

Happy New Year!

Welcome to the first edition of the *Legal Observer* for 2007. We hope you had a pleasant and restful holiday season.

We wish to extend congratulations to Eric Williams for winning the Award for Excellence in Insurance Law. It is another well-deserved feather in his cap.

In our last issue we told you about an employee who was treated in an arrogant high handed manner by his employer before being fired. In this issue we look at what happens when an employee is mistreated by their employer or supervisor to the point the employee feels they have no choice but to resign from their job.

On the real estate front, the Ontario Superior Court of Justice recently handed down a significant decision in a case involving title fraud. Title fraud has happened in Ottawa -- so be aware!

For the latest on the Herbison case turn to page 4.

Finally, we would like to take this opportunity to wish our friends and clients the very best for 2007. ☞

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Another Accolade for Eric

Eric Williams has once again been recognized by his peers for his contributions to the legal profession as well as for his achievements in the practice of insurance law. The Ontario Bar Association Insurance Law Section has announced that Eric Williams along with Jesse Glass of Laxton Glass LLP of Toronto are this year's recipients of its 2006 Award for Excellence in Insurance Law.



In its press release, the OBA had the following to say:

Eric has practised for more than 30 years as an "advocate" having appeared in more than 150 trials, hearings and appeals. He is a member of the Ontario Bar Association, Advocates' Society, and County of Carleton Law Association. Eric is an enthusiastic mentor for young lawyers both within his own firm and through the County of Carleton Bar Association's mentoring initiatives.

Over the years, Eric has volunteered as an instructor at the Bar admission course. In addition, he has authored and presented papers on a regular basis with an emphasis on advocacy and insurance issues.



"Eric has an impressive list of important reported decisions and an equally impressive list of papers and seminars to his credit. The OBA is pleased to honour his significant contributions," said Morris Chochla, Chair of the OBA's Insurance Section.

This Award of Excellence was created to recognize and thank outstanding members of the Ontario Bar Association for their exceptional achievements, distinguished service and contributions in the following areas:

- The development of insurance law through advocacy, teaching, writing or legislative reform;
- Leadership in the profession and particularly of lawyers practising insurance law;
- Maintaining the highest standards of professional competence as well as the highest levels of honesty, integrity and civility; and
- Enhancement of the profession of law and the well being of the community.

Eric's co-recipient, Jesse Glass is one of the founding partners of Laxton Glass LLP. He has practised for more than 45 years as an active trial lawyer specializing in professional liability and insurance law.

Eric will be honoured at an award ceremony and special dinner to be held in Toronto on April 26, 2007. ☞

When the Boss is a Bully

When you think of bullying the picture that probably pops up is a big mean kid pushing all the other kids around. But if you think this kind of intimidation happens only in the school yard you would be wrong. In recent years, bullying has been making its presence felt in the workplace. When the bullying becomes serious enough it may lead an employee to quit their job and sue their employer for constructive dismissal.

Constructive Dismissal

Traditionally, constructive dismissal occurs when the employer unilaterally alters an essential term of the employment contract, whether written or implied, such that the employee may treat the employment as terminated. Such changes generally include a reduction in salary and/or responsibilities or a change in work conditions.

In 1998, the courts expanded the definition of constructive dismissal. They concluded that an employee did not have to point to a particular fundamental term having been breached if the employee's situation established that the employer had renounced the entire relationship without cause. The leading case in Ontario is *Shah v. Xerox Canada Ltd.*

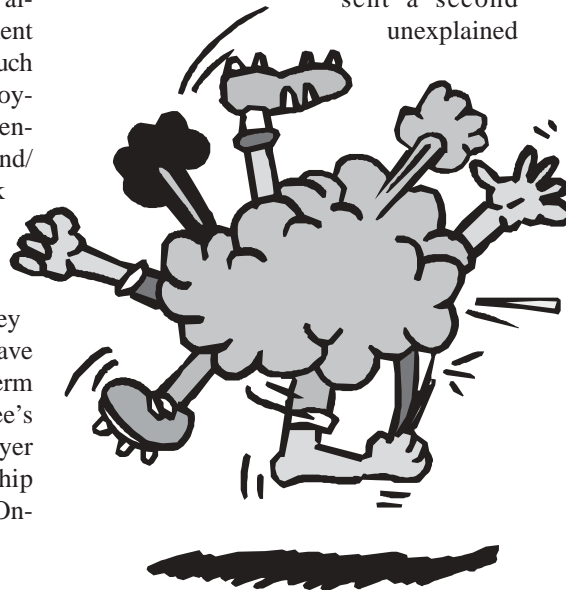
The Facts

Shah worked for Xerox for more than 12 years. During that time he had only positive performance reviews. In addition, he received regular pay raises and bonuses. Based on his technical credentials and his initiative, Shah was recommended for a new technical support analyst's position. A few months after accepting the position, Shah's sub-group was moved to Harvey's division. Confusion soon developed about the division of labour and about whom Shah was to report to. Shah was also criticized for spending too much time away from the home office, despite Harvey being responsible for Shah's being on an exchange.

