



Torkin|Manes FOCUS

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SPRING 2008

FOCUS ON BUSINESS LAW

Can the US subprime mess impact my loan?



Vince Berry

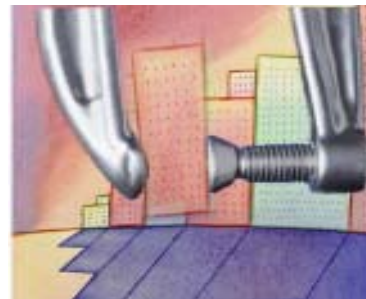
summer, which has yet to be resolved, and with the continuing contagion effect of the US subprime problem on some chartered banks, the Canadian lending

market has also faced a significant squeeze.

Current Landscape

As a result, the lending landscape in Canada has changed dramatically in the last 10 months. A number of commercial real estate lenders have retreated from the Canadian marketplace altogether. Some of the lenders that remain have been reluctant to underwrite many new transactions or are imposing more stringent terms on borrowers than they have during the past several years.

With fewer lenders in the market place, commercial property owners may be in for a jolt. If your commercial property mortgage is maturing over the next several months, you should approach your lender sooner rather than later to determine whether your lender still has an appetite to refinance the loan. You may well find that your lender is no longer in the Canadian market at all, and that you will need to locate a new lender.



Typical loan terms have also changed significantly. A year ago, it was common for lenders to offer loans on the basis of a loan to value ratio of 75 per cent to 80 per cent on a non-recourse basis (meaning the lender would look only to the value of the financed property for recovery of the loan). Currently, many lenders will not consider more than 65 per cent loan to value on a full-recourse basis, which means the lender can look to the borrower to make good on any deficiency between the value recovered from the property and the outstanding debt.

The bottom line is, you should contact your lender early. Find out whether the

Commercial real estate owners who have a mortgage loan maturing within the next 12 months should consider the impact that the US subprime mortgage disaster may have on their loans.

Background

Since the spring of 2007, North American credit markets have faced increased turmoil, resulting in a significant disruption. As news of the US subprime-lending

fiasco began to emerge, a number of US subprime lenders sought and obtained court-ordered protection, pursuant to the US Bankruptcy Code. The numerous multibillion-dollar writedowns announced by the likes of CitiBank and Merrill Lynch, and the collapse of Bear Sterns, helped propel the credit crunch into a global crisis.

In Canada, most observers agree that our resource-based economy has shown some resilience, and we have yet to see a collapse in our housing market. The Canadian debt market, however, has faced turbulence. Beginning with the asset-backed commercial paper crisis last

(continued next page)

Inside...

EMPLOYMENT LAW.....	2
FAMILY LAW	3
TRUSTS AND ESTATES LAW	5
BANKRUPTCY AND INSOLVENCY LAW.....	6
LITIGATION LAW	7
TORKIN MANES UPDATE	8

US subprime mess... (cont'd.)

lender is prepared to refinance and what the current parameters are. The earlier you begin this process, the less risk of disruption the US subprime mess will have on your operations.

Vince Berry is a member of our Commercial

Real Estate Group. His practice focuses on the acquisition, disposition and financing of commercial real estate and commercial leasing work on behalf of both landlords and tenants.

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FOCUS ON EMPLOYMENT LAW

Falsely accused employee gets \$2.1 million



Peter C. Straszynski

The Ontario Court of Appeal recently upheld a jury award of \$2.1 million to Douglas McNeil, who had sued his former employer, the Beer Store, for malicious

prosecution. The case illustrates the

Courts' increasing comfort with large damage awards against employers who treat employees with disregard for their rights, and serves as a potent reminder that employers must proceed with caution when accusing employees of serious wrongdoing.

McNeil was employed at a Beer Store outlet in Niagara Falls. As part of an investigation into possible theft, the Beer Store management set up hidden cameras. The cameras recorded McNeil removing \$140 US and \$22 CDN from the register and either pocketing the cash or giving it to another employee. Other portions of video footage, however, showed McNeil placing corresponding amounts of cash into the till, consistent with his explanation that the money was taken from the cash register for legitimate purposes and tending to exonerate him.

