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MORTGAGE INVESTMENT ASSOCIATION OF BRITISH COLUMBIA ANNUAL LEGAL REPORTS, 2013 (AND EARLIER)

RBS Real Estate Lending Group

July 16, 2013

MIABC ANNUAL LEGAL REPORT

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LEGISLATIVE UPDATE

"Community Contribution Companies"" – Amendments to the BC *Business Corporations Act*

Last year I reported on the provincial government's proposed amendments to the *Business Corporations Act*, to allow for the creation of a new hybrid type of company known as a "Community Contribution Company" or "C3". These amendments and the related Community Contribution Company Regulation will come into force on July 29, 2013. BC will then be the first Canadian jurisdiction to allow the creation of C3's, which are based on a similar model implemented in the UK. With this new corporate structure, the government hopes to encourage private investment in BC's non-profit and charitable sector, facilitate innovative ways to address social issues, and reduce the demand for government funding from this sector.

Under the legislation, one or more of the primary purposes of a C3 must be "community purposes" (as defined in the legislation), which must be set out in the company's articles. In contrast to a society, C3's will be able to accept equity investments, issue shares and pay shareholder dividends. Pursuant to the Regulation, shareholder dividends in any financial year must be limited to 40% of the C3's profit for that year (plus any unused dividend amount for any previous year), leaving the majority of the profits to be used for the company's social purposes. Additionally, in the event of dissolution, C3's will be subject to an "asset lock" to limit the distribution of assets to shareholders to a maximum of 40%, with the remaining 60% of

assets to be distributed to charitable organizations and/or other asset-locked entities. C3's will also be required to publish an annual "community contribution report" detailing the company's social spending, the amount of dividends declared, and other information as required by the Act and Regulation. C3's will not be tax exempt.

There are no amendments to the *Business Corporations Act* which would treat a C3 any differently than an ordinary for-profit company in terms of borrowing powers or the ability to grant security.

The New BC *Limitation Act* (SBC 2012, c. 13)

On June 1, 2013, the new BC *Limitation Act* came into force, replacing the former *Limitation Act* which dated back to 1975, and simplifying the time limits for filing civil lawsuits in BC.

A key change brought about by the new Act is to create a single 2-year basic limitation period for most civil claims, which replaces limitation periods of between 2 and 10 years under the old Act depending on the type of claim. The new Act's limitation periods will apply to claims arising from acts or omissions that occur and are discovered on or after June 1, 2013. Exceptions to the 2-year basic limitation period are civil claims that enforce a monetary judgment (which have a 10 year limitation), claims that have limitation periods set by other legislation (e.g. *Insurance Act*, *Wills Variation Act*), and certain other exceptions as set out in the Act. In addition, the general 30-year ultimate limitation period under the old Act is replaced with a 15-year ultimate limitation period under the new Act (with some exceptions).

Of interest to lenders is the change from a 6-year limitation period under the old Act, to a 2-year limitation period under the new Act, for obligations payable on demand, such as a demand loan or demand promissory note with no fixed date for repayment. Although the new Act shortens the limitation period to 2 years, it clarifies that the limitation period will only commence on the first day that there is a failure to perform the obligation *after a demand for performance has been made*, which will provide greater certainty and fairness to the parties.

Transition from HST to GST/PST – Sale of Real Property in BC

Effective April 1, 2013 pursuant to the *Provincial Sales Tax Act* (Bill 54 – 2012), the 12% HST was eliminated in BC and the 7% PST re-implemented alongside the 5% GST. As part of the transition from the HST to the GST/PST, the *New Housing Transition Tax and Rebate Act* (Bill 56 – 2012) and the related *New Housing Transition Tax and Rebate Regulation* were brought into force by Order in Council 757/2012 (B.C. Reg. 324/2012) effective December 1, 2012.

The general transitional rules relating to the sale of real property in BC operate based on the time at which

tax becomes payable in respect of the sale. Generally, if both ownership and possession of the real property transfer on or after April 1, 2013, the 5% GST rather than the 12% HST will apply. If either ownership or possession transferred before April 1, 2013, the 12% HST rather than the 5% GST will apply.

