

## Sanctions and Title: What Ontario Real Estate Lawyers Need to Know

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With continuing uncertainty in the geopolitical landscape, this Legal Update considers a limited hypothetical question around the registration of real property in Ontario where the recipient of an interest in real estate is an individual, entity or foreign power subject to sanctions imposed by the Government of Canada (a **"Sanctioned Party"**) and the effect on subsequent parties in so far as title is concerned.

This Legal Update does not serve to provide any commentary on geopolitical matters but rather seeks to explore what would happen (in so far as title is concerned) if an Ontario lawyer is engaged to register an interest in real property in the applicable Land Registry Office on behalf of a client that is a Sanctioned Party or a party that becomes, at a later time, a Sanctioned Party.

### Background on Sanctions in Canada

Canada currently imposes sanctions on Sanctioned Parties under five separate federal legislative frameworks, as follows:

- The Criminal Code, R.S.C. 1985, c. C-46.
- The United Nations Act, R.S.C. 1985, c. U-2.
- The Special Economic Measures Act, S.C. 1992, c. 17 (SEMA).
- The Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c. 21.
- The Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10.

Together with their respective regulations, these are collectively called **"Canadian Sanction Laws"** in this Legal Update.

Of special note for real estate lawyers, Canadian Sanction Laws can restrict the dealing in real estate. Specifically, under sections 4(2)(a) and 4(2)(e) of SEMA, it is within the discretion of the Government of Canada to enact a restriction or prohibition on:

"(a) any dealing by any person in Canada or Canadian outside Canada in any property wherever situated held by or on behalf of that foreign state, any person in that foreign state, or a national of

that foreign state who does not ordinarily reside in Canada; [and]

(e) the provision or acquisition by any person in Canada or Canadian outside Canada of financial services or any other services to, from or for the benefit of or on the direction or order of that foreign state or any person in that foreign state".

### Issue: Would a Sanctioned Party Get 'Good Title' on a Transfer of Real Property Situated in Ontario?

This Legal Update considers a hypothetical example where real property in Ontario is transferred in the provincial land registration system to a Sanctioned Party.

The issue considered is whether the Sanctioned Party in the hypothetical example would receive a valid and enforceable interest in Ontario real property where such party has a properly constituted deed registered in its name.

In the hypothetical example in this Legal Update, it is assumed that:

- Any sanctions imposed do not specifically invalidate deeds of transfer, and consistent with SEMA, instead prohibit dealing.

- The lands in question have not been the subject of any enforcement, nationalization, seizure or forfeiture.

This Legal Update is confined to title only, and not the effect on any participant in the transaction.

### Analysis

#### Provincial Law

##### Registration

In short, sections 86(1) and 87 of the *Land Titles Act*, R.S.O. 1990, c. L5 (LTA) do not contain any qualifications whatsoever that can directly impair a transfer of real property to a Sanctioned Party.

This view is based on the fact that the LTA and its register are designed to be relied on with exceptions, and the status of a Sanctioned Party is not one of the exceptions; a completed, properly registered transfer confers good title subject to the LTA; and the LTA itself does not have qualifications to invalidate such a transfer to a Sanctioned Party. This conclusion is consistent with the general principles of law that are designed to protect the integrity of the register.

Additionally, it follows from this view that a properly careful solicitor is not required to determine the sanction status of a Sanctioned Party when confining their review to title only. That is, a search of Sanctioned Parties is not an off-title search one would expect to search to provide an opinion on title. This search may be necessary and advisable as set out in the discussion of regulatory matters below (see *What Duties Does a Lawyer Have in This Situation?*), but the sanction status of a Sanctioned Party itself does not affect the register.

This of course does not insulate the solicitors, the seller, the lenders, the Sanctioned Party or the subject property from consequences for dealings that are contrary to sanctions, such as forfeiture. In fact, quite the opposite is true – the subject property would be exposed to all the restrictions or prohibitions imposed on the Sanctioned Party, and solicitors can be exposed if they deal with such property or take consideration for such transfers.

This Legal Update does not consider the discretion of the Land Registrar to disallow a registration on the basis that it, as a division of the Crown in Right of Ontario, is prohibited from dealing with the recipient. This Legal Update also does not consider whether the recording of a name or the continued registration of that name in

the register is in fact ‘dealing’ that would be prohibited. Finally, this Legal Update does not consider whether the return of an instrument to a Sanctioned Party would be considered ‘dealing’ prohibited by any sanction. These are important considerations separate from the hypothetical example in this Legal Update, which focusses only on the legal result of a successful registration in so far as title is concerned.

##### After Registration

In respect of future dealings with the subject property, the concept of deferred indefeasibility has been the subject of litigation, most recently, indirectly, in *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada*, 2016 CarswellOnt 18673 (Ont. Div. Ct.) (Computershare Decision) in order to examine what the effect would be of the registration of a fraudulent instrument on title. For more information on the Computershare Decision, see [Legal Update, The Priority of Valid Mortgages While Accompanied by a Fraudulent Discharge: The ONSC Decision in CIBC Mortgages Inc. v. Computershare Trust Co. of Canada](#).

