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MORTGAGE INVESTMENT ASSOCIATION OF BC ANNUAL LEGAL REPORT, 2011

Presented at Mortgage Investment Association of BC Annual General Meeting

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By RBS Lawyers

MIABC ANNUAL LEGAL REPORT

Annual General Meeting – 2011

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LEGISLATIVE UPDATE

1. Amendments to the Land Title Act – Electronic Filing

In March, 2011, the Land Title and Survey Authority of British Columbia (LTSA) announced Phase 1 of its new requirements regarding electronic filing of certain land title documents. Phase 1 will require all posting plans to be electronically filed starting July 1, 2011 and all Form A Transfers, Form B Mortgages and Form C Charges and Releases to be electronically filed starting January 16, 2012. For Phase 2, expected to be announced in Fall of 2011, it is anticipated that mandatory electronic filing will be expanded to include subdivision and strata plans. Additional phases may be announced in 2012. These requirements to e-file are authorized by an amendment to the Land Title Act with the addition of Division 1.1 (Establishment of Electronic Forms and Electronic Filing) under Part 10.1.

2. Amendments to the Prescribed Mortgage Terms

Registered mortgages in B.C. must contain either the express mortgage terms between the borrower and lender attached to the document, or the document must contain reference to filed standard mortgage terms

or the prescribed mortgage terms set out pursuant to the Land Title Act. The prescribed mortgage terms have been amended slightly by the Land Title Act (Board of Directors) Regulation (B.C. Reg. 332/2010) effective January 1, 2011. The only amendment is an inconsequential change to the definition of "mortgage form" which does not affect existing mortgage security. However, although the amendment is very minor, lenders and their lawyers should ensure that the updated prescribed mortgage terms are delivered to borrowers for acknowledgment of receipt when such terms are incorporated into any new mortgages.

3. Amendments to Mortgage Insurance Qualification Rules

In February, 2010, the federal government announced certain changes to the qualification rules for CMHC insured mortgages, effective April 19, 2010. These changes included:

· requiring that borrowers qualify for a five-year fixed rate mortgage even if they choose a mortgage with a lower interest rate and shorter term;

· reducing the maximum amount that can be borrowed on a mortgage refinancing from 95% of home value to 90% of home value;

· increasing the minimum down payment from 5% to 20% for the purchase of non-owner occupied properties purchased as an investment.

In January, 2011, the following further changes to the rules were announced:

· effective March 18, 2011, reducing the maximum amortization period for a new government-insured mortgage from the previous 35 years to 30 years;

· effective March 18, 2011, further reducing the maximum amount that can be borrowed on a mortgage refinancing from 90% of home value to 85% of home value;

· effective April 18, 2011, withdrawal of government insurance backing for non-amortizing lines of credit secured by residential property.

4. Deemed Trusts under the Excise Tax Act

Under the Excise Tax Act (ETA), any amount collected for GST or HST is deemed to be held in trust for the federal Crown until remitted. In March, 2011, the Security Interest (GST/HST) Regulations (the "Regulations") were brought into force with retroactive application from October 20, 2000. Prior to the Regulations, it was Canada Revenue Agency's long-standing policy to recognize mortgages registered against a debtor's property before the GST/HST was collected and not remitted, as having priority over the

ETA deemed trust, but such policy was not reflected in the law. This has changed with the coming into force of the Regulations, pursuant to which the ETA deemed trust is granted priority over all other security interests except for a "prescribed security interest", defined as a mortgage of land which is registered before the GST/HST is collected. A "prescribed security interest" includes proceeds from expropriation of or insurance on the mortgaged land, but excludes other forms of security interests such as liens, assignments and security over personalty.

The value of the "prescribed security interest" is limited to the amount of the mortgage debt outstanding at the time the GST/HST is collected. Therefore, if advances are made by the lender to the debtor after a failure to remit, these advances will be excluded in the calculation of the prescribed security interest. The value of the prescribed security interest is further reduced by any subsequent paydowns of the mortgage and by the value of other collateral available to be enforced against the debtor.

