

**Fraser Milner Casgrain's
Financial Services Seminar**

**LENDING WITHOUT LOSING &
WHAT YOU NEED TO KNOW**

September 21, 2006

Lawyers in:

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FRASER MILNER CASGRAIN LLP

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Table of Contents

FMC Profile	1
FMC (Vancouver) Profile	2
Financial Services Group Profile	3
Presenter's Profile	4
Taran Atwal	
Tim Bezeredi	
Colin Emslie	
Gordon Esau	
John Sandrelli	
Juliet Smith	
What to Watch for in Intercreditor Lending	5
Presented by Tim Bezeredi & Colin Emslie	
Securing Intellectual Property Rights	6
Presented by Taran Atwal & Juliet Smith	
Intellectual Property Rights in Insolvency and the Real Risk	7
Presented by John Sandrelli	
Additional Copies	8

About Fraser Milner Casgrain LLP

Fraser Milner Casgrain LLP is a leading Canadian business law firm offering unparalleled resources and service to help our clients succeed. We have over 500 lawyers in six offices in the largest Canadian business centres with the diverse skills and experience to address virtually every facet of business law. We understand what business is all about, and can provide the advice our clients need.

OUR CLIENTS

Our clients include major corporations (both public and private) in all sectors of the Canadian economy, national and international companies active in Canada and abroad, entrepreneurs and emerging industries. Our clients are active in financial services, communications, high technology, e-commerce, pharmaceuticals and bio-technology, oil and gas, energy, insurance, health care, manufacturing, real estate, construction, retail, professional services, transportation, forestry, mining and many other industries.

OUR APPROACH

At Fraser Milner Casgrain LLP, we understand the complexities of business and the volatility created by changing competitive forces. We know that to serve your legal needs effectively, we must understand your business and objectives in order to anticipate developments and identify opportunities. We deliver effective solutions to advance the strategic interests of our clients by combining our professional capabilities and business acumen with a clear understanding of your priorities. We believe that our success is tied directly to the success of our clients.

OUR TEAM

Fraser Milner Casgrain LLP has offices in Montréal, Ottawa, Toronto, Edmonton, Calgary, Vancouver and New York. Individually, each office has the resources, skills and experience required to meet the ongoing requirements of most businesses and institutions active in the region. Each office individually ranks among the leading firms in its respective community and is completely familiar with local business and market conditions.

Where a transaction or project requires specialized knowledge or expertise, or where jurisdictional complexities or time pressures demand additional resources, the full strength and depth of one of Canada's largest national law firms can quickly be made available. We regularly establish multidisciplinary teams to address the most complex issues or opportunities effectively and efficiently. Our offices are linked by sophisticated technologies to streamline communication, collaboration and workflow and our lawyers are accustomed to practicing nationally. This means our lawyers focus on workable solutions for our clients faster, whether at the local, regional, national or international level.

Our team approach to serving our clients extends beyond our substantial national presence. Fraser Milner Casgrain LLP has an established network of international legal resources which enables us to assist clients as their interests evolve from local to national to international arenas.



Our relationships include:

- membership in the Pacific Rim Advisory Council (PRAC), a unique strategic alliance within the global legal community comprised of 30 top-rated independent law firms who provide legal services to major international companies with substantial business dealings across the Pacific Rim;
- membership in Interlex, an international association of 33 leading law firms, 19 of which are based in Europe;
- International Lawyers Group; and
- correspondent affiliations with a number of leading U.S.-based law firms.

As one of Canada's largest full-service business law firms, Fraser Milner Casgrain LLP has the knowledge, resources and experience to provide comprehensive advice on business matters. Our team includes many lawyers independently recognized for their capabilities in all of the major business law practice areas. Lawyers from Fraser Milner Casgrain LLP are rated among the leading practitioners in the following independent publications:

- The Year 2005 Guide to the Leading 500 Lawyers in Canada published by Lexpert Magazine and American Lawyer Media
- Martindale-Hubbell Law Directory published by Martindale-Hubbell
- The World's Leading Lawyers, 2004-2005 published by Chambers and Partners

Whether you require the services of an individual lawyer or the dedicated attention of a diverse national team, the resources of our firm are available to meet your needs.

TECHNOLOGY

Fraser Milner Casgrain LLP is a leader in utilizing technology to enhance the quality and speed of service to our clients. We have worked with clients to establish secure electronic links for e-mail communications, document interchange, access to research material and document databases or other services.

We continue to make significant investments in new technology. Advances in technology create new opportunities to develop more effective solutions and improve service, strengthening our partnerships with clients.

COMMUNITY INVOLVEMENT

Fraser Milner Casgrain LLP is an active member of the community in the regions where we do business, supporting initiatives which strengthen and enrich those communities.

The firm supports a variety of local charitable, community and worthy causes through corporate sponsorships and giving, pro bono activities, participation in charitable organizations and through our own programs.

