ROBINS APPLEBY
BARRISTERS + SOLICITORS

LEGAL PULSE
FALL 2024

NEWS

HOW CAN DEVELOPERS PROTECT THEMSELVES AGAINST DEFAULTING BUYERS IN TODAY'S MARKET?

BY RACHEL PUMA

BUYING HIGH AND APPRAISING LOW

Recently, developers of residential homes, whether condominium or low-rise "freehold" homes, have faced significantly increased numbers of purchasers not closing their deals because the purchasers are unable to obtain financing, even where significant deposits have been paid to the developer. This is particularly the case for homes sold at high prices at peak market (particularly in late 2021 and early 2022).

We are not seeing as many defaults on high-rise condos due to the longer build period. High-rise condos closing today were likely sold 4-5 years ago when the market was not at a peak; whereas, high-rise condos launched at peak likely will not close until 2025/2026 or later, at which time the market and prices are expected to have rebounded.

MITIGATION STRATEGIES

As we work through the various deals in which purchasers are unable to secure sufficient financing as a result of low appraisals, we have developed a number of strategies for developers to mitigate the risk of purchasers defaulting.

Most purchase agreements allow developers to require proof of purchaser financing in that the purchaser has either available cash or a mortgage preapproval for the sale price, failing which, the vendor can terminate the deal. Developers should obtain this information when accepting agreements and request periodic updates to ensure the purchaser's financials have not changed. As closing dates approach, obtaining preapprovals with a long enough rate hold (if possible) reduces last minute surprises where a purchaser is unable to secure financing. Many purchasers themselves will not realize they cannot obtain financing until it is too late to find alternate arrangements.

Similarly, educating purchasers about closing expectations is an important mitigation strategy. Purchasers frequently do not take into consideration the extent of adjustment costs on closing and/or whether they are eligible for the HST rebate (which, if not eligible, that amount is added to the sale price). Although it is the responsibility of the purchasers and their lawyers to understand these items, developers can help avoid last minute surprises by emphasizing these items early on.

Even where the above strategies are deployed, purchasers may not be able to come up with adequate funds to close on the closing date. In that case, many developers have been working in good faith with purchasers to keep the deal alive, most often, by permitting extensions to the closing dates in order to give purchasers time to fund the shortfall.

Developers may also allow assignments in these cases, provided that the assignments are not in competition with their own inventory units. These assignments are difficult when sufficient financing is unavailable for the sale price or if other homes in the project are lower in price. However, purchasers may be able to assign at less of a loss than their loss on a default.

DEVELOPER'S REMEDIES ON A PURCHASER DEFAULT

It should go without saying that purchasers have no right to demand a price abatement or any change to the terms of the purchase agreement. In this author's opinion, purchasers would not expect to pay more for the property if market prices increase. Likewise, it is unreasonable to expect developers to accept less than the agreed upon price as a result of sale prices decreasing.

A recent Ontario Superior Court case dealt with a failed real estate transaction from early 2022. In the case of *Zoleta v. Singh and RE/MAX Twin City Realty, 2023 ONSC 5898*, the purchaser received an appraisal for a lower value of the property than agreed upon in the purchase agreement, and advised the vendor that the purchaser "require[d]" an abatement for the difference in value. The vendor did not agree, and ultimately the purchaser failed to close. In this case, the purchaser asserted bad faith on the part of the vendor. The Court found that the vendor did not act in bad faith, nor had an obligation to agree to change the terms of the agreement. The Court instead re-iterated that a party to a real estate transaction may, in the absence of any bad faith, insist on strict compliance with the agreed upon terms of the contract. The Court also found that the purchaser unequivocally communicated its intention not to complete the transaction in accordance with its terms by its lawyer stating that it "required" an abatement to close the transaction, which amounted to a repudiation of the contract.

Where a purchase agreement is terminated as a result of a purchaser's breach, the vendor is normally entitled to keep the purchaser's deposit, which is credited towards any damages suffered by the vendor as a result of the breach. The seller is entitled to damages for the difference between the purchase agreement sale price and the re-sale sale price, plus any reasonable additional costs incurred to re-sell the home (less the amount of the purchaser's forfeited deposit). Additional costs may be additional legal, realtor, or other professional fees incurred, and interest, realty taxes, and other costs associated with the purchaser's breach.

