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MORTGAGE AND REAL PROPERTY LAW REPORT

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SECURED LENDERS BEWARE – FEDS GIVE SUPER-PRIORITY OVER SECURED ASSETS TO WORKERS UPON INSOLVENCY OF EMPLOYER

Under the *Wage Earner Protection Program Act* and amendments to the *Bankruptcy and Insolvency Act* that took effect on Jul. 7/08, super-priority rights have been given to employees that will take priority over existing secured creditors of their employer in the event of the bankruptcy or receivership of the employer. The amendments provide workers with priority with respect to current assets (basically account receivables and inventory) over secured creditors for wage arrears up to $2,000 per employee.

The priority does not apply to equipment, and lenders on the security of fixed assets may not be directly affected by these particular provisions. However, a further super-priority has been created for unpaid pension contributions and unremitted employee pension deductions. There is no maximum amount for this pension priority and these claims will have priority over all secured creditors.

Fortunately, the amendments are not retroactive and will only apply to bankruptcies and receiverships that occur on or after Jul. 7/08.

In addition, a new agency is to be established to administer a "Wage Earner Protection Program", which program will guarantee payment of arrears of wages up to $3,000 per employee during the six month period preceding the bankruptcy or receivership. When the program pays an employee's claim, the program is then subrogated to the employee's claim, which means it becomes entitled to the super-priority over secured creditors outlined above.

Secured lenders losing priority appear to have little recourse other than to assert a preferred claim, which ranks below secured claims thereby putting the lender in a worse position.

Unfortunately, the amendments fail to set out a procedure to determine whose secured assets should fund the wage and pension claims, and one can foresee a situation where one secured creditor will lose its security over assets while another does not.

BANKS ALLOWED TO SHARE PRIVATE INFO FOR FRAUD INVESTIGATION PURPOSES

RBC determined it had been the victim in a series of fraudulent mortgage transactions that involved, among other persons, lawyer DM. DM had a mixed trust account with TD, and RBC made a request to TD to review a series of mortgage advances made by RBC into DM's TD trust account. TD provided copies of relevant cheques to RBC, who then commenced an action against the various parties to the alleged fraud, including DM.

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LEGAL ALERTS

- **Anti-money-laundering regulations aimed specifically at real estate developers slated to be implemented in 2009 will require developers to comply with the record-keeping and reporting requirements found in Part 1 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. For further information see Article on page 3.**
- **The Federal Government, through recent amendments to the *Bankruptcy and Insolvency Act*, appears poised to make all RRSPs, RRIFs and other similar registered savings plans (including self-directed plans) unseizable and exempt from execution. The new rules have not yet come into force, but it is anticipated that same may be proclaimed by the end of this year. BSR will continue to monitor the progress of the amendments.**
- **Commencing Apr./08, transfers of real property in Ontario require the participation of two lawyers. Exemptions to this rule include inter-family and related-company transfers, estate transfers to beneficiaries and severances where the parties are the same.**

The defendants sought a Declaration that RBC had accessed the TD information in violation of their s. 8 *Charter* rights. In addition, they argued that the provisions of the *Personal Information Protection and Electronic Documents Act* (Canada) (PIPEDA) that purportedly allowed TD to share private information with RBC were inconsistent with s. 8 of the *Charter*.

The Court disagreed. It held that s. 8 of the *Charter*, which provides that everyone has the right to be secure against unreasonable search or seizure, was inapplicable as it does not apply to a private organization.

The Court then held that the intent behind the drafting of the relevant provisions of PIPEDA was not to grant insurance companies and banks a novel power to share information between themselves for the purposes of fraud detection and prevention. Instead, these provisions served to preserve the already-existing investigative powers of these organizations. *Royal Bank of Canada v. Welton*, 2008 (ON S.C.).

LENDERS ARE ADVISED TO REVIEW DEMAND LOAN DOCUMENTS IN LIGHT OF NEW 2-YEAR LIMITATION PERIOD

Those lending monies on an interest free/deferred interest/demand basis need to be aware of the recent reduction in the limitation period under *The Limitations Act, 2002* (Ontario) and its implications in the enforcement of such loans. Under the former *Limitations Act* (in force before Jan./04) and its interpretation by the Courts, the limitation period for demand loans began running not when the borrower failed to pay on demand but when the lender advanced the money.

It had been hoped that under the new Act, with its emphasis on claims and discoverability, the limitation period for a demand loan would start only when demand was made. Unfortunately, the Ontario Court of Appeal in *Hare v. Hare* (2006) held that the former rule for demand loans still applied, with the result that the new shorter limitation period of two years runs from the date when the funds are advanced by the lender under a demand loan.

Therefore, if it is intended that interest will not be paid within two years of the date of the demand loan advance, it is necessary to ensure that the promissory note evidencing the loan specifically provides that the principal amount due shall be payable only after actual demand by the lender in writing. The document can also provide that the limitation period with respect to this loan shall be "x" years (up to 15 years).