As a result of the Regulations, the ETA deemed trust provisions have been made consistent with the Income Tax Act deemed trust provisions with respect to employee source deductions.

5. Proposed Amendments to Section 10 of the Canada Interest Act

Section 10(1) of the Canada Interest Act prevents lenders from locking in an individual borrower to a closed mortgage for a term over 5 years. Even if the mortgage is expressed to be closed, an individual borrower can prepay the balance outstanding at the end of 5 years upon payment of 3 months' interest. Section 10(2) excludes corporations which may consequently be locked in indefinitely.

The original legislative intent of section 10 was to remedy the problem of farmers being locked into mortgages at high interest rates and subject to large bonuses or penalties when they sought prepayment. The exemption in section 10(2) was enacted several years later in response to problems that section 10(1) had created for corporations in obtaining long-term financing, since lenders would be reluctant to provide long-term mortgages if the loan could be prepaid after 5 years even if expressed to be closed.

In August, 2010, the federal Department of Finance issued a Consultation Paper entitled "Ensuring Business Access to Long-Term Mortgages", in which the government proposed to amend the Interest Act to also exempt partnerships and trusts that are settled in whole or in part for business or commercial purposes, from the prepayment right given to individuals in section 10(1). The stated purpose of the amendment is to modernize the Interest Act by expanding the list of entities that are free to negotiate their own prepayment terms to obtain more favourable long-term lending arrangements. The Consultation Paper invited comments from interested persons to be received by October 15, 2010.

The Canadian Bar Association's National Bankruptcy and Insolvency Law and Business Law Sections have issued a response to the federal government recommending that the exemption should also apply to individuals borrowing money for the purpose of carrying on business where the loan is secured by a mortgage of real property used in relation to that business.

6. Canada Not-For-Profit Corporations Act, S.C. 2009, c. 23

This federal legislation received royal assent on June 23, 2009 and is expected to come into force sometime in 2011 or 2012. The Act has been promoted as a much needed modernization of the previous legislation (Canada Corporations Act) governing federal not-for-profit corporations that has remained almost unchanged since 1917. The Act seeks to simplify the incorporation process, reduce the regulatory burden on not-for-profit corporations and generally harmonize the governance of not-for-profit corporations with the rules applicable to for-profit companies under the Canada Business Corporations Act. The legislation also introduces a distinction between "soliciting" and "non-soliciting" corporations and imposes different levels of financial accountability depending on the size of the not-for-profit corporation (in terms of annual revenue) and whether it is a soliciting corporation. Soliciting corporations will also be required to file their financial statements with the Director under the Act, who will then make them available to the public. Once the Act is brought into force, there are mandatory transitional rules for existing not-for-profit corporations to file a certificate of continuance within three years.

7. Amendments to Strata Property Act

Various amendments to the Strata Property Act have been enacted through the Strata Property Amendment Act, S.B.C. 2009, c. 17 (SPAA) which received royal assent on October 29, 2009. Some provisions of the SPAA came into force on January 1, 2010 by B.C. Reg. 312/2009 while others are expected to come into force by regulation in the future. The amendments include the following:

· Strata corporations must now account for money raised by special assessments separately from other money and must invest the money collected;

· Former owners or tenants may now access records of the strata corporation that, whenever created, relate to the time they were an owner or tenant;

· Only 20% of owner votes are required to force a special general meeting or propose a resolution instead of the previous requirement for 25% of owner votes;

· Notices given to the strata corporation may now be sent by email in addition to the other methods set out in the Act;

· Previously an amendment to the bylaws before the first AGM required a unanimous resolution. Now the restriction has been extended through to the second AGM;

· Various amendments to the provisions regarding rental restriction bylaws;

· Form B Information Certificates will be required to include identification of which parking stalls and storage lockers, if any, have been allocated to the strata lot and the most recent depreciation report, if any, obtained by the strata corporation;

· The provisions regarding depreciation reports estimating the repair/replacement costs for major items in the strata corporation will be replaced, and generally a strata corporation will be required to obtain a depreciation report within two years of the coming into force of the SPAA, unless the owners pass a 3/4 resolution waiving the requirement or they have a report on hand from before that time;

· Strata corporations will be required to retain and provide access to audit reports and depreciation reports;

· Strata corporation financial statements will be required to be audited, unless the strata corporation waives the requirement or is exempted by regulation.