The Beer Store went to the police with the incriminating portions of the tape, but failed to point out the exonerating portions, even after being specifically asked by the police whether any such

exculpatory evidence existed. Criminal charges were laid, resulting in McNeil's conviction for theft. The Beer Store dismissed McNeil for cause, consistent with the criminal conviction.

McNeil grieved the termination, and the exculpatory portions of videotape surfaced during the grievance arbitration process. McNeil used the "new-found" evidence to successfully appeal his criminal conviction.

McNeil then sued the Beer Store for malicious prosecution. The Beer Store maintained the position it had taken throughout, namely that it acted reasonably in bringing the videotape evidence to the police. At trial, the jury had little trouble finding that the Beer Store had no reasonable and probable grounds for initiating the criminal proceedings and that it had acted with malice in doing so. In making its award, the jury was clearly cognizant of the tremendous negative impact of McNeil's 13-year ordeal (between the original events and the trial) on his personal and



Focus Facts

Many employers think employees on fixed-term contracts are not entitled to notice of termination, or termination pay and severance pay. This is not the law! Pursuant to the Ontario *Employment Standards Act*, fixed-term-contract employees are entitled to these benefits if their employment is terminated prior to the end of the term, the term is longer than one year, or their employment continues for three months after the term expires.

Contact any member of our Labour Relations and

professional life.

In addition to damages for income loss, loss of care and companionship suffered by his wife and reimbursement for legal costs, the jury awarded McNeil about \$800,000 in aggravated and punitive damages, for a total award of \$2.1 million. The Beer Store appealed the award to the Court of Appeal, taking the position that the award was unduly high.

The Court of Appeal refused to tamper with the award. According to the Court, "the jury viewed [the Beer Store] as a calculating and insensitive company that was prepared, for its own purposes, to see a man convicted of a crime it knew he did not commit" and the employer's 13-year "charade" had "robbed McNeil of his reputation, his employment, his dignity and his self-respect."

The Court's ruling is yet another reminder that employers must act fairly and in good faith when alleging

wrongdoing against an employee, and that failure to do so can have costly consequences. Employers who act on incomplete evidence, pursue flimsy allegations, or, worse, conceal evidence favourable to the employee, do so at their peril.

Peter Straszynski provides advice to clients in all aspects of labour relations and employment law and represents both private- and public-sector employers in a wide variety of legal settings.

He can be reached at 416 777 5447, or pstraszynski@torkinmanes.com.

Law Society Medal

On June 5, **Sidney Troister** was awarded the **2008 Law Society Medal** by The Law Society of Upper Canada, in recognition of his dedication and contribution to the Bar of Ontario and the profession as practitioner, counsel, arbitrator, mediator, author and teacher. The Law Society Medal is the Law Society's highest honour.

FOCUS ON FAMILY LAW

Court of Appeal rules on the little things...



Sara Mintz

Just when payor spouses thought their child-support obligation had ended, the Court of Appeal has found a loophole to ensure that children enrolled

in post-secondary education receive funding for everyday necessities. In the March 2008 decision of *LaRue v. LaRue*, a payor spouse was ordered to contribute to his child's special and extraordinary post-secondary education

expenses. This is nothing new — as a general rule, parents are required to contribute to a child's post-secondary education (tuition, residence and books) in proportion to their income. However, in *LaRue*, the payor spouse was not required to pay child support while the child was away at school. The trial judge, however, included a number of items as "special and extraordinary expenses", that would otherwise have been part of child-support payments, namely a bus pass, food, household supplies, laundry, telephone, Internet and clothing.

The payor spouse argued on appeal that it was not appropriate for the trial

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Focus | Highlights

Our partner and benchler, **Laurie Pawlitzka**, is the Co-Chair of The Law Society's Retention of Women in Private Practice Working Group. The benchers of the Law Society began this project in 2005 to address the disproportionate departure of women from private practice — 2½ to 3½ times more often than their male counterparts.