For sales of new housing, there are some additional transitional rules. The *New Housing Transition Tax and Rebate Act* imposes a new, temporary, 2% BC transition tax on purchasers of new or substantially renovated housing where the construction or substantial renovation is at least 10% complete by April 1, 2013, but where ownership and possession transfer on or after April 1, 2013 (and before April 1, 2015).

The *New Housing Transition Tax and Rebate Act* and related Regulation also require developers of new housing to provide certain tax-related information/disclosure to purchasers relating to the transition from the HST to the GST/PST system. For new housing contracts entered into between February 17, 2012 and December 1, 2012, the tax information/disclosure was required to be included in an addendum to the contract to be delivered to the purchaser by January 2, 2013. The developer was exempted from this requirement in the case of sales completing on or before December 31, 2012. For new housing contracts entered into after December 1, 2012 and before April 1, 2015, the required tax information/disclosure must be included in the contract itself on the date the contract is entered into. The Regulation also requires certain additional information to be included in the statement of adjustments, including the amount of tax payable, percentage completion of construction as at April 1, 2013 for purposes of transition tax, and other matters.

CASE LAW UPDATE

A. Privacy

***Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3**

Many of you have likely had experience with the requirements of privacy legislation. No doubt the organizations for which you work have developed privacy policies governing the use, control and management of personal information collected by the organization.

A fundamental requirement of privacy legislation is that organizations not disclose personal information that they collect about an individual without the individual’s consent, subject to certain exceptions specified in the legislation. The 2011 Ontario Court of Appeal decision *Citi Cards Canada Inc. v. Pleasance* is of interest to lenders because the Court was required to determine whether a mortgage payout statement constituted the borrower’s personal information, and whether a bank could disclose it to a third party judgment creditor without the borrower’s consent.

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The facts were that the judgment creditor Citi Cards held a credit card-related judgment against Mr. Pleasance, and sought to enforce it by a sheriff's sale of his residence. The sheriff would not commence a sale without mortgage discharge statements from the two lenders which held mortgages on the property. The lenders refused to provide the statements on the basis that they contained the debtor's personal information which could not be disclosed without the debtor's consent, pursuant to the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") which applies to federally regulated industries such as banks.

The Court of Appeal agreed that information on a mortgage discharge statement was clearly "personal information" under PIPEDA. As such, it could not be disclosed without the borrower's consent, unless disclosure was otherwise permitted by one of the exemptions in the Act, which the Court concluded did not apply in this case. In refusing to order the lenders to produce the statements, the Court also noted that Citi Cards had another practical remedy available that had not been pursued and which would not breach privacy rights, which was to attempt to obtain mortgage statements through an examination in aid of execution of the borrower or his wife.

The *Citi Cards* decision was followed, although reluctantly, in *Royal Bank v. Trang*, 2012 ONSC 3272, where the Ontario Superior Court refused to order Bank of Nova Scotia to provide a mortgage statement to Royal Bank (the execution creditor in that case) so that a sheriff's sale of the debtor's property could proceed, even though Royal Bank had twice attempted, unsuccessfully, to obtain mortgage information through the examination in aid of execution process. However, a few months later, in *Easybank Inc. v. Spagnuolo Estate*, [2012] O.J. No. 3921, the judgment creditor successfully obtained an order compelling TD Bank to produce a mortgage statement. In that case, the debtor had been examined in aid of execution and had personally undertaken to deliver an up-to-date mortgage statement, which he failed to do. The Court concluded that the debtor's undertaking to deliver a mortgage statement was effectively consent to disclosure of the information.

All the above cases involved a third party judgment creditor seeking to obtain mortgage information to enable the creditor to enforce its judgment. However, the same privacy issue arose in the Alberta case *Toronto Dominion Bank v. Sawchuk*, 2011 ABQB 757, where a first mortgagee whose mortgage was in good standing, refused to provide a mortgage statement to a foreclosing second mortgagee due to concern about the mortgagor's privacy rights. The Court declined to follow *Citi Cards* and ordered the first lender to disclose the information, stating that disclosure was necessary in the foreclosure context for the proper administration of justice and to determine the equity in the property.

