BSR
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FEDS TAKE SIGNIFICANT STEP TO EXPAND ROLE IN FINANCIAL SECTOR BY REMOVING EXISTING PROHIBITIONS ON OWNING SHARES IN BANKS

Given the Federal Government's legislative authority over banks and insurance companies and its political influence over the rate-setting Bank of Canada, the Federal Government already has the ability and often acts to influence the conduct and business of financial institutions. However, as part of its 2009 "fiscal-stimulation budget", the Federal Government appears to have signalled a clear intention to take a more direct and hands-on role in the actual business and policy decision-making processes of financial institutions.

On Jan. 27/09, the Minister of Finance tabled Bill C-10, being "An Act to implement certain provisions of the budget in Parliament and related fiscal measures." The Bill contains, among other things, amendments to the Financial Administration Act (FAA), the Canada Deposit Insurance Corporation Act (CDICA), the Bank Act (BA), and other financial institution statutes.

The Bill amends the BA to provide authority for Cabinet to override the existing prohibition on financial institutions issuing shares to the federal government if that is necessary to "promote the stability of the financial system in Canada." The Bill goes further, and provides that, in the event that such shares are acquired, the Minister may, by order, impose "any terms and conditions on — or require any undertaking from — the bank that the Minister considers appropriate, including any terms and conditions or undertakings relating to (a) the remuneration of the bank's senior officers … and directors; (b) the appointment or removal of the bank's senior officers … and directors; (c) the payment of dividends by the bank; and (d) the bank's lending policies and practices."

The steps initiated by the Feds could appear, to the jaundiced observer, to be the first steps towards the effective nationalization of Canada's financial institutions.

The amendments have a soft sunset clause, requiring the Minister to take the measures considered practicable in the circumstances to sell or otherwise dispose of the shares if after two years (or earlier, at the Minister's discretion) the Minister determines that the holding of such shares is no longer necessary to continue to promote the stability of the financial system in Canada.

The Bill also amends the FAA to provide authority to the Minister to enter into any contract that the Minister determines is necessary to promote the stability or maintain the efficiency of the Canadian financial system. This includes the authority to enter into contracts to provide loans or loan guarantees to, or provide credit insurance on the financial assets of any entity that is operating in Canada. It should be noted that the entity does not need to be incorporated under Canadian laws.

The Bill also makes significant changes to the CDICA by giving the Cabinet the authority to exempt the Canada Deposit Insurance Corporation from the requirement that it pursue its objects in a manner that will minimize its exposure to loss in order to avoid a situation that may otherwise have an adverse effect on the stability of the financial system in Canada or public confidence in that stability.

The significance of the amendments to the Canada Deposit Insurance Corporation Act becomes even greater when one takes into account that the expenses of the Canada Deposit Insurance Corporation are borne not the Federal Government but by the member institutions.

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BSR is pleased to announce the launch of its internet web site at www.bsrlawpractice.com, and we encourage all our clients and interested persons to visit same, and to provide us with your comments, if any. The site will contain the current and all previous volumes of the Mortgage and Real Property Report.

In addition, the Bill provides that, where Canada Deposit Insurance Corporation has been appointed receiver of an institution, the Minister may direct the incorporation of a "bridge institution" and the Cabinet may exempt the particular financial institution or the bridge institution from any of the requirements of the financial institution statutes.

ONTARIO ACTS TO CORRECT INEQUITIES RELATING TO DEMAND LOANS ARISING FROM NEW 2-YEAR LIMITATION PERIOD

In our Autumn 2008 Newsletter, we advised lenders to review demand loan documents in light of a recent Ontario court decision on the new 2-year limitation period under *The Limitations Act, 2002* (Ontario). The decision in question held that the limitation period for demand loans begins running not when the borrower failed to pay on demand but when the lender advanced the money.