8. Amendments to Civil Forfeiture Act

The Civil Forfeiture Act was brought into force in 2006, generally granting the Province the ability to seize and dispose of any property in B.C., including real property, that has been used in the commission of a crime or was obtained with proceeds of crime, in whole or in part. Amendments to the Act have been made by the Miscellaneous Statutes Amendment Act (No. 3), 2010 which came into force on June 3, 2011 and by Bill 6 – 2011 (Civil Forfeiture Amendment Act, 2011) which came into force on June 4, 2011. The amendments include:

· broadening the definition of "instrument of unlawful activity" and "proceeds of unlawful activity" to include property realized from a court ordered disposition under the interim preservation order;

· enhancing the test for relief from forfeiture by requiring a court to determine that forfeiture is *clearly* not in the interests of justice to justify relief and by introducing an onus on the party seeking relief to establish certain facts as set out in the legislation so as to justify the court granting relief;

· allowing the Director under the Act to make an application for an interim preservation order on his/her own initiative;

· adding a new Part 3.1 (Administrative Forfeiture of Subject Property) to the Act establishing a scheme for

administrative forfeiture to the government without having to commence court proceedings in certain specified limited circumstances (including, the property must be property other than real property, the fair market value of the property must be $75,000 or less, and the property must be in the possession of a public body as defined).

9. Harmonized Sales Tax

Effective July 1, 2010, the Harmonized Sales Tax (HST) of 12% was implemented to replace the Federal GST (5%) and Provincial PST (7%) taxation regime previously in place. HST is payable on the purchase of newly constructed or substantially renovated homes, where the purchase contract was entered into after November 18, 2009 and both ownership and possession of the home is transferred after June, 2010.

There is a partial rebate for qualifying purchasers to reflect the higher taxation level of the HST as compared to the GST on new homes. The maximum rebate for the provincial portion of the HST is $26,250. The rebate eliminates any tax increase on new housing sold for a purchase price of up to $525,000. Additionally, new home buyers may be eligible for a rebate for the federal portion of the HST provided that the purchase price is less than $450,000. The maximum rebate for the federal portion of the HST is $6,300.

The HST does not change the taxation applicable to mortgage insurance premiums.

It has been well publicised that the Provincial government is conducting a referendum on the HST during the summer of 2011 to determine if the new tax will remain in place. The HST Referendum Regulation (B.C. Reg. 68/2011) stipulates that the referendum will be conducted by mail, and prescribes the form of ballot for the referendum which must be received by Elections B.C. by July 22, 2011.

10. Amendments to Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act

On September 18, 2009, the balance of amendments from the 2005 restructuring of the federal insolvency legislation came into force (the earlier amendments including the introduction of the Wage Earner Protection Program Act which came into force in July, 2008). Some amendments of note among the very numerous provisions brought into force include establishing time limits regarding the duration of interim receivers, establishing powers of possession and disposal of property for interim receivers, establishing a "national" receiver to act across provincial boundaries, establishing explicit provisions for interim financing, amended rules for disclaiming and assigning contracts and amended rules on the sale of assets.

11. Amendments to Home Owner Grant Regulation

The Home Owner Grant Regulation, B.C. Reg. 100/2002, was amended effective January 1, 2011 to increase home owner grants for building owners, land co-operative owners and multi-level dwelling leased parcel owners in the northern and rural area of British Columbia. The amendments define "northern and rural area" as the area of the Province outside the boundaries of the Greater Vancouver, Capital and Fraser Valley Regional Districts.

CASE LAW UPDATE

1. "Slipsheeting" pages in executed agreements

R (Mercury Tax Group) v. R&C Comrs [2008] EWHC 2721 (Admin)

This decision of the English High Court is of interest because it highlights the need for caution in the common practice of "slipsheeting" pages in executed agreements, in order to ensure that their enforceability cannot later be challenged.