At the end of the day, purchaser defaults are happening and will continue to happen. However, developers are well within their rights to not agree to an abatement of the purchase price, even in a volatile real estate market, and purchasers will be held responsible if they do not comply with the deals they made.

ONTARIO COURT OF APPEAL AFFIRMS ENFORCEABILITY OF NON-COMPETITION COVENANTS IN M&A TRANSACTIONS

BY CHARLIE KIM, MATTHEW MCGUIGAN AND LEXY MOGIL

INTRODUCTION

The recent 2024 decision of the Ontario Court of Appeal (the "**ONCA**"), *Dr. C. Sims Dentistry Professional Corporation v. Cooke*, has reinforced the principle that Ontario courts will generally not intervene to invalidate non-competition covenants in Mergers and Transactions (M&A). Rather, the ONCA confirmed that in the M&A context, these covenants represent thoughtful negotiations between sophisticated parties, which create binding and enforceable obligations, except in extraordinary circumstances.

SUMMARY OF CASE

FACTS

Dr. Sims acquired Dr. Cooke's dentistry practice for $1.1 million. The agreement of purchase and sale (the "**Purchase Agreement**") included a non-competition clause (both as part of the Purchase Agreement and in the form of a stand-alone agreement) that, among other things, prevented Dr. Cooke from practicing dentistry within a 15 km radius of the acquired practice for a period of five years. Upon the completion of the transaction, Dr. Cooke was to maintain employment at the acquired practice for two years, or until either party terminated his employment with sufficient notice. Shortly after Dr. Sims exercised his right to terminate Dr. Cooke's employment services, Dr. Cooke conveyed an intention to work at a dental practice located only 3.3 km from the acquired practice. Dr. Cooke took the position that the non-competition covenant was unenforceable.

Dr. Sims objected to the breach of the non-competition clause, arguing that the $1.1 million purchase price he paid for the acquired practice included goodwill – the value produced by the intangible assets, such as its brand name, logo, and clients. Such goodwill could be diminished, however, if existing patients could easily decide to follow Dr. Cooke to a new practice before beginning to trust Dr. Sims as their dentist.

HOLDINGS

The trial judge upheld the non-competition clause, finding that it was reasonable based on the following grounds:

i. the Purchase Agreement was agreed to and negotiated by sophisticated commercial parties who had access to legal counsel;

ii. the five-year duration was reasonable based on evidence of the length of time required for patients to build a loyal relationship with a new dentist; and

iii. the 15 km radius was appropriate compared to similar cases involving dental practices.

These conclusions were upheld on appeal. The ONCA noted that the trial judge was correct to state that the commercial nature of the transaction is a determining factor in enforcing non-competition covenants. Due to the value that the Court places on freedom of contract, it would require exceptional circumstances to invalidate an agreement made between two equally informed parties. Whereas a non-competition agreement made in an employment context is more likely to attract the Court's intervention, due to an inherent power imbalance between employers and employees, such power imbalance is not apparent in the commercial context of an M&A transaction.

With respect to goodwill, the ONCA held that the purpose of a restrictive covenant is to protect the goodwill being sold from a devaluation caused by the seller's actions. Such clauses prevent sellers from acting in a manner that could devalue what was sold to the purchaser, thus ensuring the purchaser obtains the value for which it bargained. Ultimately, the ONCA affirmed the enforceability of non-competition covenants negotiated in the commercial setting, so long as they are reasonable.

TAKEAWAY FOR SELLERS IN M&A TRANSACTIONS

At the time of negotiation, a seller must recognize that a non-competition covenant is not merely an ancillary element of the transaction. Courts will continue to enforce these covenants in the M&A context. Sellers should therefore consider their long-term career consequences when negotiating agreements of purchase and sale.
For example, sellers should consider:

i. their age;

ii. their opportunity for other work, particularly in the context of professionals with a specialized and specific skillset; and

iii. their opportunity/ability to retire.

The foregoing factors should particularly be considered when negotiating and assessing the purchase price for their business.