Laurie recently co-chaired the province-wide consultation with the profession. The draft recommendations were very well received by the profession, and were adopted by Convocation on May 22.

Laurie will continue to be involved in the implementation of the recommendations.

Little things... (cont'd.)

judge to include in the definition of "special and extraordinary expenses", expenses that normally would be characterized as child-support payments, simply because the payor spouse was not required to make child-support payments while the child was away at school. The

Focus Facts

In most civil and family cases in Ontario, court costs are awarded by the Court at the end of trial or after a motion, typically based on who won. It may surprise you to know that in family law cases, the Court has the discretion to order one spouse to pay the other side's legal costs and disbursements, on an interim basis, while the case is ongoing. The Court takes into account, need, necessity, reasonableness of the amount requested, and the merits of the case, in order to "level the playing field" between spouses of unequal means. In other words, you could end up paying your ex-spouse's legal costs (at least on an interim basis) to litigate against you!

Contact any member of our Family Law Group for more information.

Court of Appeal upheld the trial judge's decision. One factor the Court relied on in making its decision, was that the amounts in question were very modest.

This raises a number of significant questions concerning the law as we know it today. Does this decision open the floodgates on what is considered a "special or extraordinary expense?" Has the Court just created a door for adult children to obtain funding for cell phones and spring-break trips? Is the Court attempting to enforce child support where none is payable? It seems the Court has created a new category of child-support payments. Since the Court did not provide a definition as to what constitutes a "modest expense", there may be other "expenses" that may be payable, based on the payor spouse's income. For example, a \$300 pair of designer jeans may be "modest" to a person with an income of \$500,000, but will be considered outrageous for a payor with a \$30,000 income. Unfortunately, "modest" is a relative term.

The good news is that many family-law practitioners faced with similar situations already create detailed lists of the post-secondary education expenses to which the parents will contribute. Often a meal plan and cable/Internet are included, particularly when there is no child support payable for the months the child lives away from home. There

are many benefits to generating a detailed list of what constitutes a special and extraordinary expense (for post-secondary education or otherwise), even if those expenses are outside the scope

of the *Child Support Guidelines*. A defined list will help reduce conflict, allow each party to budget and plan, and will aid in keeping parties out of court as the expenses arise.

While we will have to wait and see how lower-court Judges interpret this case, high-income payor spouses should be aware that they may be ordered to pay for more than tuition and books for their adult children.

Sara Mintz's practice includes all aspects of family law, including custody and access disputes, property issues, support claims, and marriage contracts.

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Is there a topic you would like us to cover in a future issue of Focus?

Visit torkinmanes.com and let us know.

Supreme Court of Canada shakes up joint ownership rules



Wendy Templeton

Joint ownership of property with a "right of survivorship" has long been used as a convenient way to pass property on death from one family member to another.

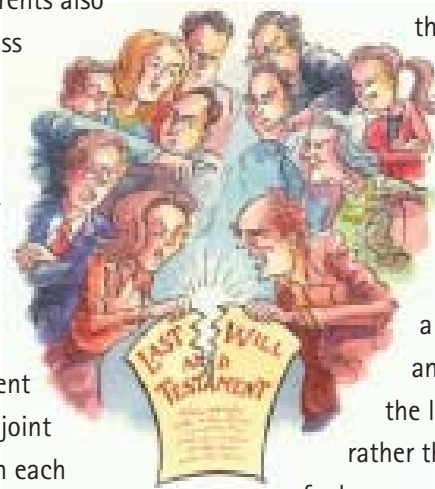
Title passes automatically outside the estate of a deceased owner to the surviving owners, often circumventing any need for probate and reducing exposure to the 1½ per cent Estate Administration Tax in Ontario. Married couples often hold all their assets in joint names for this reason. Parents also use joint ownership to pass property to their children and enable children to manage their assets without using a power of attorney.

