

# focus

## on Financial Services



FRASER MILNER CASGRAIN LLP

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### A PROMISE IS A PROMISE

**If a mortgage is granted as “collateral security” to a note, and the note is not technically a “bill of exchange”, is the mortgage enforceable by the creditor? The answer is yes.**

In *Sniderman v. Gibbs* the borrower argued that because the note was not for a sum certain as required in the *Bills of Exchange Act*, it was not a bill of exchange and therefore was void. Because the note contained a promise by the borrower to pay all costs and expenses paid or incurred by the creditor in collecting under the note after demand, the court found that the note was not for a “sum certain” as required under the *Bills of Exchange Act* and therefore not a bill of exchange. The borrower reasoned that, because the mortgage was given as collateral security for a void note, the mortgage should also be treated as unenforceable.

The court rejected the borrower’s argument. The court said that the term “collateral” means “additional” or “parallel”, not “secondary.” The court said that in any case, whether or not there is a separate agreement to pay, **the existence and enforceability of one form of security taken by the creditor is not dependent upon the existence and enforceability of another form of security.** The collateral mortgage contained its own promise language. It was enforceable in its own right and was not dependent upon the note. The note did not need to qualify as a bill of exchange. The court would have enforced the note as a simple contract and promise to pay.

If you would like to discuss the *Sniderman* case, please contact **Lori Lyn Chanda** of our Toronto office at (416) 863-4543.

### SCORE FOR THE CROWN IN OTTAWA SENATORS

The Ontario Court of Appeal recently released its decision in the Ottawa Senators case. The Court of Appeal overturned the lower court decision and said that with respect to monies distributed in a *Companies’ Creditors Arrangement Act* (CCAA) proceeding **the Crown does have priority over secured creditors with respect to GST claims outside of a bankruptcy.**

Both the CCAA and *Excise Tax Act* (ETA) had clauses indicating that the particular legislation operated notwithstanding any other Act. The Court of Appeal said that it was the intention of Parliament to have the “notwithstanding” language in the ETA prevail over that in the CCAA. It noted that the ETA specifically exempted the *Bankruptcy and Insolvency Act* from its notwithstanding language, but not the CCAA. The court also said that because the notwithstanding language in the ETA was passed later in time than the notwithstanding language in the CCAA, it represented the most recent view of Parliament.

The Court of Appeal also upheld the judgment of the lower court to the extent that it found that penalties and interest due on source deductions were to be treated as unsecured claims under the CCAA.

One of the Crown’s key arguments was not considered by the court. The Crown sought to rely on the provision of the CCAA which states that where a CCAA Order suspends Crown enforcement of claims for withholdings, for a plan or compromise to be sanctioned by the court, the plan must include a provision that sums due to the Crown (i.e. including penalties and interest) must be paid in full within six months of

court sanction of the plan. The Crown argued that here, the sale of assets was a plan or compromise under the CCAA such that the penalties and interest should have been ordered to be paid as a condition of sanctioning the sale. Because this issue was not properly raised in the material before it, the court declined to decide the issue. However, we can expect this issue to be argued in subsequent proceedings and should bear it in mind when distributing money under the CCAA. It is of note that had there been a bankruptcy before the sale (or likely the distribution), neither of these issues would have had to have been dealt with.

If you would like to discuss the *Ottawa Senators* case, please contact **Jane Dietrich** of our Toronto office at (416) 863-4467.

#### NO CRIMINAL RATE

A recent decision of the Alberta Court of Queen's Bench provides further interpretation of Section 347 of the Criminal Code of Canada. Section 347 is the so-called 'criminal interest rate provision. It prohibits (among other things) receiving (or agreeing to receive) interest at a rate exceeding 60% per annum.

Section 347 defines interest broadly as "all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form..." The intent of Section 347 is to aid in the prosecution of loan sharks. However, it can also be used by a sophisticated borrower attempting to avoid the payment of a charge imposed in a freely negotiated financing transaction. This was the case in *ReBearcat Explorations Ltd.*

A number of inducements were offered by the borrower in two loan agreements to encourage the lender to enter into a series of loans. Those inducements included the recovery of the lender's lost equity on a previous investment in the borrower, a gross overriding royalty (GORR) on well production, provisions for the potential triple payment of principal, shares in a related company and other interests. The court said they were all "interest" under Section 347.

However, the court said that neither of the agreements resulted in a criminal interest rate. **A lender could not be found to have entered into an agreement to receive interest at a criminal rate just because it was a mere possibility at that time that the rate could become illegal.** Because the actual amount of interest and actual period of repayment were not known, there could not be a breach of Section 347. Where a term is not set, it is not possible to calculate whether an interest rate is criminal until the lender has been fully repaid and the actual term of the loan has been defined.

It was not necessary for the court to rule on removing offending provisions from the agreements. However, the court said that if the interest rate had been criminal, the appropriate remedy in this case would be to reduce the interest rate to no more than 60%.

If you would like to discuss the *Bearcat* case, please contact **Philip Barton** of our Calgary office at (403) 268-6305.

#### WHO AND WHAT IS NEW AT FMC?

20 FMC lawyers have been listed in the 2005 edition of the *LEXPERT/ALM Guide to the Leading 500 Lawyers in Canada*, an authoritative source which identifies leading lawyers across Canada in 40 separate practice areas.

**Brian Carr** of our Toronto Business Law Group presented a paper on "Divisive Reorganizations and Butterfly Transactions" at the 6<sup>th</sup> Annual Taxation of Corporate Reorganization Conference.

**Laura Safran** of our Calgary Corporate Group was recognized as one of Canada's Top 100 Most Powerful Women by the Women's Executive Network. The WEN annually identifies and celebrates the 100 most exceptional and influential women in Canada.

**David Tsubouchi** of our Toronto Real Estate Group was recently appointed to the Board of Governors of York University.

**Noel Rea**, Q.C., formerly of Imperial Oil, joined our Calgary Litigation Group as counsel. Noel was recently recognised nationally for his expertise in ADR matters.

#### WHAT WE'VE BEEN DOING IN FINANCIAL SERVICES

Here are just some of the recent transactions on which our various offices across Canada have worked:

- Assisting a client in documenting specialized safekeeping and custody arrangements with a financial institution.
- Advising a foreign bank lender on regulatory aspects of lending to a Canadian borrower outside Canada on the security of assets located in Canada.
- Acting in Canada for both the Canadian and U.S. lending syndicates who provided financing to a US borrower for a \$400 million acquisition of the assets of a large Canadian steel company in *Companies' Creditors Arrangement Act* proceedings.