Although these cases concerned the federal privacy legislation PIPEDA, credit unions governed by the BC

Personal Information Protection Act should also take note, as that legislation similarly requires consent to disclosure of personal information.

Given these decisions and the requirements of privacy legislation, it would be prudent to include in standard mortgage terms, a general consent from the borrower to the disclosure of mortgage and other information collected by the lender that might constitute the borrower's "personal information" under privacy laws, and a general consent to obtain "personal information" about the borrower from third parties and for such third parties to disclose the information, in circumstances where the lender, acting reasonably, determines this to be necessary to enable the lender to exercise its remedies or for loan administration purposes. Any such language should be reviewed with a privacy lawyer to ensure the language itself is not overreaching and complies with privacy legislation.

B. Priorities

There were several interesting cases involving priority disputes heard by the BC Courts in 2012.

One of these is *Bank of Montreal v. Peri Formwork Systems*, which has caused some concern for lenders. For the first time, the BC Court of Appeal was required to interpret the priority rules in section 32 of the *Builders Lien Act* in connection with a priority contest between a registered first mortgagee and a subsequently registered builders lien claimant.

***Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 (leave to appeal refused [2012] S.C.C.A. No. 361)**

The dispute involved a multi-phase real estate development which ran into financial difficulties. Before the project could be completed, the construction lender Bank of Montreal ("BMO") demanded repayment of its loan.

The developer then obtained a stay of proceedings under the federal *Companies' Creditors Arrangement Act*. Pursuant to the CCAA order, the developer was permitted to borrow up to $2 million from BMO by way of debtor-in-possession financing, which was granted priority over all other security interests including any builders liens. The developer was unsuccessful in achieving a restructuring, and the stay of proceedings expired on December 8, 2009.

BMO then moved to appoint a Receiver, also on December 8, 2009. The court order appointing the Receiver permitted the Receiver to borrow an additional amount of up to $21 million from BMO to complete the project, and to provide security through a "Receiver's Borrowing Charge" on the subject property. BMO subsequently obtained another order granting the Receiver's Borrowing Charge priority over the prior

registered liens. The Receiver then made arrangements with certain lien claimants to pay them $1.655 million for past services, from the $21 million BMO loan facility. For reasons which are not explained in the case, the plaintiff Peri Formwork, which had supplied concrete formwork equipment for the project, was left out of the proposed distribution to lien claimants. This led Peri Formwork to appeal the priority order to the Court of Appeal.

The issue was whether BMO's advances of up to $21 million under the Receiver's Borrowing Charge, occurring after registration of the Peri Formwork lien, should have priority over the lien.

The Court of Appeal concluded that the lower Court had no jurisdiction to make the priority order under the CCAA, as that proceeding had already expired by December 8, 2009. The question then became whether the priority order could be granted under section 32 of the *Builders Lien Act*.

Section 32(2) of the *Builders Lien Act* states that advances under a registered mortgage which occur after the registration of a builders lien, rank in priority after the lien. There is an exception to this basic priority rule in sections 32(5) and (6), which state:

> "(5) ... if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more *further advances under the mortgage* are to have priority over the claims of lien. [emphasis added]
>
> (6) On an application by a mortgagee under subsection (5), the court must make the order if it is satisfied that
>
> (a) the advances will be applied to complete the improvement, and
>
> (b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances."

In other words, the legislation allows a lender to obtain priority for further advances occurring after registration of a lien, where this will allow the project to be completed for the benefit of all interested parties.

The decision turned on whether BMO's advances under the Receiver's Borrowing Charge were "further advances" within the meaning of section 32(5). The Court concluded they were not, stating that on a plain reading of the section the "further advances" must relate back to the original mortgage, and the meaning could not be stretched to include what was essentially an entirely new loan secured by an entirely new

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charge.