About Fraser Milner Casgrain LLP, Vancouver

Fraser Milner Casgrain LLP (FMC) is a leading Canadian business law firm offering unparalleled service and resources to help our clients succeed. One of Canada's largest national law firms, we have over 500 lawyers in six offices in the largest Canadian business centres. We have the diverse skills and experience to address virtually every facet of business law. In Vancouver, our team is highly respected for its concentration of skilled lawyers. We understand what business is all about, and can provide the advice our clients need.

OUR CLIENTS

Our clients include major corporations (both public and private) in all sectors of the Canadian economy, national and international companies active in Canada and abroad, entrepreneurs and emerging industries. Our clients are active in financial services, communications, high technology, e-commerce, pharmaceuticals and bio-technology, oil and gas, energy, insurance, health care, manufacturing, real estate, construction, retail, professional services, transportation, forestry, mining, and many other industries. In addition to representing all types of businesses, we also represent individuals and partnerships.

OUR APPROACH

At FMC, we know that to serve your legal needs effectively, we must understand your objectives in order to anticipate developments and identify opportunities. We deliver effective legal solutions to advance the strategic interests of our clients by combining our professional capabilities with a clear understanding of our clients' priorities. We believe that our success is tied directly to the success of our clients.

OUR TEAM

The Vancouver office of FMC has over 50 lawyers allowing us to develop a close relationship with our clients. Our Vancouver office was noted in a leading legal publication as being "remarkable in its depth of legal talent". Our team includes many lawyers independently recognized for their capabilities in all of the major business law practice areas. Lawyers from FMC are rated among the leading practitioners in the following independent publications:

- The Year 2006 Guide to the Leading 500 Lawyers in Canada published by Lexpert Magazine and American Lawyer Media;
- Martindale-Hubbell Law Directory published by Martindale-Hubbell;
- The World's Leading Lawyers, 2006 published by Chambers & Partners;
- The National Post 2005 special edition;
- International Law Office 2005 Client Choice;
- The Practical Law Company 2006; and
- The International Financial Law Review 2006.



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Our clients also have access to the skills and local expertise of our lawyers in our offices in Calgary, Edmonton, Toronto, Ottawa, Montreal and New York. We regularly establish multidisciplinary and national teams to address the most complex issues or opportunities effectively and efficiently. Our offices are linked by sophisticated technologies to streamline communication and collaboration. This means our lawyers focus on workable solutions for our clients faster, whether at the local, regional, national or international level.

LOCAL, NATIONAL AND INTERNATIONAL

Our team approach to serving our clients extends beyond our local knowledge and substantial national presence. FMC has an established network of international legal resources which enable us to assist clients as their interests evolve from local to national to international arenas. Our relationships include:

- Membership in the Pacific Rim Advisory Council (PRAC), a unique strategic alliance within the global legal community comprised of 30 top-rated independent law firms who provide legal services to major international companies with substantial business dealings across the Pacific Rim;
- Membership in Interlex, an international association of 33 leading law firms, 19 of which are based in Europe;
- International Lawyers Group;
- Global Alliance for eCommerce Law; and
- Correspondent affiliations with a number of leading U.S.-based law firms.

Whether you require the services of an individual lawyer, the dedicated attention of a diverse national team or assistance internationally, the resources of our firm are available to meet your needs.

TECHNOLOGY

FMC is a leader in utilizing technology to enhance the quality and speed of service to our clients. We have worked with clients to establish secure electronic links for e-mail communications, document interchange, access to research material and document databases or other services.

We continue to make significant investments in new technology. Advances in technology create new opportunities to develop more effective solutions and improve service of our clients.

COMMUNITY INVOLVEMENT

FMC supports initiatives which strengthen and enrich the communities where we live and work. The firm supports a variety of local charitable, community and worthy causes through corporate sponsorships and gifts, pro bono activities, participation in charitable organizations and through our own programs.

PRACTICE AREAS

Aboriginal Law & Policy	Entertainment, Sports & Media	International Affiliations	Pension & Benefits
Alternative Dispute Resolution	Environmental	International Trade	Private Client Services
Banking	Financial Services	Internet & E-Commerce	Privatizations
Capital Markets	Forestry	Labour & Employment	Project Finance
Commodity Tax	Franchising	Litigation & Advocacy	Real Estate
Communications	Government Relations	Mergers & Acquisitions	Regulatory
Competition & Antitrust	Health	Mining	Securities
Construction & Infrastructure	Insurance	Municipal	Taxation
Corporate/Commercial	Intellectual Property	Not-for-Profit	Technology
Energy	Insolvency & Workout	Oil & Gas	Transportation

FRASER MILNER CASGRAIN LLP

Vancouver Financial Services Group

The Members of Fraser Milner Casgrain LLP have represented finance institutions since the opening of our Vancouver Office. Members of the Financial Services Group advise financial institutions, creditors, borrowers and others. Their practices include the creation, licensing, regulation, taxation and liquidation of financial institutions; matters relating to documentary and standby letters of credit, swaps, forwards and other financial instruments; domestic and international secured and unsecured credit transactions, project financing, securitizations, portfolio acquisitions and sales, participations, syndications, tax-effective financing and financial leasing; workouts, restructurings, realizations, receiverships, foreclosures, insolvencies and all aspects of *Companies' Creditors Arrangement Act* and *Bankruptcy and Insolvency Act* matters.