Existing demand loans that are acknowledged by a promissory note stating that the loan is payable on demand where the loan was advanced at any time after Jan. 1/04 and where no interest has been paid on the loan, may now be unenforceable two years after the loan was advanced. Where the loan is not yet unenforceable, the holder of the note should, prior to the expiry of the two year period, make a formal demand for payment. The borrower should then be required to execute a new promissory note with the additional language suggested above.

VALIDITY OF MPAC'S EXPANDED DEFINITION OF "CURRENT VALUE" FOR PURPOSES OF COMMERCIAL PROPERTY TAX ASSESSMENTS STILL UP IN AIR

The *Assessment Act* (Ontario) provides that all real property in Ontario is to be assessed on the basis of "current value" defined as "the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer." To this end, properties in Ontario will or have received notices of assessment this year that will serve as the basis for municipal property taxation for 2009 to 2012. Two recent decisions have thrown confusion on the meaning of "current value".

In the *Carsons' Camp Limited and Municipal Property Assessment Corporation* decision, at issue were third-party owned trailers that were affixed to an owner's land, which MPAC had included in determining the "current value" thereof. The Judge of first instance held that the 229 trailers could not be assessed and taxed as land because they did not form part of the "fee simple" of Carson's property. On appeal, the Ontario Court of Appeal upheld MPAC's assessment.

In the second decision of *BCE Place Limited and Municipal Property Assessment Corporation and City of Toronto*, known as the "Bank Towers" case, MPAC in assessing the value of the certain buildings in Toronto again took the position that the definition of "current value" should not be restricted to the fee simple interest of the owner of land but requires that all interests in land be assessed, including all estates, terms, easements and rights in land, including tenants' interests. The Assessment Review Board disagreed, and held that "current value" meant that only the owner's interest in real property is to be valued, and that the valuation is to be done as if property is vacant and untenanted.

Both MPAC and the City of Toronto have requested leave to appeal the Board decision to the Divisional Court. It is interesting to note that the Carsons' Camp decision was discussed in the Bank Towers case, but was distinguished and not followed. Until the matter is dealt with by way of legislative amendment or the decision of a higher Court, the meaning of

current value will likely remain the subject of conflicting interpretations resulting in continuing uncertainty.

COURT HOLDS THAT CONDO CORPORATION MAY CHARGE UNIT OWNERS FOR CABLE SERVICES CONTRACTED ON A BULK BASIS

RM owned a residential condominium unit in YCC No. 216, which had entered into a "bulk" contract with a supplier of basic cable television services to the condominium and charged the cost to each owner as a common expense. RM objected to paying for this service and withheld payment of this part of the common expenses. The Corporation liened her unit.

In the subsequent action, YCC No. 216 argued that "whenever the condominium corporation pays, the unit owners pay." The Court, in dismissing RM's case, did not go quite as far as this. Rather, it framed the issue as "whether this expense is related to the performance of the objects or duties of the Corporation." The Court found that the by-laws of the Corporation give it the standard corporate authority to enter into contracts and its By-law No. 7 provided that its duties are not limited to the operation and maintenance of the common elements and the supply of utilities to the units.

"I am satisfied that the duties of the Corporation under By-law No. 7 can reasonably include entering into contracts for the supply of services, such as cable TV or internet, to the unit owners. While these services are not "utilities", they are sufficiently similar to utilities, in this day and age, that in my view they fall reasonably within the duties of the Corporation. "

The Court found three additional circumstances that were relevant to its conclusion. First, s. 22 of the condominium Act contemplates that the corporation may enter into a telecommunications agreement in which all or part of the charges are invoiced to the corporation. Second, it seems to be common for condominium corporations to enter into bulk contracts for cable TV services and the practice has been implicitly recognized in several cases. Third, the Corporation's contract with Rogers has been in place for more than ten years. It seems to have been accepted by the plaintiff, as it apparently has by other unit owners, for most of those years and she may well have received the benefits of the arrangement in the past by attracting tenants and recovering the cost through higher rents. *Mancuso v. York Condominium Corporation No. 216*, 2008 (ON S.C.)