Our advice has, fortunately, been made moot now that the Ontario government has recently passed an amendment to the Act, which amendment provides that the limitation period with respect to a "demand obligation" begins to run on the first day on which there is failure to perform the obligation, once a demand for the performance is made. The change is retroactive to Jan. 1/04.

Notwithstanding the amendments, one needs to remain vigilant with respect to the application of The Limitations Act, 2002 to guarantees.

The 2-year limitation period will continue to impact the treatment of guarantees. In the recent Ontario Superior Court decision of *2015673 Ontario Inc. v. Chorny*, it was held that the limitation period for a claim under a guarantee does not run from the time a creditor demands payment from a guarantor and is not paid, but rather from the time when the principal debtor defaults in payment. In other words, an action against a guarantor needs to be brought within two years of the underlying debt becoming due.

Turning to the recent amendments to the Act, it is doubtful whether a guarantee would be considered a "demand obligation" within the meaning of the Act. As a result, we recommend that lenders include language in guarantees stating that a claim may be brought at any time within a specified time period following demand. This is now permissible because the Act was amended in 2006 to now permit parties to suspend or extend certain of the limitation periods under the Act.

ONTARIO MOVES TO INCREASE RESTRICTIONS ON LAKE SIMCOE DEVELOPMENT

In a move that will necessarily impact upon future development of lands and communities surrounding Lake Simcoe, Ontario in Dec. /08 passed the *Lake Simcoe Protection Act*. The stated purposes of the Act is to establish a framework for protecting Lake Simcoe.

The Act requires the province to create a Lake Simcoe Protection Plan, and on Jan. 13/09 Ontario published a draft plan, and has requested comments from interested parties.

One of the province's long-term goals as set out in the draft plan is to reduce, to 44 tonnes a year, the amount of phosphorus entering into the lake from key sources such as sewage treatment plants and storm water runoff. In this regard, the draft plan provides that:

- that a environmental assessment must be carried out and approved before sewage services, whether new or extended, can be provided

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- It would appear that the efforts of the housing industry to galvanize opposition to the harmonization of the GST and PST as payable on new homes, including the dire warnings of the Building Industry and Land Development Association (BILD) that the harmonization would result in "single-detached tax increases ranging from nearly $12,000 in Windsor to more than $46,000 in Toronto," had some of the desired effect as Premier McGuinty's Budget provides that new homes costing less than $400,000 will be subject only to the pre-Budget five per cent GST and homes costing $400,000 to $500,000 would receive partial tax credit.

  However, as reported by Roger Belgrave in the Brampton Guardian, some industry experts continue to have their concerns, and Mr. Belgrave quotes Frank Giannone, the President of the Ontario Home Builders' Association (OHBA), as stating that the "[o]ffsetting measures may have mixed outcomes for Ontario homebuyers with different ramifications for municipalities throughout Ontario … This measure must be examined with respect to industry job losses, drag on provincial economy and fair treatment to home purchases throughout the province."

  It should be noted that closing costs on all homes, including realtor fees, legal services and home inspections, will climb because they had not been subject to provincial sales taxes, adding, according to some estimates, $2,037 to the purchase of a $360,000 home.

- The Ontario government, as a part of 25 significant changes to procedures in its civil courts aimed at simplifying, speeding up and lowering the costs of resolving disputes, is increasing the monetary limit of the Small Claims Court from $10,000 to $25,000 effective Jan. 1/10. Additional changes include raising the monetary limit for Simplified Procedures from

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$50,000 to $100,000 (effective Jan. 1/10), reducing pre-trial costs and delays by requiring advance timelines for sharing information between parties and limiting pre-trial examinations to one day, unless the parties or the court decide that more time is needed. The civil courts will now also be subject to the general principle of proportionality – meaning the time and expense devoted to any case must reflect what is at stake in the proceedings.