The Supreme Court of Canada recently decided two cases in which a parent transferred property into joint ownership with a child. In each case, a father transferred property into joint ownership with his daughter who made no financial contribution. In one case, *Pecore*, the joint ownership was attacked by the daughter's ex-husband, who was a beneficiary under his former father-in-law's estate. In *Madsen*, the daughter's right to the property was attacked by her siblings.

In each case, the Court reviewed the evidence respecting the father's intention with respect to the right to

the property on his death. In *Pecore*, the Court found that the father intended the joint property to pass to his daughter and permitted her to keep all the jointly held property as the surviving joint owner. In *Madsen* however, the Court decided that there was insufficient evidence to support an intention that the property pass to the daughter, and ordered the daughter to pay the property back to the father's estate to be administered under the terms of his will.

In making these decisions, the Court clarified the law relating to presumptions about gratuitous transfers. Prior to this case, the law was that when a parent transfers property to a child for no consideration, it is presumed that



the intention of the parent is to "gift" the property to the child. This concept is known as the "presumption of advancement." As a result of *Pecore* and *Madsen*, it is now the law in Canada that rather than a presumption of advancement, the presumption

is that a child of the age of majority holds the property in a type of trust, known as a "resulting trust." Jointly held property will form part of the assets of the estate of the deceased transferor and be disposed of under his or her will. The presumption of advancement is reserved for transfers by parents to minor children. Of course, these are presumptions only and may be refuted on sufficient evidence that the intention

of the parent was actually to "gift" the property to the adult child.

This result has significant impact on estate planning, and a review of the use of joint ownership in your estate plan may be timely.

If you want to ensure that joint property passes on death to the surviving owner – or that it does not – a written

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Focus Facts

TTrue or false: designating a beneficiary of your RRSP can shelter the plan from probate fees on death. True. But, without the appropriate clause in your will, beneficiaries can "double dip" by receiving the full amount of the registered plan, *and* their full share under your will. Also, divorce does not terminate the beneficiary designation, so forgetting to update your beneficiary designation could lead to problems. Call us to make sure your estate plan is right for you.

Contact any member of our Estates and Trusts Law Group for more information.

Joint ownership rules... (cont'd.)
 declaration of intention is recommended. A clear estate plan that leaves little room for legal arm-wrestling can help prevent a lawsuit.

It is important to recognize that the use of joint accounts to avoid probate fees is sometimes not the best planning. Other tax saving strategies may reap bigger savings, and joint ownership can disrupt your intended plan of distribution. A review of your will and estate plan can uncover the

most strategic use of joint accounts and ensure that your probate fee planning is co-ordinated with other tax saving opportunities.

Wendy Templeton works with individuals and corporate clients to develop and implement wealth-transfer strategies. This focus draws on a number of related areas of her expertise, including wills, trusts and estates, philanthropy, business reorganization and tax planning.

She can be reached at 416 643 8810 or

wtempleton@torkinmanes.com.

FOCUS ON BANKRUPTCY AND INSOLVENCY LAW

Guaranteed trouble



Barry A. Cohen

When a business obtains a credit line at a bank, it is not unusual for the lender to request guarantees from the principals. Guarantees may be

either limited or unlimited in amount.

The Facts

If all guarantors are active in the business, it is assumed that they are aware of how the business is doing and where matters stand at their bank. However, what happens if one or more principals leaves the business, but the guarantee remains?

In a recent case, one of the principals of a company who was also a guarantor of the company's bank line of credit, left the company but remained a shareholder. The company subsequently ran into financial trouble and the bank converted the demand loan credit facility into a term loan, payable monthly. The

lender, once it determined it was not satisfied with how the business was doing, advised the company (but not the departed guarantor) that if it didn't wish to have the loan converted, it could pay it in full in 30 days. The company accepted the conversion to a term loan, made some payments and then defaulted.

The company eventually went bankrupt and the lender sued the guarantors. To make matters worse, the guarantor who had remained active in the company also went bankrupt, leaving the departed shareholder/guarantor with the only pocket to go after.