TAKEAWAY FOR PURCHASERS IN M&A TRANSACTIONS

To hold the seller to its non-competition covenant, a purchaser should take necessary precautions to ensure that the agreement is reasonable in the circumstances. While the ONCA affirmed that these covenants are enforceable in an M&A setting, the Court nonetheless constrained this enforceability with the concept of "reasonability." Therefore, purchasers should consider industry standards for the scope and duration of a non-competition covenant. This can provide a higher level of confidence as to the enforceability and reliability of such covenants in the future.

VICTORY AT THE COURT OF APPEAL: UPHOLDING THE FREEDOM OF CONTRACT FOR LENDER

BY DAVID TAUB AND ALEXANDER CAPUTO

Litigation partner, David Taub, together with senior associate, Samuel Mosonyi, persuaded the Ontario Court of Appeal to overturn the lower court decision in *660 Sunningdale GP Inc. v. First Source Mortgage Corporation*. The case was decided earlier this year and has been extensively discussed in the legal community. The Court of Appeal held that our client, First Source Mortgage Corporation, was entitled to collect its full lender's fee, when the borrower, 660 Sunningdale GP Inc., chose to terminate its loan agreement prior to receiving any loan advance.

First Source and Sunningdale had signed a commitment letter where First Source agreed to loan $15,500,000 for an initial $426,500 lending fee (plus interest on the loan advances), $100,000 of the fee was payable on signing the commitment and the $326,500 balance was payable upon the first mortgage advance.

Sunningdale paid the $100,000 upon delivery of the commitment letter and shortly afterward, reneged on its agreement after finding other financing. Sunningdale refused to pay the $326,500 and further claimed the right to receive back the $100,000 payment. Accordingly, the dispute was submitted to Court.

At the Superior Court level, the Judge held that First Source could keep the $100,000, but was not entitled to recover the $326,500 balance because: (1) the balance was payable under an unenforceable "penalty clause", and (2) relief against forfeiture should be granted for the $326,500 balance pursuant to s.98 of the Courts of Justice Act, as that balance was not earned.[1]

Our team believed that the Judge made the wrong decision and appealed to the Ontario Court of Appeal which overturned the decision, ruling in favour of First Source. The Court of Appeal held that the lender fee was not a penalty clause or an "unconscionable" situation requiring Court intervention to relieve Sunningdale from the consequences of its bargain. The Court of Appeal concluded that the lender fee provision was enforceable as it was clearly written and there was no reason for the Court to upend the bargain made by the parties. Further, the lender's fee was not a penalty clause as it was payable as a result of entering the contract while penalty clauses are payments which arise only when a party breaks a contract.