- Further to the alert in our Autumn 2008 Newsletter, the exemptions from seizure for registered retirement savings plans (including RRSP's, RRIF's and DPSPs) are effective commencing July 7, 2008. It should be noted that (i) contributions made in the 12 months prior to the date of bankruptcy will be recovered for the benefit of the bankruptcy estate for RRSPs in provinces without RRSP exemption laws (being BC, AB, ON, NB and NS), (ii) there is no upper cap on the amount of RRSPs that can be protected, and (iii) the RRSPs need not be in a locked-in plan.

- On Oct. 6/08, the MOE published for public comment, proposed amendments to the regulations governing Records of Site Conditions. The proposed amendments include a package of interconnected elements comprising of (i) enhanced Record of Site Condition (RSCs) integrity, (ii) new rules for completion of Phase One and Phase Two environmental site assessments for brownfield redevelopment, (iii) a regulated timeline to support the submission and filing process for RSCs (proposed 30-day notice period for all RSC submissions), (iv) liability protection and off-site migration from the RSC property, (v) a streamlined risk assessment approach, and (vi) strengthened soil and ground water site condition standards. Comments needed to be received by the MOE prior to Feb. 10/09 to be considered.

to areas outside existing settlement areas;

- any new municipal sewage treatment plants in the Lake Simcoe watershed will be approved only to replace an existing plant or failing subsurface sewage works; and
- any new non-municipal plant will be approved only if it can demonstrate a net reduction in phosphorus.

In addition, no new septic systems will be permitted within 100 meters of the Lake Simcoe shoreline unless it serves an agricultural use, replaces an existing septic system, or serves a development that consists of three dwellings or less. The draft plan also takes steps to ensure enough of the available water supply is reserved for the ecosystem by requiring in-stream flow targets that will be used in future strategies for water-takings, as well as water budgets for stressed watersheds.

All applications for major development must be accompanied by a plan showing development is consistent with the master plan.

Within five years of the plan coming into effect, the municipalities of Barrie, Orillia, New Tecumseth, Bradford West Gwillimbury, Innisfil, Oro Medonte and Ramara will be required to prepare a water conservation and efficiency plan. This plan will need to identify and evaluate water conservation measures, incentives, analyze costs and benefits, contain an implementation plan, monitor the effectiveness, and consider the potential impacts of climate change.

SHARI'A COMPLIANT LENDING – AN UPDATE

Notwithstanding the recent industry buzz on the potentials of Islamic financial services in Canada, as discussed in our Spring 2008 Newsletter, there appears to have been little meaningful activity to date. No major financial institutions are currently offering such products in a meaningful way.

As previously reported, applications for such products have recently been made to OSFI, and while some of the applications have been reported to be quite far advanced, applications appear to be on hold pending the response of a federal multi-agency task force established in 2007 to consider the issues.

Canadian Mortgage and Housing Corporation (CMHC) recently issued a Request for Proposal for a research report on the subject.

Muslim Canadian Congress has called the recent Shari'a banking impetus the "biggest con job ever."

The Request for Proposal was criticised by the Muslim Canadian Congress, which released a letter written to CMHC's chief executive officer, Karen Kinsley, urging the housing authority to abandon the $100,000 study.

For more information on the Muslim Canadian Congress' position, please see the Article in the Jan. 30/08 Toronto Star. Despite the opposition, the federal housing authority indicated that it will be going forward with the study. We will continue to monitor the situation.

BSR PREVENTS CROWN FROM FORFEITING PROCEEDS OF HOUSE SALE TO DETRIMENT OF MORTGAGEE CLIENT

In 2007, MGB pleaded guilty to Possession of Cocaine for the Purpose of Trafficking and Possession of Property Obtained by Crime Over $5,000.00. MGB owned two properties, one being a house in Ennismore, ON (the "Property"), which was subject to