The case is particularly relevant given the prevalence of email which allows parties to execute and transmit documents remotely should they reside out of town or be away on business or vacation.

The case involved a judicial review application by the claimant Mercury Tax Group Limited ("Mercury") which provided tax consultancy services. Mercury sought to set aside search warrants obtained by Her Majesty's Commissioners of Revenue and Customs ("Her Majesty") to search Mercury's business premises and those of its clients, for documents relating to a tax avoidance scheme.

The scheme involved a series of complex arrangements involving the purchase, granting of options over, and subsequent sale of certain securities known as "gilt strips", in order to generate tax losses which could then be offset against income tax. At the time events took place in 2003, the scheme was perfectly legal provided the paperwork implementing the scheme was properly documented.

In the interests of timing, clients of Mercury signed early, incomplete drafts of the key documents relating to the scheme, being a trust deed, an option agreement and a sale/purchase agreement. Later, these documents were amended by adding material details such as the identity of the security to be purchased, pricing information, etc. When the documents were in final form, the participants did not sign the final versions but instead the signature pages from the drafts were detached and stapled to the final versions and presented as the duly executed documents.

Her Majesty launched an investigation into the scheme after millions of pounds of tax losses had been claimed, and in support of its application for search warrants, claimed fraudulent irregularities in the implementation of the scheme and related documentation.

The High Court in the judicial review proceeding ultimately concluded that the search warrants were unlawful as there was insufficient evidence of fraud or dishonesty by Mercury or its clients. In reaching this conclusion, the Court examined the documents relating to the scheme and concluded they had not been properly executed and were invalid.

The Court noted the following flaws in the documentation:

· The drafts signed by the participants contained material differences from the final versions, with no evidence that the differences were specifically brought to the participants' attention and that they authorized the changes. In addition, the drafts contained several blanks and words in square brackets, which were completed or confirmed in the final versions, with no evidence the participants had authorized or ratified the changes.

· Although the Court noted prior judicial authority that a contract can be effectively altered after signature if the person making the alteration had the authority to do so or his act was subsequently ratified, there was no judicial authority for taking the signature page from one document and using it in another document. The Court stated that:

"...the common understanding is that the document to be signed exists as a *discrete physical entity (whether in a single version or in a series of counterparts)* at the moment of signing....the requirement that a party sign an actual existing authoritative version of the contractual document gives some, albeit not total, protection against fraud or mistake." [emphasis added]

· Each of the key documents relating to the scheme was intended to be a deed, and the applicable UK statute required that the portion of the deed containing the party's and witness' signature must form part of the same physical document which is the deed. Detaching the signature page from the draft agreements and attaching to the final versions did not meet this requirement.

What does this mean in practice?

Although the Mercury decision has not been considered in Canada, it is prudent to review ones procedures for obtaining execution of documents and modify them if necessary to address the issues raised in Mercury. There are a number of UK law firms which have analyzed the implications of the decision and have recommended changes to their procedures as a result.

The risks presented by the Mercury case can be averted by the following:

· Ensure the agreement includes a counterpart provision permitting the agreement to be signed in multiple counterparts and transmitted by facsimile, email or other electronic means.

· Where signatures are being collected by email or fax, the entire agreement should be sent to the parties for signature (not just signature pages), and signed versions of the full agreement should be returned (not just signature pages).

· If any changes (however small) need to be made to the agreement after signing, the changes should be expressly brought to the attention of the parties, and written authority for the changes obtained.

(For example, it is not unusual for a mortgage to be executed with the interest rate and monthly payment amount left blank, to be inserted at a later date once the interest rate is fixed in accordance with the terms of the commitment letter. Although the parties presumably will sign a letter agreement once the interest rate is set evidencing the parties' agreement to the rate and monthly payment amount, specific authorization from the borrower to slipsheet the applicable page of the mortgage containing the rate and payment amount should be obtained. It is also prudent to include this authorization in the borrower's directors resolution authorizing the loan and security, where the interest rate and payment amount is not known at the time of execution of security documents and related resolutions).