The issue for construction lenders presented by this case, is that when projects run into difficulty, their mortgages will most likely be fully advanced up to the registered principal amount. This potentially puts the lender in a difficult situation in terms of getting its money out of the project, if lien claimants and other interested parties refuse to cooperate to enable the project to be completed.

Some lenders have responded to the *Peri Formwork* decision by drafting their mortgages to considerably overstate the principal amount, to leave room for additional advances "under the mortgage" in excess of the amount initially committed, should the project run into difficulty and additional funds be required to complete the project. It may also be beneficial to add a clause in the standard mortgage terms, granting a Receiver the authority to amend the mortgage on behalf of the borrower to increase the principal amount, to allow further advances to be made under the mortgage and construction to continue.

***First West Credit Union v. Milligan*, 2012 BCSC 610**

Oftentimes, in a foreclosure of a strata unit, there will be unpaid strata fees or assessments owing to the strata corporation, in addition to the debt owing to the foreclosing lender.

Section 116 of the BC *Strata Property Act* permits a strata corporation to register a lien against an owner's strata lot for unpaid strata fees and assessments, and grants the lien priority over prior registered mortgages (subject to certain exceptions). Section 118 permits reasonable legal costs, land title and court registry fees, and other reasonable disbursements relating to registering a lien or enforcing a lien to be added to the total lien amount.[1]

The strata lien's priority will not cause problems as long as there are sufficient sale proceeds to repay both the lender and the strata corporation the amounts they are owed in full. However, frequently there are not sufficient sale proceeds, as occurred in *First West Credit Union v. Milligan*, resulting in a priority dispute over the total amount of the lien ranking in priority to the lender's mortgage. The case is of interest because it clarified the types of legal costs that may be added to the total lien amount and their method of calculation.

The lender in this case foreclosed on a condo unit. At that time the owner was indebted to the strata corporation which filed a lien against her unit. There was no dispute as to the amount of unpaid strata fees owing and forming part of the lien. The issue was what legal costs in relation to the lien should have priority over the mortgage, and how they should be calculated.

The strata corporation argued that section 118 of the Act should be broadly interpreted to include all activity related to recovery of the core lien amounts and related costs on an indemnity basis, including the strata's

legal costs associated with the parties' dispute about the proper interpretation of section 118 (which amounted to several thousand dollars).

The Court disagreed, concluding that the plain, unequivocal meaning of section 118 is that only those costs directly related to registering a lien and enforcing a lien are entitled to priority. Further, the priority is limited to party and party costs pursuant to the Rules of Court, not actual legal costs on a solicitor/client basis. In the Court's view, this interpretation struck the appropriate balance between the rights of third party chargeholders whose priority was being displaced in part, and the interests of strata corporations. Since there were no enforcement costs incurred by the strata corporation in this case, the strata was only entitled to legal costs specifically relating to registration of its lien on a party and party basis.

***Paradigm Quest Inc. v. Chung*, 2012 BCSC 1646**

In this case, the priority dispute was between two registered mortgagees about the proper interpretation of section 28(2)(b) of the BC *Property Law Act*.

Section 28(2) allows a prior registered mortgagee to continue to make advances under its mortgage, and to retain priority for such further advances even when made after registration of a subsequent mortgage or judgment, if:

> "(a) the subsequent registered mortgagees or judgment holders agree in writing to the priority of the further advances,
>
> (b) at the time the further advances are made, *he or she has not received notice in writing of the registration of the subsequent mortgage or judgment, from its owner or holder*, [emphasis added]
>
> (c) at the time the further advances are made, the subsequent mortgage or judgment has not been registered, or
>
> (d) the mortgage requires him or her to make the further advances."

The rationale behind section 28(2)(b), which codified the common law, is that a mortgagee should not be required to search title every time it makes an advance under its mortgage up to the registered amount, and that the onus should be on the subsequent chargeholder to give express notice of its interest to the prior mortgagee.