DECISIONS TO NOTE

- **Condominium – Common Expenses – Promotional Fund** – Court holds, in oppression action commenced by the owner of a commercial condominium in a retail mall, that it would generally be expected that a prudent and diligent board of directors for a commercial condominium would spend money marketing and promoting the condominium for the benefit of the unit holders, and that a commercial condominium unit owner could reasonably expect that it would have to participate in promotion and marketing in accordance with its proportionate ownership interest consistent with the contributions made by other unit owners. See *1240233 Ontario Inc. v. York Region Condominium Corporation*, OSCJ 2009.
- **Workplace Accident – Criminal Negligence –** In a decision that should be of interest to all employers in the construction field, Transpave Inc., a concrete block manufacturer, was fined $110,000 as a result of a workplace accident resulting in the death of an employee in the first prosecution of a corporation under the new criminal negligence provisions of the Criminal Code. This new duty contained in the Criminal Code (s. 217.1) requires that "everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."
- **Construction Liens – Payment into Court** – Court dismisses action against owner of lands and general contractor commenced by sub-subcontractor where monies were paid into court on grounds that, once a lien has been vacated upon payment of security into court, the lien claimant no longer has a claim to the lands and whether the owner or general contractor have made payments under the relevant contracts is irrelevant. See *Ablesystems Mechanical Ltd. V. Aer Comfort Mechanical Services Ltd.*, OSCJ 2009.

two mortgages – a first mortgage in favour of Resmor Trust and a second mortgage in favour of Canada Trust Company in trust for a self-directed RRSP (the "Mortgage"). The second mortgage was stated to be collateral to a second mortgage on the other property owned by MGB in Peterborough, ON (the "Peterborough Mortgage") .

Quantities of cocaine, drug paraphernalia and gold jewellery were found at the Property, and the Crown obtained Restraint and Management Orders (the "Orders") against the Property. The Orders provided that (i) the Property could not be sold without a forfeiture order, and (ii) "nothing in this order detracts from the interest that a bona fide secured creditor has in relation to the property if that creditor's interest was registered against the property before the registration of this order."

The Mortgage and Peterborough Mortgage were assigned to # Co, which, in the face of default thereunder, brought a Notice of Sale under the Peterborough Mortgage only. In addition, a Statement of Claim for judgment and possession of the Peterborough property was issued on Mar. 11/08. This claim was later amended to include the Property, and served on MGB.

In Feb./08, MGB accepted an offer to sell the Property, which offer was agreeable to # Co. The Public Prosecution Service of Canada ("PPSC") agreed to vary the Orders to allow for the sale of the Property. They further agreed to pay out the balance of the first mortgage, but not the Mortgage, on the grounds that it was a collateral mortgage and # Co had an obligation to exhaust its enforcement on the principal property. Any shortfall would then be recoverable from the proceeds of sale from the Property.

The issue could not be resolved before the sale of the Property, and the proceeds of sale (net of the first mortgage) were paid to the Seized Property Management Directorate ("SPMD"). # Co commenced an Application under s. 14, 16 and 20 of the *Controlled Drugs and Substances Act* (the "CDSA") seeking payout to it of the amount held by the SPMD. # Co was represented at the Application hearing by Elee Scarlett of our Firm.

The Crown argued that to allow the collateral mortgage to be reduced by proceeds of sale of the Property would result in a windfall for MGB.

The Court accepted the arguments advanced by Ms. Scarlett, and held that # Co was entitled to the payout of its mortgage from the proceeds of sale. In coming to this conclusion, the Court found, firstly, that # Co has standing to apply to have the Property restored (in this case, the mortgage paid out to it from the proceeds of sale) and was "lawfully entitled to possession" of part or all of the proceeds of sale such that it qualified for property restoration under the CDSA.

Finally, the Court held that # Co could seek restoration of the Property before exhausting its enforcement of the Peterborough Mortgage, stating that it "cannot find any authority in the CDSA or any related statute that would allow the Crown to interfere with the rights of a third party creditor and force them to exhaust his or her rights as creditor in one fashion or another." See *R. v. Balemba*, ON S.C. 2009.

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