· To be extremely cautious in light of the Mercury decision, separate counterpart signatures should not be detached from the counterpart copy of the agreement and combined in a single copy of the agreement containing all signatures, but rather should be left as a series of separate, signed counterpart copies of the agreement. At the very least, the agreement should specifically permit signatures on counterpart copies of the agreement to be detached and combined in a single copy of that agreement. However, it is not clear from the Mercury decision whether this would be sufficient.

· Avoid the practice of a party signing a draft version of an agreement, and then using the signature page from the draft on the final version of that agreement (or any other agreement), even with the authority of the signatory to do so.

· If the procedures are problematic, powers of attorney should be considered.

2. Priorities

Vancouver City Savings Credit Union v. Serving for Success Consulting Ltd. (2011 BCSC 124)

This recent decision of the B.C. Supreme Court will be of interest to lenders and tenants, and probably surprising to both.

In this case, the lenders in a foreclosure proceeding sought to have two unregistered long term leases declared unenforceable against them, despite the fact the lenders knew about the unregistered tenancies at the time they made their loans and took security.

The Court applied the provisions of section 29(2) of the B.C. Land Title Act which deal with the effect of notice of an unregistered interest in land, and concluded the lenders (and therefore any purchaser from them) were not bound by the unregistered tenancies.

The background facts can be summarized as follows:

· In July, 2000, City Center Manor Holdings Ltd. ("City Centre") acquired certain property in Victoria, B.C. which it operated as a hotel under the name Traveller's Inn.

· City Centre leased the hotel's pub, restaurant and banquet facilities to Starlan Management Ltd. ("Starlan") under a 5 year lease commencing in July, 2000.

· Also in July, 2000, Starlan subleased all of its interest in the property to KKBL No. 315 Ventures Ltd. ("KKBL") for a 5 year term.

· In July, 2001, KKBL sub-subleased the pub portion of the hotel operations to Serving for Success Consulting Ltd. ("Serving for Success") for a 4 year term. None of the Starlan lease, the KKBL sublease or the sub-sublease to Serving for Success was registered at the land title office.

· There were also operating agreements in place with terms of approximately 5 years between the property manager Traveller's Inn (wholly owned by the same individual that owned City Centre), KKBL and Serving for Success, entered into to satisfy certain requirements of the liquor distribution branch.

· In August, 2004, VanCity made a loan to City Centre secured by a first mortgage on the property.

· In September, 2007, Safety First Savings & Mortgage Corp. et al (collectively, "Safety First") made a loan to City Centre secured by a second mortgage on the property.

· City Centre subsequently defaulted on both loans and foreclosure proceedings were commenced.

· VanCity obtained an Order Nisi and wanted to sell the property to an interested purchaser who desired vacant possession. Vancity and Safety First sought declarations that their mortgages had priority over any

claim of KKBL and Serving for Success to remain in occupation, and that the lenders were entitled to vacant possession.

The Court was satisfied on review of the evidence, that at the time the lenders made their loans and took security, both lenders knew the food and beverage operations of the hotel had been transferred to others, that the arrangements had been in place for some time and were expected to continue, and were aware of the revenue generated from the operations.

The lenders relied on section 20 of the Land Title Act in support of their claim for vacant possession and priority over the unregistered interests of the tenants. Section 20 provides that, except as between the parties to the agreement, a lease for a term of more than three years purporting to grant an interest in land is not effective unless it is registered.

In addition, the lenders relied on section 29(2) of the Land Title Act which is intended to protect those acquiring land or taking a charge on land, from any adverse unregistered interest affecting the land, subject to certain exceptions including leases for terms under three years which were not applicable in this case. Section 29(2) states as follows:

"(2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner

(a) a transfer of land, or

(b) a charge on land…,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than…

….(d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement…"

KKBL and Serving for Success, on the other hand, relied on the opening words of section 29(2). They argued that the lender's knowledge of their presence at the hotel as long term business operators amounted to "fraud" within the meaning of section 29(2), and that therefore, the lenders could not rely on the protection provided by the section but were bound to recognize the unregistered interests of KKBL and Serving for Success.