Four months passed with no further criticism. However, at Shah's next perform-

ance review Harvey raised several concerns, which Shah addressed. The review was followed up with a warning letter which suggested that Shah's position was in jeopardy. Harvey became more authoritarian, impatient and intolerant with Shah. About this same time, Shah's wife suffered her fifth miscarriage and Shah himself became ill. At no time did Harvey inquire about Shah's personal situation, and he turned down Shah's request for a six-week unpaid leave of absence.

Two months after that first letter, Harvey sent a second unexplained



warning letter. Shah was then put on one month's probation. Believing that his days at Xerox were numbered, Shah tendered his resignation.

Resignation or Constructive Dismissal

Shah subsequently sued for damages claiming that the situation had become unbearable and that he was left with no choice but to resign.

A careful review of the evidence convinced the court that Shah's position as a member of Harvey's group had indeed become intolerable and that he had been constructively dismissed without cause. The court found that the situation was primarily the result of Harvey's inefficient and unreasonable conduct.

Although, as previously indicated, a finding of constructive dismissal generally requires a change of a fundamental term of the employment contract, the judge in the Shah case indicated that such a finding is not necessary. Instead, the test to be met is whether the conduct of the manager/employer was such that a reasonable person in the circumstances should not be expected to persevere in the employment.

Xerox unsuccessfully appealed. In upholding the lower court's decision, including the broader definition of constructive dismissal, the Ontario Court of Appeal stated, "In some cases, however, the employer's conduct amounts not just to a change in a specific term of the employment contract but to repudiation of the entire employment relationship."

|| Saunders v. Chateau Des Charmes Wines

Saunders v. Chateau Des Charmes Wines is another case where the employee was found to have been constructively dismissed based on how he was treated by his supervisor. Saunders began his career as a sales manager before being promoted to director of marketing. The relationship between he and his boss was positive and productive during the first nine years.

Although there were several unpleasant exchanges between Saunders and his supervisor during the final year, it was the treatment by the latter, during the last two weeks, that "was of sufficient severity and effect to amount to a repudiation of the employment relationship." Saunders' supervisor had begun to display an unrelenting and escalating anger. His behaviour was hostile, aggressive, profane, rude, demeaning and intimidating.

With respect to the short period of bullying, the court specifically stated that "It matters not that it was over a period of only about two weeks."

see **BULLY** page 4

Real Estate Fraud - A Victory for the Homeowner

Although not a rampant crime, the problem of real estate fraud is very real. Real estate fraud can result in a home being sold or mortgaged without the knowledge of the legal owner. Up until recently this has meant that innocent owners risk losing their home, since the scam artist is usually long gone by the time the fraud comes to light. However, a recent decision of the Ontario Superior Court of Justice provides some welcome news for property owners.

The Facts¹

In 2001, the "Rs" purchased a condo in north Toronto. Three years later, the property was mortgage free. Unbeknownst to the Rs, while they were paying off the last of their mortgage, fraud artists, posing as the Rs, purported to sell the condo to a bogus purchaser. The price for this fraudulent sale was \$270,000. In addition, the bogus purchaser was granted a mortgage on the Rs condo from TD in the amount of \$247,860. The deed and the mortgage were registered at the Registry Office.

The fraud artists presented what appeared to be proper identification at the time of the sale.

When the Rs discovered what had happened, they sued the bank. Specifically, the Rs sought to have title to their condo restored to their names and the fraudulent mortgage set aside. Although the bank agreed that the fraudulent transfer was invalid, it argued that the mortgage was a valid charge on the property.

The Law

In 1885, Ontario adopted a land system whereby title to real property would be established by setting up a register. The register would guarantee that the person named as property owner had title subject only to any registered encumbrances. The job of the registrar is to verify that the proper documents (e.g. transfers of deed and mortgages) are properly completed, to accept the designated fees and land transfer taxes and to correctly register the documents on title. Note that it is not the registrar's job to verify whether owners have indeed sold and/or mortgaged their property.

Although the government eventually enacted the *Land Titles Act*, the Supreme Court of Canada has stated that the statute did not abolish the original principals of the common law.