THE CCDC 2 – 2008 STIPULATED PRICE CONTRACT FINALIZED

The long awaited CCDC 2 – 2008 Stipulated Price Contract has now been released by the Canadian Construction Documents Committee. The new version contains significant and substantial changes, including:

- Interest on overdue accounts are now at prime rate plus 2% for the first 60 days and 4% over the prime rate after 60 days.
- Notice may now be given by fax and e-mail.
- The responsibilities of who pays for tests to be conducted on the project has been revised.
- Specific shop drawings must be listed in the construction documents, and the owner has an obligation to show the location of utilities in contract documents.
- The owner can only request to speed up the time to complete the contract as specified in the contract documents by way of a change order.
- If there is to be a change order, the additional costs that are to be included by the contract are specified in significant detail in the new standard contract. The percentage of mark up for profit and overhead is to be added to those costs.
- The provisions regarding delay are set out with new clarity in the new contract and quick notice must be given by one party to the other along with particulars as to cost.
- Provisions dealing with toxic and hazardous substances have been set out in a new form to make it consistent with new developments in occupational health and safety.
- The new contract attempts to clarify responsibility for obtaining government approvals, permits, licences, inspections and certificates.
- The insurance requirements have increased the minimum liability coverage to $5,000,000 and a new CCDC 41 has been introduced to set out additional types of insurance that need to be provided under these types of contract.
- There are now significant changes to the indemnification, waiver of claims and warranty claims setting out specific time limitations within which claims can be made or must be waived.

It is recommended that the new contract be carefully reviewed.

NEW FEDERAL BILL REQUIRES REAL ESTATE DEVELOPERS TO COMPLY WITH *PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT*, AND EXPANDS DUTIES OF REAL ESTATE BROKERS

In 2000, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "Act") was passed by the Federal government. Under the Act, reporting entities such as financial institutions, insurance companies, securities

dealers, money service businesses, real estate brokers and casinos were required to implement a compliance regime, keep certain records, complete reports, undertake client identification procedures and report suspicious and other prescribed transactions.

The Act was recently amended by Bill C-25, which will impose greater regulatory burdens and new obligations on existing reporting entities, and, in February 2009, on real estate developers.

The impact on developers is significant - they will be subject to the record keeping and reporting requirements of the Proceeds Of Crime (Money Laundering) And Terrorist Financing Act whenever they sell a new house, condominium, commercial or industrial building or multi-unit residential building.

Real estate brokers and sales representatives are already subject to the Act. Bill C-25 will require real estate brokers and sales representatives to collect and verify more information from purchasers and vendors than previously set out, and will also have to maintain a "client information record" for every purchase or sale of real estate. In addition, the requirement for a broker to report a suspicious transaction now applies to attempted suspicious transactions as well.

Bill C-25 will, commencing February 20, 2009, extend the coverage of the Act to Real Estate Developers. A "Real Estate Developer" is defined to include a person or entity who has sold to the public:

- five or more new houses or condominium units;
- one or more new commercial or industrial buildings; or
- one or more new multi-unit residential buildings each of which contains five or more residential units or two or more new multi-unit residential buildings that together contain five or more residential units.

Upon implementation of Bill C-25, developers will be required:

- to keep a "receipt of funds record" in respect of every amount received in the course of a single transaction, unless the amount is received from a financial entity or a public body, and a "client information record" in respect of every sale of a house, condominium unit, commercial or industrial building or a multi-unit residential building;
- where the "receipt of funds record" or the "client information record" is in respect of a corporation, to keep a copy of the corporation's corporate records relating to the power to bind the corporation;
- to report suspicious transactions and certain prescribed transactions – if a developer receives an amount in cash of $10,000 or more in the course of a single transaction, it will have to keep a large cash transaction record (unless cash is received from a financial entity or a public body) and will be required to report the transaction to FINTRAC (the Financial Transactions and Reports Analysis Centre of Canada); and
- to report suspicious transactions and attempted suspicious transactions to FINTRAC where there are reasonable grounds to suspect that the transaction is related to the commission of money laundering or terrorist financing.

Developers will also have to develop and implement a compliance program and provide employees with training on the implementation of office policies and procedures.

Developers that do not comply with the Act are subject to penalties, with the maximum penalty amount for a person being $100,000 and an entity, $500,000.

FIRM ACTIVITY

BSR is pleased to announce the addition of Bruce Milburn to the firm. Bruce's practice will be focused on commercial real estate and development, including purchase and sale transactions, leasing, mortgage financing, development approvals, development agreements and environmental aspects of land development and real property. Before joining BSR, Bruce was Vice President of Real Estate and Legal Counsel for a large Canadian based multi-national real estate company. Prior to that, Bruce was a partner with the law firm of Aird & Berlis LLP in its real estate group. Bruce also worked 12 years as a planning consultant and real estate development manager in the Toronto area.

John Singer has left the Firm, and we at BSR extend to John our best wishes in his future endeavors. Please direct any inquiries relating to John Singer's departure or files that he may have handled to either Bernard Schneider (ext. 220 or George Ruggiero (ext. 215).

Baker Schneider Ruggiero LLP is engaged in various areas of law with particular emphasis on the following:

- Commercial Lending
- Subdivision and Condominium Development & Redevelopment
- Debt Restructuring & Mortgage Enforcement (Commercial & Residential)
- Real Property & Commercial Litigation
- Corporate/Commercial/Leasing

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