The Court noted that the case law interpreting section 29(2) primarily deals with purchasers of land not

mortgagees taking a charge on land, and that there is a significant difference between the two when the principle of equitable fraud is considered. The Court noted two divergent lines of authority which have developed in the case law. The first line of authority would hold that a purchaser who takes title to a property with knowledge of a prior unregistered adverse interest, and who then attempts to rely on section 29 of the Land Title Act, may be found to have committed "fraud" within the meaning of section 29(2). The second line of authority requires something more than knowledge, usually, conduct that constitutes some form of dishonesty.

The Court concluded that the second line of authority is correct in the context of a mortgagee taking a charge on land. Before a finding of fraud can be made under section 29(2), there must be evidence of actual knowledge of the prior unregistered interest, together with some act of dishonesty or deceit on the part of the person seeking the protection of section 29(2). In other words, in addition to actual knowledge, there must be some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the unregistered interests such that it would be inequitable for the court to allow reliance upon the statute as protection.

The Court stated that even if the lenders had actual knowledge of the unregistered interests of KKBL and Serving for Success, there was nothing in the evidence to suggest the lenders acted outside the normal course of business in making their loans, or had any intention at the time they made their loans and took security, to interfere with the operations of KKBL and Serving for Success. The lenders acted simply as lenders who satisfied themselves that the debt could be serviced and no doubt took comfort in the cash flow generated by the tenants' operations.

The Court concluded the lenders could rely on section 29(2) of the Act, that the mortgages ranked in priority to the unregistered interests of KKBL and Safety First, and that VanCity was entitled to vacant possession upon the approval of any sale.

This is obviously not a comforting case for tenants to whom the advice should be to register their leases. If there is a prior registered mortgage at the time of the lease, non-disturbance agreements should be obtained.

Although the decision is advantageous to lenders, it does seem a rather harsh decision for the tenants and one wonders if another judge might have reached a different conclusion. It will be interesting to see if the decision is appealed.

3. Disclosure Statements

There have been a series of recent decisions in B.C. courts dealing with a developer's duty of disclosure pursuant to the requirements of the Real Estate Development Marketing Act (REDMA). In a number of recent cases, the courts have ruled that purchasers could walk from their pre-sale contracts because the developer made insufficient disclosure of material facts relating to the development. These decisions increase the risks for developers but also for lenders who rely on the enforceability of pre-sale contracts in their underwriting. Lenders should be mindful of these and other cases favouring purchasers when they are reviewing disclosure statements provided by their borrowers.

Two recent decisions in this area are:

· *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.* (2010 BCCA 300), where the B.C. Court of Appeal held that failure by the developer to file an amendment to disclosure statement amending the estimated dates for commencement and completion of construction as set forth in the disclosure statement, once the developer knew they were no longer correct, was fatal rendering the purchaser's contract unenforceable. The Court determined that the commencement and completion dates were material facts which could reasonably be expected to affect the price, value or use of a unit, and that failure to amend the estimated dates constituted a misrepresentation under REDMA.

· *Ulansky v. Waterscape Homes Limited Partnership* (2011 BCSC 83), where the B.C. Supreme Court concluded that the pre-sale contracts for units in a residential high-rise building were unenforceable because the developer failed to disclose that the municipal bylaw permitted as a secondary use "hotel/motel accommodation within a multiple residential unit" which would make it possible for owners to rent out their units and for the strata corporation to allow this practice. The Court held that this fact was a material fact which could reasonably be expected to affect a purchaser's willingness to buy for the price offered or the use of the property, and as such should have been disclosed by the developer pursuant to its obligations under REDMA.

4. Section 73 and 73.1 of the B.C. Land Title Act

In 2009 we reported on the decision of the B.C. Supreme Court in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.* (2008 BCSC 849), which concerned the effect of section 73.1 of the Land Title Act on a long term lease of unsubdivided land.