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It is important to note that section 28(2)(b) only protects against a subsequently registered mortgage or judgment. It provides no protection against any other subsequent encumbrance such as a builders lien, which means that reliance by a prior mortgagee on the protection provided by section 28(2)(b) is certainly not without risk.

In the *Paradigm Quest* case, the issue was whether further advances under the first mortgage occurring after registration of the second mortgage, should have priority over the amount secured by the second mortgage. This depended on whether the second mortgagee had provided adequate notice of its interest to the first mortgagee pursuant to section 28(2)(b) of the *Property Law Act*.

The background facts are as follows:

- In March, 2007, the borrower granted a mortgage to Computershare Trust Company ("Computershare") which was registered against the subject property.
- On November 16, 2010, the borrower's solicitors wrote a letter to Computershare, advising that the borrower's solicitors were acting for the borrower *"in connection with placing a second mortgage in favour of B2B Trust"* on the subject property. The letter also requested a statement from Computershare of the balance outstanding under its mortgage and whether in good standing. This letter was received by Computershare.
- On November 24, 2010, B2B registered a second mortgage against the property and advanced funds to the borrower.
- On April 26, 2012, Computershare transferred its interest in the mortgage to Paradigm Quest. Up to that time, Computershare was acting as custodian of the mortgage on behalf of Paradigm and at all material times, the address on the mortgage was the address of Paradigm.
- At some point after B2B registered its second mortgage, additional funds were advanced under the first mortgage. It is not entirely clear from the decision, but it would appear no title search was carried out before additional funds were advanced.

B2B argued that the November 16, 2010 letter from the borrower's solicitors to Computershare constituted *"notice in writing of the registration of the subsequent mortgage or judgment, from its owner or holder"* within the meaning of section 28(2)(b) of the *Property Law Act*, and that therefore the B2B mortgage should have priority over Paradigm's further advances. Paradigm argued the technical requirements of section 28(2)(b) had not been met and that Paradigm's further advances should have priority.

The Court agreed with Paradigm for two reasons. First, the Court likened the borrower's solicitor's letter to a mere inquiry, and not actual notice of registration of the subsequent charge. Second, the letter was from the

borrower's solicitors to Computershare, and not directly between the lenders as required by the Act.

It should be noted the Court specifically stated that it was not sufficient for notice to be given "*on behalf of*" the chargeholder, as the legislation did not expressly provide for this. This means, somewhat surprisingly, that notice by a subsequent chargeholder's solicitors on behalf of the subsequent chargeholder would also not meet the requirements of section 28(2)(b) as interpreted by the Court. Rather, the notice should be on the subsequent chargeholder's letterhead and be given by the subsequent chargeholder directly to the prior chargeholder.

C. Disclosure Statements – Delayed Completion Date

***299 Burrard Residential Limited Partnership v. Essalat*, 2012 BCCA 271 (leave to appeal refused [2012] S.C.C.A. No. 372)**

This is an interesting decision dealing with a developer's duty of disclosure pursuant to the requirements of the BC *Real Estate Development Marketing Act* (REDMA), the legislation aimed at protecting BC consumers purchasing real estate. The Court of Appeal held that the failure by the developer to file an amendment to disclosure statement revising the estimated construction completion date for the development as disclosed in the disclosure statement, once the developer knew it was no longer accurate, was fatal rendering the purchaser's contract unenforceable.

The Court held that the estimated completion date was a "*material fact*" as defined in REDMA, in other words a fact that "*affects, or could reasonably be expected to affect, the value, price, or use*" of a unit, and that the developer's failure to amend the estimated completion date to disclose the roughly four-month delay in completion, constituted a misrepresentation under REDMA. The fact that the purchaser had been given informal notice of the change in the completion date (without any complaint by the purchaser), was irrelevant in determining whether there had been a misrepresentation of a material fact, which the Court stated cannot depend on the particular knowledge possessed by any given purchaser.