Solely as it relates to title – if a buyer (and all other subsequent parties in the chain of title) purchases a property from a Sanctioned Party, and title is transferred to the buyer from a party that becomes, after such transfer, a Sanctioned Party, the view in this Legal Update is that subsequent instruments in the chain of title would have the benefit of the Computershare Decision, notwithstanding that the root of title may contain an instrument that is impaired by Canadian Sanction Laws, or consistent with the Computershare Decision, prior instruments are later adjudged to have been void on registration.

In other words, consistent with the Computershare Decision, if an innocent party relied on the face of the register to then register its interest in the property, that innocent party has a valid and enforceable interest, under the concept of deferred indefeasibility, all other things being equal.

Again, these conclusions are limited to title and of course do not insulate the solicitors, the buyer, or the Sanctioned Party from consequences for dealings that are contrary to any Canadian Sanctions Laws. The hypothetical example in this Legal Update does not consider these consequences.

It is important to repeat the assumptions for the hypothetical example in this Legal Update: where Canadian Sanction Laws do not invalidate deeds, but instead prohibit dealing, the view is that good title has

passed to such a buyer upon registration because of the particular formulation of the LTA – even where everyone involved has broken laws in facilitating, dealing or even paying for such interests. None of the parties are free from consequences of their actions, even if the passed title is ‘good’. However, the chain of title remains preserved.

### Federal Law

Accordingly, it is open to argument as to whether Canadian Sanction Laws, particularly section 4.2(a) of SEMA, would invalidate, or make void, a transfer. The specific wording of Canadian Sanction Laws that applies to the Sanctioned Party must be carefully examined, but absent a specific and positive statement that invalidates instruments in writing executed by the Sanctioned Party, it seems likely that a properly constituted and registered transfer confers on the Sanctioned Party, in its capacity as transferee, ‘good title’ through the operation of the words of the LTA.

Specifically, if Canadian Sanction Laws specifically and positively make a statement that invalidates instruments in writing executed by the Sanctioned Party, then these conclusions would be different.

### Paramourncy, Equity and Later Judicial Decision

Should there be any potential conflict between the LTA and Canadian Sanction Laws, under the doctrine of paramountcy, as federal law, Canadian Sanction Laws in the ordinary course would prevail, with the LTA, as provincial law, being deemed inoperative to the extent that it conflicts with the applicable Canadian Sanctions Laws. While this Legal Update does not explore the division of powers as a constitutional matter, this is an important and relevant consideration to be assessed should a potential conflict arise in the wording of any sanction regulations.

Additionally, it is within the power of any court of competent jurisdiction to find on the facts that a deed could not have passed good title where Canadian Sanction Laws are not respected. That is, on an equitable basis, a court is free to invalidate any transaction on a number of different legal theories around equity.

Furthermore, these conclusions are limited by the assumption around the text of those Canadian Sanction Laws and their regulations – those regulations must be carefully examined in each case.

## What Duties Does a Lawyer Have in This Situation?

### Compliance with Rules of Professional Conduct

Lawyers in Ontario must always comply with the [Rules of Professional Conduct](#) (Rules).

Firstly, it is important to stay conscious of Rules 3.2-7 to 3.2-7.3, which speak to the ideas that a lawyer must not knowingly assist in or encourage dishonesty, fraud, crime or illegal conduct (which includes wilful blindness or recklessness) and guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client or any other person.

Secondly, specific attention should also be paid to Part III of By-Law 7.1 made under the Law Society Act, R.S.O. 1990, c. L.8, which addresses client identification and verification requirements as well as obligations placed on a lawyer to combat money laundering and terrorist financing.

If a lawyer follows these established procedures, policies and processes, one should generally have enough information to make an informed decision as to whether one should act for a client or prospective client on a given matter.

### Compliance with Canadian Sanction Laws

Separate entirely from the question of title passing, law firms and lawyers should also be constantly monitoring updates to Canadian Sanctions Laws to see if any duties or obligations are placed upon lawyers and law firms, which includes reviewing the regulations under the Canadian Sanctions Laws and not just the Acts themselves. This is especially true during periods of geopolitical unrest, where Canadian Sanction Laws can rapidly be amended.

### Practical Implications

While in limited circumstances the integrity of the register will govern, the fact that good title may pass does not insulate anyone from consequences for their actions.

It is imperative that law firms stay well-informed of world news and ensure that their procedures, policies and

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processes in respect of client onboarding, matter openings, fund transfers, know your client, and anti-money laundering obligations help protect the firm from inadvertently acting on behalf of a Sanctioned Party.

At a time when the Government of Canada is rapidly deploying sanctions, law firms should be extra vigilant in ensuring that appropriate due diligence before opening any new matters.

### Practical Law Resources

The following resources may be helpful:

- [Russia Sanctions and Related Considerations Toolkit](#).
- [Legal Update, The Priority of Valid Mortgages While Accompanied by a Fraudulent Discharge: The ONSC Decision in CIBC Mortgages Inc. v. Computershare Trust Co. of Canada](#).

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