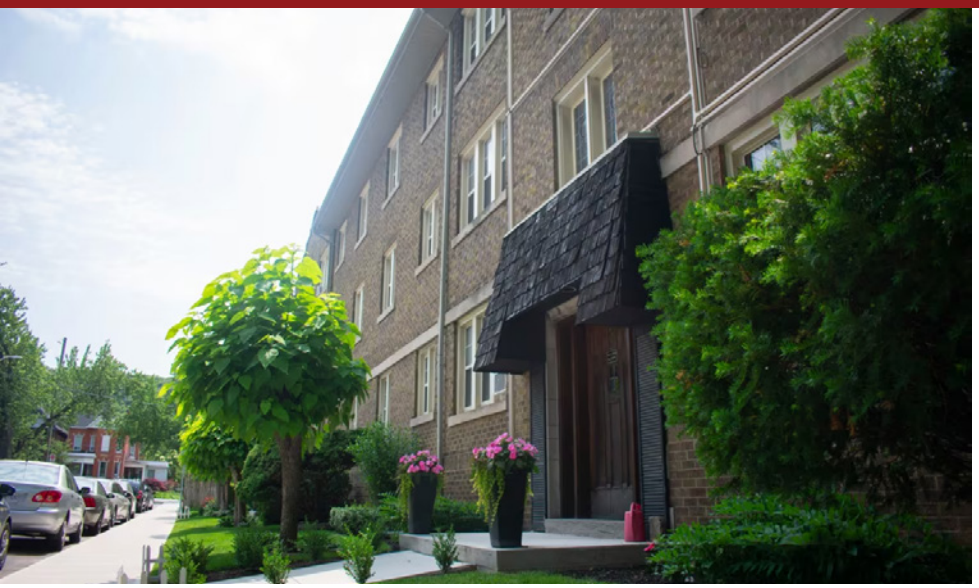
BEYOND THE DOCTRINE OF UNCONSCIONABILITY AND PENALTIES: OUR KEY TAKE AWAY

The unique aspect of this case is the Court of Appeal's clear rejection of the motion judge's approach and her decision to alter the terms of the contract, followed by a detailed discussion of the limited circumstances where Courts would interfere with the parties' bargain. The motion judge took a result-driven approach in deciding the contract was unfair which undermined the contract's terms as negotiated by two sophisticated parties. Judicial discretion should not and now, will not, interfere with freedom of contract, where the parties are sophisticated, even if the bargain seems unfair or one-sided. Such parties understand the risks involved in entering into their contractual agreements and are well suited to understanding these risks at the time the contract is made.

Plainly put, the Court of Appeals' decision in this case sends a message. Judges hearing similar cases will let stand the negotiated agreements between sophisticated parties and not give weight to after-the-fact complaints. Unnecessary interference from judges will only hinder commercial dealings and create uncertainty if parties don't know whether their bargain will be upheld. In *660 Sunningdale GP Inc v. First Source Mortgage Corporation*, the motion judge called the contractual payment a penalty. The Court of Appeal ruled that this was the wrong approach and unwarranted. Thanks to the expertise of our team, we have a precedent-setting case with lasting implications for both the real estate lending industry and the legal community. David Taub and Samuel Mosonyi will continue to fight for our clients to obtain ethical and sound decisions which protect their interests.

[1] 660 Sunningdale GP Inc. v. First Source Mortgage Corporation, 2024 ONCA 252, at paras 3, 4.

BIG DEALS



THE EMPOWERING PURCHASE OF 272 CAROLINE, HAMILTON

When is a $5M acquisition of a residential apartment building a big deal? When its tenants purchase it.

Robins Appleby acted for the tenants of 272 Caroline Street in Hamilton as they came together, formed a co-operative corporation, and purchased their building. The building had rental rates far below the average monthly rent in Hamilton. This was largely the result of long-term tenancies, with some residents living in the building for decades. Concerned that a sale to the private market would yield unaffordable rents in due course, the former tenants, now members of the Co-operative, took control and bought their building.

The transaction was financed with loans from First Ontario Credit Union, insured by CMHC, an investment from New Market Funds, a loan from the CMHC Innovation Fund, and the City of Hamilton through a contribution agreement and rent supplements. The Robins team was led by John Fox and included Ladislav Kovac, Claudia Pedrero, Amelia Briggs-Morris and Natalie Caprara. Our incredibly tenacious client group was headed by Emily Power and Jacob Hoytema.

The importance of this kind of transaction ought not to be missed. Where the press and governments have tended to focus on the creation of new affordable units, Ontario loses more existing affordable units than it can hope to build. This transaction ensures that these 21 units at 272 Caroline will remain affordable for a long time. The multiple levels of financing also underscore the challenges for non-profit actors seeking to buy at market rates—loans from different levels of government and partnerships with socially-minded lenders are essential for success. We offer our congratulations to Emily, Jacob, and all the members on completing this transaction.

ANNOUNCEMENTS

ROBINS APPLEBY CONGRATULATES OUR BEST LAWYERS AND ONES TO WATCH 2025 HONOUREES!

We are thrilled to announce that several of our exceptional lawyers have been recognized in the 2025 edition of Best Lawyers in Canada. This prestigious honour is a testament to their dedication, expertise, and unwavering commitment to their clients.

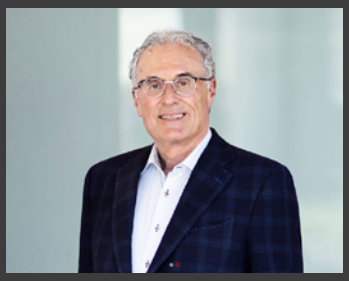
In addition, we are proud to celebrate our rising stars who have been recognized as Ones to Watch in 2025. These lawyers are already making a significant impact in their fields and are poised for even greater achievements.

Congratulations to all our honourees for their outstanding achievements. We're lucky to have you as part of the Robins Appleby team!

