

## Real Estate Law Update

### Section 50 of the *Planning Act* Keeps Causing Real Estate Title Problems



**Sidney H. Troister, LSM**  
Partner, Commercial Real Estate

PHONE  
416 777 5432

EMAIL  
stroister@torkinmanes.com

Sid is a partner at Torkin Manes LLP. He is the founding and continuing Chair of the Law Society's Annual Real Estate Law Summit and the author of *The Law of Subdivision Control in Ontario*. He is a noted real estate trouble shooter and problem solver and routinely advises lawyers about the tricks and traps of practising real estate law.

A recent number of real estate claims to LawPro and title insurers has prompted another bulletin on careful title searching and the need to be aware of *Planning Act* traps. A few such claims:

1. The husband owned one house and the wife owned the house next door. When they borrowed on one house, the lender insisted that both husband and wife own the house to be mortgaged. The lawyer added the wife to the title to the husband's house. Now, husband and wife owned one house and wife owned the other. When they decided to finance the wife's house, the lender again asked for husband and wife to own the mortgaged house. The lawyer added the husband to the title to the wife's house. The ownership was now identical and this new mortgage breached the act. However, both mortgages got paid off and now, the clients want to put new mortgages on both houses. Clearly title is merged and separate mortgages on two separate houses are

not permitted without a severance consent. Care must be taken when adding people to ownership to ensure that there is no abutting ownership in the same names. Needless to say, the lawyer should have searched abutting lands when acting for the mortgagee and identified the problem and in the first instance, advised that following the lender's instructions would merge title.

2. The owner of a residential property gave a mortgage on his home. The lawyer for the lender searched title and registered the mortgage on title to the property. Or so the lawyer thought. In conducting the search, the lawyer found one PIN with the owner's name on it and created the mortgage using that PIN. Regrettably, the property consisted of two PINs, one for the original house and one for a lot addition arising from a rear public laneway, a portion of which was closed by the town and conveyed to the abutting

owner, namely this borrower. The original property was not the whole of a lot on a plan of subdivision and so the mortgage contravened the *Planning Act*. Even if it had been, the lender would have got less than all of the borrower's property. Lawyers and their clerks should be mindful when searching owners by name in Teranet that if more than one PIN appears, it is important to check to ensure that all of the PINs for that property are picked up. On one claim, a single property consisted of 4 PINs. Remember that a PIN does not equal a property. Remember also that there is no exception in the *Planning Act* for dealings with all of a PIN. PINs mean nothing for *Planning Act* purposes. Abutting lands must be searched.

3. Many lawyers still don't understand "once a consent always a consent." The *Planning Act* is clear: only the land previously conveyed with an unstipulated consent gets the benefit of the once a consent exception in section 50(12). There is no exception for land that abuts land previously conveyed with consent. It is not enough to say the property was severed. The *Planning Act* only recognizes the land that was conveyed with an unstipulated certificate of consent attached to or endorsed on it as being exempt from further *Planning Act* compliance.
4. Trusts continue to be a problem. The cases indicate that the

person with the power of disposition is determinative of ownership of abutting land for *Planning Act* purposes. In the Registry system, looking behind a registered owner trustee was possible to find a power of disposition in a non-titled beneficial owner. That does not appear to be the case with land now registered in Land Titles. The *Land Titles Act* clearly states that only the person who is registered as the owner of land has the power of disposition. The act also notes that trusts will not be recognized in land titles. Taking title as a trustee for others while being registered as owner of abutting land, whether beneficially or as a trustee is an invitation to an allegation of merger. Lawyers should ensure that in all cases, registered ownership is taken by different persons regardless of the degree of ownership. Again, it is the person or persons or corporations registered as owner that have the power of disposition. The courts at least to date do not look behind registered ownership for, for example, common directors of corporations or who might be the beneficial owners controlling a disposition. But do not identify on title the role of a person as a trustee for someone else since it will invite the allegation of a common power of disposition.

5. Finally, fixing a title after you discover that there was a piece missing in an old deed. Take the second example. The property

consists of two PINs. Only one PIN is transferred to the buyer. Later, it is discovered that the other PIN was missing and so you then do a transfer for the second PIN and state that it was omitted from the first transfer and both were intended to be transferred at the same time. Does that second transfer solve the problem that the first transfer is considered to have contravened the *Planning Act*? Can you fix a contravening transfer like that? If you had the original transferor available to do the second transfer, it would be better to unwind the first transfer, transfer the property back to the original owner and then have that owner transfer both PINs together to the current owner. This way, you avoid the question whether the second transfer cured the defective first transfer. Unfortunately, we don't have correcting deeds, quitclaim deeds, and statutory declarations of intention in Land Titles to fix and clarify titles. We only have transfers to change ownership of land. And finally, if you discover an error like this, report to LawPro to ensure that you fix it right and are covered for the error. It is a lot easier to fix this kind of error with a couple of transfers if the original owner is still around than to try to fix it years later when the original owner cannot be found and a court order is required to rectify the original transfer to include the missing PIN.