found that the services provided, which formed the basis of the lien, were not of the type contemplated and defined in the relevant section of the B.C. *Builder's Lien Act*. The Court reviewed a series of cases that were decided on the principle that, in order to support a lien, the work provided must be an "integral and necessary part of the actual physical construction of the project." It was clear that Conquest had not performed any of the actual physical construction of the project.

In addition, Conquest's services could not be characterized as those of an architect or engineer so as to bring it into the broader definition of "services" found in the Act. The Court further held that the lien itself was frivolous and vexatious, since lienable work is very clearly described in the Act.

Fraud Watch— Ascertaining the Identity of Borrowers

As discussed in our last issue, instances of identity theft and real estate fraud are on the rise. In some cases, the fraudster will pose as a homeowner mortgaging their property, and fraudulently receive mortgage proceeds, while the homeowner is left with a charge on title that he didn't authorize. Experts advise that a strict protocol for obtaining identification at time of signing can help to deter or prevent the fraudster from reaching his goal. Moreover, certain legislation, such as the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada) R.S.C 2000 c.17, requires that the identity of parties to financial transactions be ascertained and the form of their identification recorded when they attend to sign documents.

Many lenders' instructions now require that lawyers follow such a protocol to obtain and record the form of clients' identification at the time documents are signed. At Mullin DeMeo, clients are usually asked to provide two forms of identification, which may include a birth certificate, driver's license, provincial health insurance card, passport or any other similar record. A photocopy will be made of the client's identification and kept with the relevant file.

The harsh results of real estate fraud make it increasingly important for professionals working in the real estate business – including real estate agents, bankers and lawyers – to be on guard against the perpetrators of fraud. Our protocol at Mullin DeMeo is consistent with current best practices. Please assist us by reminding your clients to bring their identification when they come in to close their deal.



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About Us

Mullin DeMeo maintains one of the busiest real estate law practices in British Columbia and certainly on Vancouver Island. Each year, Mullin DeMeo processes more real estate transactions than any other firm in the Victoria area.

We have a staff of five lawyers, eighteen legal assistants, a land title agent, electronic filing capability and advanced technology, all dedicated to providing excellent legal services regarding real estate matters.

All major financial institutions in Victoria have approved us to prepare mortgage documentation and we are counsel for several local branches. Our lawyers maintain a good working relationship with Victoria Real Estate Board members, and we are called upon on a weekly basis to speak to Realtors on legal issues.

We are proud to have been the first law firm in British Columbia to submit Land Title Documents by electronic filing. In fact, Peter DeMeo was the first lawyer in the province to obtain and use a digital signature molded exclusively by the Law Society of B.C. Mr. DeMeo has since been regularly invited to speak to various legal groups and both the legal and real estate community respects his expertise with electronic filing of real estate documents.

The goal of our firm is to provide a level of service that will ensure that our clients are fully satisfied and will wish to remain long-term clients of the firm. If you would like further information please contact us.

We're on the Web!

Visit us at:

www.realestatelawvictoria.com

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