BARBARA GREEN

Corporate and Commercial Litigation

Labour and Employment Law

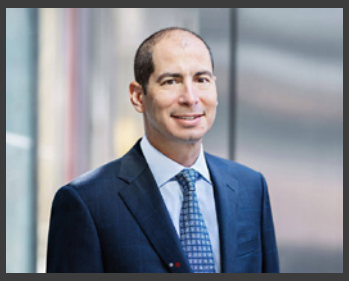


A. LORNE GREENSPOON

Trusts and Estates

LEOR MARGULIES

Real Estate Law



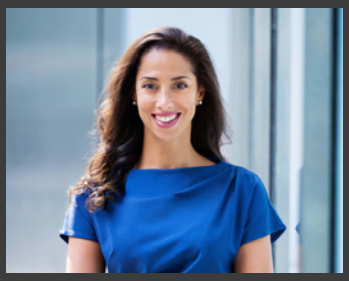
DAVID R. SCHLESINGER

Tax Law

Trusts and Estates

ERROL TENENBAUM

Trusts and Estates



HEELA DONSKY WALKER

Trusts and Estates

RACHEL PUMA

Real Estate Law

ROBERT SANTIA

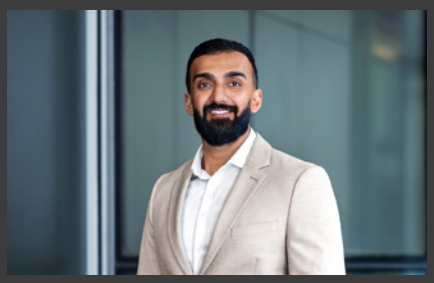
Tax Law

WELCOME TO THE ROBINS APPLEBY TEAM

After articling with us, we are pleased to welcome back Matthew McGuigan as an associate in our Business and Transaction Group, as well as Stephanie Lanz and Sukhraj Sandhu as associates in our Commercial Real Estate and Development Group.

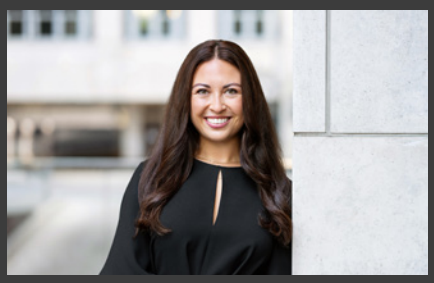
MATTHEW MCGUIGAN

Matthew is an associate in our Business and Transactions Group advising clients on mergers and acquisitions, debt financing, private capital markets, and shareholder and partnership arrangements. His practice areas encompass the Canadian, cross-border, and international context.



SUKHRAJ SANDHU

Sukhraj is an associate in our Commercial Real Estate and Development group. Sukhraj advises on all key aspects of commercial real estate law, including acquisitions, dispositions, development, and financing.



STEPHANIE LANZ

Stephanie is an associate in our Commercial Real Estate and Development Group as well as the Affordable and Social Housing Group. She advises on real estate transactions and development matters for both for profit and non-profit developers.

LAWYER SPOTLIGHT: ROBERT SANTIA

Q) How long have you been with Robins Appleby LLP and what is the one thing you value most about the firm?

A) I have been at Robins Appleby since January of 2024. I've really valued how the members of my practice group have made an effort to thoroughly integrate me into the team and the firm more generally. Although it's only been nine months, I already feel like a longstanding member of the team.

Q) Could you tell us more about your practice and what excites you the most about it?

A) I really enjoy the technical complexity of tax law and the human element of estate planning. As someone who works in the intersection of these two practice areas, I get a great deal of satisfaction when I can find tax-efficient solutions for clients that also align with their personal goals.

Q) What fun fact about yourself can you share that would surprise people?

A) I have an "Advanced Diploma of Portuguese as a Foreign Language" that I earned from the University of Lisbon. Some people find this surprising because I obtained the diploma without taking Portuguese in school or having any relatives who spoke Portuguese, and before I had ever been to a Lusophone country. I kept telling people that I spoke Portuguese and no one believed me, so I took an exam to prove it!

Q) If you had to pick one food to eat for the rest of your life, what would it be?

A) Fajitas. Hands down.