The lender sued the guarantor. The guarantor defended the claim, saying the lender made a material change in the loan without notifying him. In essence, his argument was that the conversion of the loan to a term loan changed the loan in a material way. The Court held the guarantor liable and referred to specific wording in the guarantee that resulted in the

continuing liability of the guarantor.

The Moral of the Story

Many people sign a guarantee without ever reading it or having a lawyer review it. If you are a guarantor and are no longer acting in the business, every effort should be made to be released from the guarantee. If this is not possible, (remember that the lender is not required to release a guarantor who chooses to leave the business) at the very least, the guarantor should insist on receiving financial statements from the company, an indemnity from the remaining principals, and should notify the lender in writing that written notice of any change to the lending agreement are required.

Failure to take steps to protect yourself frequently results in problems. Remember, you may leave the business, but your guarantee stays.

Barry Cohen deals with the financial aspects of lending to corporations, corporate bankruptcy and general insolvency matters. He is involved in corporate reorganizations, restructurings,

proposals and bankruptcies and has also been involved in all aspects of realizations on behalf of both secured and unsecured creditors, mortgagees and other interested parties.

He can be reached at 416 777 5434 or bcohen@torkinmanes.com.

FOCUS ON LITIGATION LAW

Time really is of the essence in litigation matters



Loretta P. Merritt

In Ontario, parties have two years from the date they become aware of all of the elements of their cause of action to begin legal proceedings. If an action is begun after the two-year period, it can be dismissed by the Court. As the Court of Appeal stated in one case, the aim of limitation periods is "to balance the right of claimants to sue with the rights of defendants to have some certainty and finality in managing their affairs."

How strictly is this doctrine applied? Until recently, judges occasionally extended the limitation period if "special circumstances" existed. The Court of Appeal recently closed the door on this possibility.

In *Joseph v. Paramount Canada's Wonderland*, the plaintiff suffered injuries while visiting the defendant amusement park. The defendant was notified of the claim two weeks later and obtained both a written statement

from the plaintiff and extensive medical documentation with respect to the extent of his injuries. Unfortunately, due to an error in the office of the solicitor for the plaintiff, a claim was not formally issued until 25 months after the date of the injury.

The plaintiff argued that it would be unfair for his action to be dismissed as a result of an error by his solicitor, and that special circumstances existed that mitigated in favour of a brief extension of the limitation period. The Court noted that the defendant would not suffer prejudice as a result of the fact that the claim was issued late.

The Motions Judge agreed with the plaintiff and exercised his discretion to extend the limitation period. On Appeal, the Court of Appeal overturned that decision. The Court held that, under the current *Limitations Act*, Courts do not have the discretion to extend limitation periods to allow an action to be commenced following that expiration of the limitation period pursuant to the common law doctrine of special circumstances. The Court also said that special circumstances can only be used to add a new defendant to an existing lawsuit.

Focus | Facts

Remember the Windsor, Ontario, man who claimed damages of more than \$300,000 as a result of finding a fly in a bottle of water? The plaintiff alleged that the fly triggered depression and anxiety that affected his work and even his sex life. In a 9-0 ruling, the Supreme Court of Canada decided that these damages were not foreseeable and upheld a Court of Appeal ruling dismissing the claim. Thus far, the fly has declined to comment...

The message: Courts take limitation periods very seriously. Do not wait to consult one of our lawyers if you think you have a cause of action!

Loretta Merritt's civil litigation practice includes personal injury litigation (products liability, medical malpractice, motor vehicle cases), civil sexual assault, labour relations and employment litigation and professional negligence and other torts, including insurance litigation.

She can be reached at 416 777 5404, or lmerritt@torkinmanes.com.

Torkin Manes Update

NEW PARTNERS

We are pleased to announce that **Allan Bronstein, Barbara MacFarlane and Laurie Pawlitza** were admitted to the partnership, effective January 1, 2008.

NEW LAWYERS

We are pleased to announce that the following lawyers have joined the firm.

