

# Exhibit 7



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# REAL ESTATE PRACTICE IN ONTARIO

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rent for the remainder of the term; and (ii) the next three years' rent. A landlord may also challenge in court any disclaimer of a lease; however, pursuant to s. 65.2(3), no such challenge can succeed if the court is satisfied that the insolvent person would not be able to make a viable proposal without the disclaimer of the lease.

Once a bankruptcy occurs, a landlord's rights against a tenant are stayed (see s. 69.3). The landlord cannot terminate the lease or exercise a distraint remedy. The landlord is given a preferred claim for arrears of rent for a period of three months of arrears of rent and three months of accelerated rent for the periods before and after the bankruptcy, respectively, the latter claim only being available if it is provided for in the lease (see s. 136(1)(f)). Pursuant to s. 146 of the Act, all other rights of landlords in such circumstances are left to be governed by provincial jurisdiction and accordingly, one must turn to the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 in Ontario for further details on post-bankruptcy rights of landlords and trustees-in-bankruptcy.

Pursuant to s. 38(2) of the *Commercial Tenancies Act*, a trustee-in-bankruptcy for the tenant may occupy the premises demised by a lease for the three-month period following bankruptcy and then elect to either terminate the lease, retain the lease or assign the lease. If the trustee elects to assign the lease, all rent arrears must be paid in full to the landlord and any assignee of the lease must execute an assumption agreement, agree to conduct a business that is not of a more objectionable or hazardous nature than that of the former, now bankrupt, tenant and be approved by the court as "a person fit and proper" to be allowed into possession. As you can expect, there are many court decisions reported dealing with the application of this test in s. 38(2). The recent decision in *Sunys Petroleum Inc. v. 653120 Ontario Ltd.*, [2000] O.J. No. 1105 (C.A.) is an interesting case where the court refused to accept an assignee of a lease as a "fit and property person".

## **BEDS OF NAVIGABLE WATERS ACT, R.S.O. 1990, c. B.4**

You would do well to keep this Act in mind when giving an opinion on title to a farm or a cottage property which has a frontage on a lake, or across which a stream flows. Unless there is an express grant in the Crown Patent of the bed of a navigable body of water or stream bordering on or passing through a parcel of land, title to the bed of that body of water or stream does not pass with the title to the adjacent land; it remains in the Crown in right of Ontario. Thus, if the body of water is navigable, the boundary of land bordering it is the low water mark; if it is non-navigable, the boundary of the land is the centre of the body of water.

There is no definition in the Act of a navigable water or stream. The question of navigability and the right of the public to use navigable waters has been the subject of many reported court cases in Canada. Perhaps Doherty J. best

summarized the test of navigability in *Canoe Ontario v. Reed* (1990), 69 O.R. (2d) 494 at 501, 6 R.P.R. (2d) 226 (H.C.), as follows:

- (i) Navigability in law requires that the waterway be navigable in fact. It must be capable in its natural state of being traversed by large or small craft of some sort.
- (ii) Navigable also means floatable in the sense that the river or stream is used or is capable of use for floating logs or log rafts or booms.
- (iii) A river may be navigable over part of its course and not navigable over other parts.
- (iv) To be navigable, a river need not in fact be used for navigation so long as it is realistically capable of being so used.
- (v) A river is not navigable if it is used only for private purposes or if it is used for purposes which do not require transportation along the river (*e.g.*, fishing).
- (vi) Navigation need not be continuous but may fluctuate with the seasons.
- (vii) Where a proprietary interest asserted depends on a Crown grant, navigability is initially to be determined as at the date of the Crown grant.

In the Supreme Court of Canada case, *Simpson Sand Company Ltd. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333, 45 D.L.R. (2d) 19, the court held that the creation of a large bay along the St. Lawrence River by the excavation of gravel created a body of navigable water, and that the owner of the land under that water could not prevent others from passing over it.

The Act does not, however, apply to mill ponds or small lakes that have no navigable outlet or inlet; they have been found to be not navigable and the boundaries of lots on which such bodies of water are located follow the original lot lines notwithstanding the water lying thereon (see *Williams v. Salter and Karwick* (1912), 23 O.W.R. 34 (C.A.)).

If a body of water is navigable, then it may be used by any member of the public who has a legitimate reason to pass over it including particularly other owners of land fronting on that water. Anyone who attempts to build an impediment to the use of such water without approval of the Minister of Transport will be in breach of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22. This includes construction of docks. Section 5(1) states:

- (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless
- (a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;
  - (b) the construction of the work is commenced within six months and completed within three years of the approval referred to in paragraph (a) or within such further period as the Minister may fix; and
  - (c) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (a).



Section 6(1) states that “[w]here any work ... is built or placed without having been approved by the Minister, ... the Minister may ... order the owner of the work to remove or alter the work”.

It should be noted that the Crown, through the Ministry of Natural Resources, in the 1980's, embarked on a “Water Lot Program”. Sections 13 and 26 of the *Public Lands Act*, R.S.O. 1990, c. P.43, make it an offence for anyone to erect a building or make an improvement on Crown land without authority. The Ministry took inventory of all boathouses with living accommodations built into navigable waters and required the owners to apply for a lease, licence of occupation or land use permit. At this time, the Ministry is not requiring authority for docks or boathouses without living accommodations.

A landowner who can establish actual possession alone or through predecessors of a part of the bed of the lake or stream for more than 60 years need not apply for authorization. Section 3 of the *Limitations Act*, R.S.O. 1990, c. L.15, protects such an owner against action by the Crown, and s. 17 of the *Public Lands Act* authorizes the Minister of Natural Resources to issue a quit claim to such person.

## **BOUNDARIES ACT, R.S.O. 1990, c. B.10**

This Act provides a procedure whereby the owner of land may apply to the Director of Titles to have the survey boundaries of the land confirmed or have the land surveyed where doubts or errors exist as to the true location of the boundaries.

On receipt of a report from a surveyor appointed by the Director, a hearing is held after advertisement and the Director may dispose of any objections in such manner as seems just and equitable. The Director may order that the survey be amended or confirm it. There are provisions for appeal. A certificate of confirmation of the survey is conclusive and the boundaries as shown on that survey become the true boundaries. The certified plan of survey is then deposited in the land registry office and supersedes all former plans and descriptions.

This Act is most often used by the Ministry of Transportation and Communications and by municipal corporations, pursuant to s. 13(2), to confirm the true location of the boundaries of public highways. Once the certified plan of survey has been registered, no instrument that affects any parcel that adjoins the confirmed boundary may be registered unless the description both conforms and refers to that plan.