

Court file no. *RE 4413/94*

ONTARIO COURT (GENERAL DIVISION)

BETWEEN:

IAN HARVEY

APPLICANT

and

(Court seal)

LAURENTIAN BANK OF CANADA, ROBERT KERNOHAN,
and GAIL HERRINGTON

RESPONDENTS

APPLICATION UNDER: SECTION 23, FAMILY LAW ACT, R.S.O. 1986 c.4
 THIS IS EXHIBIT
 REFERRED TO IN THE AFFIDAVIT OF
GAIL HERRINGTON
 SWORN BEFORE ME THIS *23*
 DAY OF *DECEMBER* 19*94*
 NOTICE OF APPLICATION
 A COMMISSIONER, ETC.

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on September 28, 1994, at 10:00 a.m. at 145 Queen St., West, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: SEPTEMBER 7/94

Issued by 
Local registrar

Address of court office:

145 Queen St. West
Toronto, Ontario
M5H 2N7

TO:

Laurentian Bank of Canada
1981 McGill College Ave.
Montreal, Quebec
H3A 3K3

Robert Kernohan
66 Clancy Dr.
Willowdale, Ontario
M2J 2V8

Gail Herrington
29 Dominy Dr.
Ajax, Ontario
L1T 3H6

APPLICATION

1. The applicant makes application for:

- (a) an order withdrawing and discharging the mortgage registered as Instrument # C747474 that is held against 299 Warden Ave., Scarborough, Ontario;
- (b) an order withdrawing and discharging the assignment of mortgage registered as Instrument # C820125.
- (c) \$17,000.00 in special damages;
- (d) \$135,000.00 for punitive damages;
- (e) costs on a Solicitor and Client basis;
- (f) such further and other relief as to this Honourable Court seems just.

2. The grounds for the application are:

- (a) The Applicant and Ms. Gail Herrington jointly hold the title to the property described in paragraph (c) below. Said property is the their matrimonial home.
- (b) In matrimonial proceedings between the Applicant and Ms. Herrington, Notices of Motion were served by and upon both parties. In both of these notices it is explicitly stated that each party will be requesting an interim Order restraining the other party from depleting any property under their control and requiring them to preserve all such properties until further Order of the Court.

The Notice from Ms. Herrington was dated September 20, 1991 while the Applicant's Notice was dated November 12, 1991.

(c) Despite these notices (including Ms. Herrington's), a mortgage dated November 27, 1991 was granted between Ms. Herrington, as mortgagor and the Respondent, Robert Kernohan, in Trust, as mortgagee. This mortgage was registered on November 27, 1991 in the Registry Office for the Land Titles Division of Metropolitan Toronto as instrument # C747474, described as: Parcel 1527, Section Scarborough, being Lot 8, Plan M-548, City of Scarborough, Municipality of Metropolitan Toronto. The Property is known municipally as 299 Warden Ave., Scarborough, Ontario.

(d) The above noted mortgage is invalid as it was acquired in contravention of Section 21 of The Family Law Act, 1986, c.4, as amended which states:

***No spouse shall dispose of or encumber an interest in a matrimonial home unless:**

(a) the other spouse joins in the instrument or consents to the transaction;

(b) the other spouse has released all rights under this Part by a separation agreement;

(c) a court order has authorized the transaction or has released the property from the application of this Part; or

(d) the property is not designated by both spouses as a matrimonial home and a designation of another property as a matrimonial home, made by both spouses, is registered and not cancelled.

(e) A Mr. Eric Nagler (an Ontario Lawyer) acted on behalf of both Ms. Herrington and Mr. Kernohan in the transaction noted in paragraph (c) above. Mr. Nagler knew that the above noted mortgage was to be placed upon a property which was a matrimonial home. This resulted in an encumbrance upon the Applicant's matrimonial home in direct contravention of Section 21 of the Family Law Act as stated in paragraph (d) above.

(f) The interest rate for the mortgage outlined in paragraph (c) herein reached as high as 49% per annum. In two years the interest accumulated to more than the principal. This unconscionably high rate of interest raises serious questions regarding the purpose and intent of the Respondents as it served to injure the Applicant.

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(g) By assignment of Mortgage registered on January 28, 1993 and registered as Instrument # C820125 the Mortgage was assigned by Robert Kernohan, in Trust, to the Respondent, Laurentian Bank of Canada, Trustee for R.R.S.P. 204-001-572.

(h) The Applicant never consented to the transactions described herein with respect to the above noted mortgage.

(i) The Applicant is not a party to the transactions described herein with respect to the above noted mortgage.

(j) There is no court order allowing the transactions described herein with respect to the above noted mortgage.

(k) The said property is the only property designated by both spouses as their matrimonial home. No other real property exists and there exists no separation agreement to allow any encumbrance on the title to the said property.

(l) The respondents, Laurentian Bank of Canada and Robert Kernohan, currently hold a mortgage on the property described in paragraph (c) herein in the amount of \$36,000.00 principal and \$38,686.06 in interest as of November 26, 1993.