Beyond stating that the law won't concern itself with "trifling" delays, the Court of Appeal declined to give guidance on what would be an appropriate margin for error in estimating the completion date of a development in the disclosure statement, stating that this was more appropriately the role of the Superintendent of Real Estate which has been delegated administrative authority to prescribe the form and content of disclosure statements.

The *Essalat* decision is one of several decisions in the past few years where the Court has taken a strict approach to compliance with REDMA as consumer protection legislation. Lenders should be mindful of these

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decisions when reviewing disclosure statements provided by their borrowers and when making loans in reliance on the enforceability of pre-sale contracts.

D. Continuing All-Indebtedness Guarantees

***Royal Bank of Canada v. Samson Management and Solutions Ltd.*, 2013 ONCA 313**

This Ontario Court of Appeal decision is good news for lenders, because it reversed the lower Court's decision that a standard form continuing all-indebtedness guarantee granted by a business owner's wife in connection with a small business loan to his company, was unenforceable. The case is a useful reminder to carefully analyze the terms of a guarantee, whenever there is any proposed change to the terms of the underlying loan agreement between the lender and the borrower. Ideally, the guarantor's consent to any material changes should be obtained, in order to avoid potential disputes about the enforceability of the guarantee.

The background facts are as follows:

- In 2005, Ms. Cusack (under independent legal advice) signed a continuing guarantee in favour of RBC for up to $150,000, guaranteeing the indebtedness of her husband's business Samson Management and Solutions Ltd. ("Samson").
- In 2006, RBC agreed to increase Samson's operating line of credit to $250,000. Ms. Cusack (again under independent legal advice) gave a new guarantee for $250,000. Both the 2005 guarantee and the 2006 guarantee covered Samson's present and future liabilities and were not tied to any specific loan between RBC and Samson.
- In 2008, the credit available to Samson was increased to $500,000. The loan agreement also changed some loan terms, including establishing a borrowing base and mandating certain reporting requirements.
- In 2009, the loan amount was further increased to $750,000. As in 2008, RBC did not require a new guarantee from Ms. Cusack but left in place her 2006 guarantee for $250,000.
- At no time did RBC have any contact with Ms. Cusack and she never saw any of the loan agreements. RBC simply provided the guarantee forms to her husband along with a form for independent legal advice.
- The business eventually failed and RBC made demand on Ms. Cusack's personal guarantee and the guarantees provided by her husband.

The issue was the enforceability of Ms. Cusack's 2006 guarantee for $250,000.

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The lower Court concluded her guarantee was unenforceable because there had been material changes to the terms of the loan without her knowledge or consent, relying on the leading decision of the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415.

The Court of Appeal agreed that the *Conlin* case sets out the basic governing law, which is that a guarantor will be released from liability on its guarantee where the lender and the principal debtor agree to a material alteration to the terms of the loan without the guarantor's consent. However, parties are entitled to make their own arrangements, and a guarantor if it chooses can contract out of the protections provided by the common law or equity, and the courts will generally respect the guarantor's decision to do so, as long as the contracting-out language in the guarantee is clear and unambiguous.

The Court concluded that Ms. Cusack had contracted out of her common law protections, and was therefore liable under her guarantee. The guarantee stated that Ms. Cusack will pay on demand to RBC "*all debts and liabilities, present or future, direct or indirect, absolute or contingent, mature or not, at any time owing by…*" Samson to RBC "*or remaining unpaid by the customer to the Bank, heretofore or hereafter incurred or arising and… incurred by or arising from agreement or dealings between the Bank and the customer…*". In the Court's view, this clause made it clear that RBC could increase the loan amount and Ms. Cusack would remain liable. The Court also noted various other clauses in the guarantee which expressly permitted RBC to take actions that might or would otherwise be material alterations affecting the enforceability of the guarantee, including introducing new terms and conditions in respect of the borrowing.

Footnotes:

[1] "118 The following costs of *registering a lien* against an owner's strata lot under section 116 or *enforcing a lien* under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:

(a) *reasonable legal costs*;

(b) land title and court registry fees;

(c) other reasonable disbursements." [emphasis added]

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