Q) What brings you the most peace? How do you de-stress?

A) I draw a lot of strength from spending time with my wife and daughter; they help me keep a perspective on what's important in life. In terms of de-stressing, I find that regular exercise, sufficient sleep and approaching each day with a positive attitude do wonders in helping me keep everything together.

Q) What is the hardest part of your job?

A) I would say that the hardest part of my job is also my favourite part: reconciling a client's financial objectives with their personal objectives. It's one thing to say you have a pragmatic approach to the practice of law, but it's important to remember that "pragmatic" means different things for different people. Understanding a client's specific goals is crucial to providing effective service, but understanding how best to achieve those goals by taking into account a client's personal values and priorities is a lifelong skill that I continually strive to improve.

Q) Do you have any hidden talents? And if so, what are they?

A) Well, I can name all the capitals of the world, or at least I could have at some point.

DEPARTMENT HIGHLIGHT

REAL ESTATE LITIGATION

At Robins Appleby our team skillfully handles complex disputes including fraud and title repair, receiverships, ownership disputes, tenant disputes, the enforcement of security, and failed transactions.

Real estate transactions can be complex, involving significant investment and often strict timelines. Disputes can arise when parties fail to fulfill their obligations leading up to or after closing. Transactions can also fall through if funding is not secured before closing, or if there are undisclosed mortgages, interests, liens, or charges on a property that prevent the seller from providing clear title.

In these cases, our team knows how to identify strategies to recover or prevent losses when a real estate transaction has gone sideways. We have successfully recovered and claimed deposits on failed transactions, pursued buyers for losses arising from breaches of purchase agreements, and acted for buyers claiming damages for the lost opportunity to purchase a property.

To protect your real estate interests, our lawyers have experience moving quickly to secure certificates of pending litigation (CPLs), injunctive relief, specific performance, and other remedies available through the Courts to protect our clients' property interests.

When acting on real estate disputes, our litigation lawyers work hand-in-hand with our industry-leading real estate practice group. Clients who come to Robins Appleby for legal advice in real estate transactions know that the firm has the capacity to handle disputes or litigation should either arise.

Our litigation and real estate lawyers have experience acting on all manners of disputes relating to condominiums, commercial leases, joint ventures, partnerships, syndications and construction liens. We have advocated for clients in land title disputes, adverse possession claims, and mortgage and secured debt enforcement. Our lawyers have extensive experience litigating issues under the *Land Titles Act*, the *Construction Act*, and the various other statutes which apply to real estate.

Our group's unique expertise has been recognized by two of Ontario's title insurance companies, Chicago Title and Stewart Title Guaranty Company, who regularly use our lawyers to resolve issues covered by their title insurance policies.

If you are facing a real estate dispute and in need of experienced legal representation, our team is skilled in handling a wide range of real estate litigation matters. We can help you navigate the complexities of real estate disputes to protect your interests and achieve your objectives. Contact us today.

COMMUNITY INVOLVEMENT & EVENTS

BIKE FOR BRAIN HEALTH

We're thrilled to share that Robins Rockets, our firm's cyclists, raised an incredible $14,907 for the Mattamy Homes Bike for Brain Health supporting Baycrest Charity Ride on Sunday, June 2nd, 2024! This marks our third year participating in this fantastic event, and we couldn't be prouder to support such a worthy cause. Riding along the DVP, we joined 10,000 enthusiastic participants in rides ranging from 25 to 75 km. Despite some rain, the spirit of the event shone brightly, and everyone had an absolute blast. From the exhilarating ride to the heartwarming camaraderie, every pedal was a testament to our team's dedication and spirit. Here's to many more years of making a difference, one ride at a time!

WESTERN-THEMED TEXAS HOLD'EM

Our Annual Texas Hold'em event was a rip-roaring success with nearly 120 attendees having a rootin' tootin' good time! This year, we upped the ante with a Wild West theme that had everyone hollerin'. The One King West Hotel was transformed on May 9th with western décor, delicious grub, and specialty Paloma drinks that truly captured the spirit of the Wild West.

Folks wholeheartedly embraced the theme, donning their finest western gear for our best-dressed contest. A hearty congratulations to our winners for best-dressed cowboy and cowgirl, as well as to our poker tournament champions!