(m) Despite considerable correspondence between counsel for the Applicant and the Laurentian Bank of Canada informing them of the invalidity of the mortgage, they refuse to lift the cloud on title to the property outlined in paragraph (c) above. They even refuse to recognize that they are on title.

(n) In refusing to recognize their responsibility, the Laurentian Bank of Canada has used reasoning ranging from this matter not being within their power to it not being their problem. The Vice-President and General Counsel for the bank, Mr. Michel Richard, went as far as to claim that the damage that the Applicant has suffered has been due to his divorce "rather than by a mere inscription on the title of his house". This cavalier attitude that Laurentian Bank of Canada has exhibited only serves to further emphasize the malicious nature of their conduct. This has required the Applicant to be put to great expense in having to move before the courts to remedy the situation.

(o) The Applicant brings this Application under section 23 subsection (d) of The Family Law Act, 1986, c.4, as amended which states:

The court may, on the application of a spouse or person having an interest in property, by order,

(d) direct the setting aside of a transaction disposing of or encumbering an interest in the matrimonial home contrary to subsection 21 (1) and the revesting of the interest or any part of it on the conditions that the court considers appropriate;

3. The following documentary evidence will be used at the hearing of the Application:

(a) The Affidavit of Ian Harvey dated July 28, 1994, 1994;

as Instrument no. C820125, January 28, 1993;

Robert Kernohan, in Trust, registered November 27, 1991, as

Claim 93-CQ-45325;

motion dated September 20, 1991 from Gail Herrington to Ian Harvey;

Motion dated November 12, 1991 from Ian Harvey to Gail Herrington;

from Norman Bergstein to the Laurentian Bank of Canada dated May 6, 1994;

from the Laurentian Bank of Canada to Norman Bergstein dated:

- May 20, 1994
- June 15, 1994
- June 30, 1994

(i) Any other documents that this Honourable Court may seem just.

Date of issue: *Sept 7*, 1994

NORMAN BERGSTEIN
Barrister and Solicitor
113 Davenport Rd.
Toronto, Ontario
M5R 1H8

(416) 961-3100
Solicitor for the Applicant

IAN HARVEY

and

Laurentian Bank of Canada, Robert Kernohan,
and Gail Herrington
RESPONDENTS

APPLICANT

(Short title of proceeding)

Court file no. **RE-4413-94**

ONTARIO COURT (GENERAL
DIVISION)
Proceeding commenced At Toronto

Court File No.

ONTARIO COURT (GENERAL DIVISION)

Re 4843/95

BETWEEN:

ELIZABETH SMITH

Applicant

- and -

LAURENTIAN BANK OF CANADA, TRUSTEE FOR RRSP 204-001-572,
IAN HARVEY and GAIL HERRINGTON

Respondents

THE MATTER OF Rule 14.05 of the Rules of Civil Procedure

NOTICE OF APPLICATION

THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing before a judge on Tue day, the 17 of June, 1995 at 10:00 or as soon after that time as the application can be heard at 130 Bay Street West, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38C prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE MATTER IN QUESTION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office.

The application is to be heard as soon as possible, but not later than 2 p.m. on the day of the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

DAN 4/95

Issued by



Address of
Court Office:

145 Queen Street West
Toronto, Ontario
M5H 2N9

APPLICATION**THE APPLICATION IS FOR:**

- (a) a declaration that the Applicant, or in the alternative the Respondent Laurentian Bank of Canada, as Trustee for RRSP 204-001-572 has an equitable second charge against the interest of the Respondent Gail Herrington in certain real property municipally known as 299 Warden Avenue, Scarborough, Ontario;
 - (b) costs of this application;
 - (c) an order validating service of this application by way of personal service upon the solicitors of record for the Respondents in Court File No. Re 4413\94
- such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE APPLICATION:

The Respondent will rely on Rule 14.05 of the Rules of Civil Procedure.

As set out in the affidavits of Robert Kernohan filed herewith.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing
on:

The Affidavits of Robert Kernohan and Exhibits thereto;

Such further or other documents as counsel may advise and this Honourable Court permit.

December 30, 1994

BRESVER GROSSMAN SCHEININGER & DAVIS
Barristers & Solicitors
390 Bay Street, Suite 2800
Toronto, Ontario M5H 2Y2

Andrea M. Habas
(416) 869-0366 (Fax: 869-0321)
Solicitors for the Applicant

FERRINGTON

M. IRWIN

and Solicitor

ence Avenue East, Suite 11

h, Ontario M1P 2R2

WEY

AN BERGSTEIN

Solicitor

ort Rd.

ario M5R 1H8

100

the Respondent, Ian Harvey

N BANK OF CANADA

RRSP 204-001-572

UB

solicitors

West, Suite 2600

M5H 3T9

pendent,

Canada

04-001-572