Vince Berry – *Commercial Real Estate*
Zoe Kalmanson – *Commercial Real Estate*
Wendy Templeton – *Trusts and Estates*

ANNOUNCEMENTS AND NEWS

On May 29, **Gregory Hersen** spoke at an OBA program titled "Construction Surety Bonds as a Source of Recovery" He also presented a paper on April 12 at the CBA's National Construction Law Conference titled "The New CCDC 2 – 2008 Stipulated Price Contract-The New Regime."

On May 12, **Scott Martin** spoke at the Ontario Bar Association Conference, "Beyond Conveyancing: Added Services for Real Estate Clients – Vendor and Purchaser Applications."

On May 7, **Barbara MacFarlane** spoke at "Release & Waivers" at the Canadian Bar Association National Symposium on Charity Law.

Linda Godel co-chaired the "2008 National Charity Law Symposium" held jointly by the Canadian Bar Association and the Ontario Bar Association, On May 7. She also spoke on "Legal Issues for Charitable & Non-Profit Organizations" at the Long-Term Care & Retirement Communities Convention.

On May 1, **Thomas Stefanik and Lisa Corrente** spoke at the Human Resources Professionals of York Region at a professional-development session on "Privacy and Surveillance Issues in the Workplace."

Duncan Embury co-chaired the Medical Malpractice and Liability conference at the St. Andrew's Club and Conference Centre on April 14 and 15.

On April 8, **Wendy Templeton** presented "Registered Plans and the Second Spouse" at The Six Minute Estates Lawyer Conference for The Law Society of Upper Canada.

On March 3, **Sabina Mexis** spoke at the Ontario Bar Association program, Taxation of Trusts and Estates: A Practical Approach on the topic of "Effective Roll-Out Strategies and 21-year planning."

On February 21, **Lorne Wolfson** spoke at The Law Society of Upper Canada Roundtable in Family Law on "Support for the Adult Child." On February 27, he spoke to the Ontario Bar Association program on Alternative Dispute Resolution in Family Law on "Family Arbitrations in Ontario."

On February 25, **Len Rodness** spoke at The Law Society of Upper Canada Program, Commercial Mortgage Transactions, discussing "Common Collateral Security in Mortgage Transactions."

In January, **Rosemary Greside** chaired the Law Society's Practice Gems: 4th Annual Title and Off-Title Searching. In April, she also moderated a panel which discussed "To search or Not to Search on Title Insured Deals" at the Law Society's 5th Annual Real Estate Law Summit.

Torkin Manes Charity Golf Tournament

The 10th Annual Torkin Manes Charity Golf Tournament was held on June 12th at Silver Lakes Golf and Country Club and was another fun-filled day of golf and prizes.

We are grateful to all of our participants, contributors and sponsors for making our tournament such a tremendous success and benefiting SickKids Foundation.

Over our tournament's 10 years, and together with our friends and clients, we are extremely proud that we have been able to contribute more than \$300,000 for the important and worthwhile work of the Foundation.

On behalf of Torkin Manes and SickKids Foundation, we thank you for your support of our event!

Baycrest ProAm Hockey

On May 2-3, **Irv Kleiner, Danny Melamed, and Michael Hanley** participated in the 3rd Annual Baycrest International Pro-Am Hockey Tournament at the York Gardens Arenas, in support of Alzheimer's disease research and treatment. Each team drafted and played with an NHL Alumnus.

"The Geri Hat-Tricks" team was formed by our frozen threesome, and friends of Torkin Manes. The Geri Hat-Tricks finished among the top 12 of 55 fundraising teams, raising almost \$56,000 to help Baycrest in the fight against Alzheimer's.

Focus is published regularly by Torkin Manes Cohen Arbus LLP, Barristers & Solicitors. The contents are of a general nature, do not constitute legal advice, and are not intended to be a full and complete analysis of the topics. Before applying the concepts discussed in *Focus*, it is imperative that you consult your legal advisor.

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