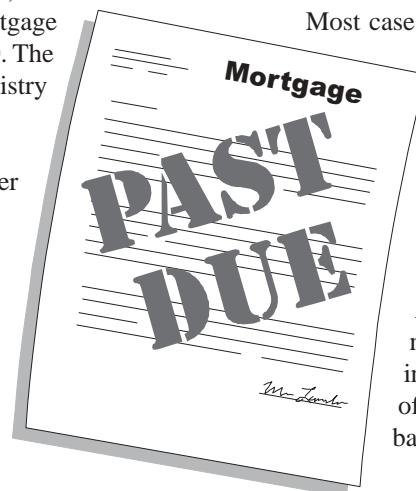
The Decision

Justice Echlin in the Rs' case concluded that the mortgage was a fraudulent charge and was void. He recognized that the Rs and the bank were innocent parties, however only the bank had been

in a position to do something which might have been able to prevent the fraud. In the judge's view, the bank had failed to exercise due diligence by ensuring that a proper in-person appraisal was carried out prior to releasing the mortgage monies. He also found that certain anomalies should have put the bank on notice that something was not right. The end result was that in this instance, the bank could not rely on the register.

The Caveat

In 2005 the Ontario Court of Appeal decided *Household Realty v. Liu*², another mortgage fraud case, in favour of the mortgagee. Unlike the Rs case, where the registered owners of the condo were completely innocent of the fraud, the fraud in the *Household Realty* case did involve one of the registered owners.




Most cases involving a fraudulent mortgage are decided in the mortgagee's favour. If TD appeals this decision, it is possible that the appellate court could reverse Justice Echlin's decision. Having said that, this set of facts might be different enough to favour the homeowners.

What To Do?

Although this type of fraud is more common than ever before, it remains relatively insignificant when one considers the number of transactions that are registered on a daily basis in the Ontario Registry System.

The Ontario government recently amended the *Land Titles Act* to ensure that ownership of property cannot be lost as a result of the registration of a falsified mortgage, fraudulent sale or a counterfeit power of attorney. Any title to land obtained by fraudulent means will be null and void. The changes will also speed up financial assistance for victims of fraud, ensuring the title is returned and a decision on compensation is made within 90 days. In addition, the maximum penalty for real estate fraud has been raised to \$50,000 from \$1,000.

A pro-active step that you can take to protect yourself from this kind of fraud is to purchase title insurance. It can be ordered through your lawyer during a refinance transaction or at any time during the course of home ownership. The policy is effective from the date on which you took title to the property until you sell your home.

If you would like to learn more about purchasing title insurance please contact Paul McEnery of our firm. 

¹Rabi v. Rosu, 2006 CanLII 36623 (ON S.C.)

²*Household Realty Corp. v. Liu*, (2005), 261 D.L.R. (4th) 679 (Ont.C.A.)

BULLY - continued from page 1**Advice for Employers and Employees**


So where does this leave employers and employees? Are employers entitled to be critical of the unsatisfactory work of its employees? Are employers entitled to take measures to remedy the situation? And what about employees who take everything personally? Will every harsh word support a constructive dismissal?

In order to protect itself against a claim for constructive dismissal, an employer must ensure that its employees are treated with civility, decency, respect and dignity. Therefore employers should guard against the following types of behaviours and actions.

- Mailing rude, degrading or offensive remarks;
- Discrediting an employee by spreading rumours;
- Intimidating an employee; and
- Isolating or shunning an employee.

Another important note to employers is that it is not up to the vulnerable employee to advise the employer that a particular type of conduct is not acceptable. Rather the employer bears the onus of identifying problems in the workplace and taking appropriate steps. The employer is also obliged to conduct an investigation to determine what has actually happened, as the rights of the “harasser” must also be protected.

If you are an employee and you are being subjected to a pattern of unacceptable behaviour you would be wise to keep a journal of the events as well as seek legal advice. It is important that you determine if you are the target of a bully or you are simply being subjected to strong management or justifiable criticism. If you resign and a court does not agree with your assessment of the situation you will be without a job and your claim for constructive dismissal will be lost.

For more information about constructive dismissal, whether you are an employer or an employee, please contact our firm. 

The Latest on Herbison

On December 11, 2006, Mark Charron and Jaye Hooper argued *Lumbermen v. Herbison*¹ before a full panel of the Supreme Court of Canada. The court heard this appeal in conjunction with *Vytingam v. Farmer*. The common issue in these two appeals was whether the current legal test to determine if an accident arose, directly or indirectly, from the ownership use or operation of a motor vehicle was still appropriate.


Our position on the appeal was that the test is still appropriate but has been misapplied by some courts. On the facts of the Herbison case, neither part of the test, when properly applied, is met.

We further argued that when considering whether coverage should apply, the court should use a common sense approach that considers the reasonable expectations of

an insurer as well as a policyholder. We submitted that a reasonable policyholder would not expect a hunting accident to be covered by an automobile policy.

The bench engaged in a lively discussion with counsel on both sides of these two cases. It would appear that they have concerns with the lower court decisions and believe further guidance is necessary.

While we are cautiously optimistic that we will succeed in our appeal, we believe that the court will, at minimum, provide clarity and direction for those cases in which the involvement of the vehicle is questionable.

If you have any questions or concerns regarding these cases or on coverage under automobile policies in general, please contact our firm. 



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*The articles in the Legal Observer are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