By way of background, the purpose of section 73.1 of the Land Title Act, which came into force on May 31, 2007, was to remedy the problems created by the 1996 decision of the Court of Appeal in *International*

Paper Industries Ltd. v. *Top Line Industries Inc.*, (1996) 20 B.C.L.R. (3d) 41.

In the *Top Line* case, the landlord and tenant entered into a long term lease of an unsubdivided portion of land. The Court of Appeal held that the lease was unenforceable as it was effectively a subdivision of land, and therefore in contravention of section 73 of the Land Title Act which prohibits the subdivision of land into a smaller parcel(s) for the purpose of a lease of over 3 years, except on compliance with the subdivision approval procedures set out in the Act. The Court's view was that to enforce any right of occupation in respect of the leased premises on the part of the tenant would offend the public policy objectives of section 73, which were to ensure municipal control over subdivision as a means of regulating land development and use.

The *Top Line* decision made the lease review process much more problematic for lenders. Oftentimes lenders would be left with some uncertainty as to the enforceability of a pad lease for a stand alone operation such as a Macdonalds or a Tim Hortons or the enforceability of a lease involving a major tenant of an entire building such as a Safeway, Canadian Tire or Home Depot where the lease was entered into prior to completion of the building in question leaving it open to interpretation that the lease was a land lease and therefore in breach of section 73 as opposed to a lease of a building which is exempted from the requirements of section 73.

Against this background, section 73.1 was added to the Land Title Act which states as follows:

"73.1 (1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease *by reason only that*

(a) the lease or agreement for lease does not comply with this Part, or

(b) an application for the registration of the lease or agreement for lease may be refused or rejected."

(emphasis added)

In other words, a lease over 3 years of an unsubdivided portion of land is not unenforceable between the parties merely because of contravention of the provisions of section 73. However, the lease will not be registrable by virtue of other provisions of the Act.

In *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, the parties entered into a lease in 1978 of an unsubdivided portion of land. In 1999, a dispute arose between the landlord and tenant over an unrelated matter, and it was only then after consulting with lawyers about their dispute, that the parties learned that the lease contravened section 73 of the Land Title Act and was therefore invalid because of *Top Line*.

Negotiations to settle the dispute were unsuccessful and eventually, the landlord made formal demand upon the tenant to deliver up possession of the lands on the grounds that the lease was invalid as it contravened section 73.

This was the landlord's position at the hearing in the action in June, 2006 before section 73.1 of the Land Title Act came into force. Section 73.1 came into force in May, 2007, and as no final determination in the case had been made by the Court, counsel made further arguments in February, 2008.

The landlord's position was that section 73.1 should have no impact on the outcome of the case. As the lease contravened section 73 at the time it was entered into, it was invalid from the beginning and section 73.1 should not operate retroactively to give validity to an invalid lease. The landlord argued section 73.1 was written in the present tense and should only apply to leases entered into after May 31, 2007.

The tenant's position was that section 73.1 was intended to remedy the hardships caused by *Top Line*, and that it should apply to all leases, no matter when they were made, so long as no final determination of the matter had been made by a Court before the amendment came into force.

The B.C. Supreme Court agreed with the tenant that section 73.1 was passed to bring fairness and equity to precisely a situation like that before the Court, and concluded that the 1978 lease was valid.

The decision was appealed and in October, 2010, the Court of Appeal reversed the trial court's decision in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2010 BCCA 460 and declared the 1978 lease to be invalid and unenforceable. In the Court of Appeal's view, there was nothing in the wording of section 73.1 that expressly or by necessary implication required retroactive application, and that to give the provision retroactive effect was contrary to well-accepted principles of statutory interpretation.

As a result of the Court of Appeal's decision, long term leases of unsubdivided land in British Columbia entered into before May 31, 2007 which do not comply with section 73 of the Land Title Act remain invalid and unenforceable.

It should be noted that for leases entered into after May 31, 2007, caution should still be exercised given the specific wording of section 73.1 which arguably suggests enforceability only between the parties. The section states that a lease or an agreement for lease "is not unenforceable between the parties to the lease or agreement for lease" by reason only that section 73 is not complied with. This at least raises some question as to whether a lender can take the benefit of the provision.

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