There are 15 lawyers in the Vancouver Office who are members of the Financial Services Group. Two of our partners in this Group, Gordon Esau and Doug Knowles are recognized in "The 2002 Guide to the leading 500 Lawyers in Canada." Nationally, the Group consists of over 100 lawyers and paralegals located in all six of our offices. The members of the Financial Services Group work closely with the firm's Tax, Securities, Real Estate and Corporate Groups to provide coordinated, cost-effective legal services.

Key Practice Areas

- Advising domestic and global clients on the regulation of banks and other financial institutions in Canada including establishing financial service businesses in Canada and incorporating Canadian domestic banking subsidiaries.
- Structuring, negotiating and documenting credit transactions of all types, including domestic and cross-border corporate lending, syndications, trade finance, factoring, financial leasing, project financing and structured finance transactions.
- Debt financing for provincial governments and government agencies.
- Equipment financing and leasing, including financing or leasing of computer, aircraft and railway equipment.
- Representing Hollywood studios, U.S. television networks and independent film producers in connection with tax effective financing of film production costs.
- Representing leading Canadian and foreign banks in the financing of Canadian produced television services, made for television movies and theatrical motion pictures.
- Private and court-sanctioned debt restructurings and loan workouts, arrangements and proposals.
- Receiverships and other asset recovery and realization transactions.
- Bankruptcy and liquidation.



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Representative Engagements

We recently acted in connection with or for (or are presently acting in connection with or for):

- A real estate investment trust client in connection with its financings from a number of different lenders and in connection with its swap transactions.
- Hollywood studios, U.S. television networks and independent U.S. production companies in connection with film financing and transactions involving over \$3 billion of film production costs
- A lending syndicate which provided Cdn \$150 million and U.S. \$125 million acquisition and operating lines of credit for a forest company
- A lending syndicate which provided a Cdn \$325 million credit facility for a forest company
- A lending syndicate which provided a Cdn \$125 million credit facility for a paper company
- A lender which provided Cdn \$40 million operating facility to a newly formed income trust
- A lender which provided Cdn \$50 million construction facility for the renovation of a major downtown Vancouver hotel
- A lender which provided Cdn \$14 million real estate acquisition facility for a real estate developer
- A lender which provided Cdn \$30 million operating facility for a technology based corporation
- The formation and listing of an income trust and the subsequent borrowing by the Trust
- A number of borrowers with respect to the issue of investment grade debt or high-yield debt in the U.S. capital markets pursuant to Rule 144A or the Multi-Jurisdictional Disclosure System.
- Two of the primary creditors in the 360 Networks debt restructuring
- Skeena Cellulose in the rearrangement and restructuring of its debts and the sale of its assets
- Restructuring of Vantage Securities a significant investment company, resulting in almost a 100% return to investors and creditors
- Reorganization of the debt of a major software company
- The administrator in the reorganization of two international agriculture organizations
- Conor Pacific Industries in the structuring, negotiating and filing of a pre-packaged plan of arrangement under the Companies' Creditors Arrangement Act while preserving the company's TSE listing

Contact Information

If you require further information or assistance in meeting your Lending needs, please contact us at:

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Taran is an associate in Fraser Milner Casgrain LLP's Vancouver office practicing in the Corporate/Commercial, Intellectual Property, Technology and Securities practice areas. She advises clients on all areas of business law with a particular emphasis on intellectual property law, information technology and computer law and licensing. When advising clients on corporate/commercial and securities matters, Taran is able to draw on her background in the sciences, focusing particularly on physics and biochemistry, and her experience in patent and trade-mark prosecution, enforcement and licensing. Taran is a registered trade-mark agent and



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PREFERRED AREAS OF PRACTICE

- Corporate/Commercial
- Intellectual Property
- Technology, E-Commerce and Internet
- Securities

EDUCATIONAL BACKGROUND

- Year of Call to the Bar: 2003 (British Columbia)
- University of British Columbia, LL.B (2002)
- University of British Columbia, B.Sc. (Honours Physics, 3 years)

OTHER PROFESSIONAL ACTIVITIES

- Registered Trade-mark Agent (Canada)
- Member of the Intellectual Property Institute of Canada
- Member, Licensing Executives Society
- Member, Canadian Bar Association, BC Branch



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FRASER MILNER CASGRAIN LLP

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Tim is an experienced member of Fraser Milner Casgrain LLP's Vancouver office where he represents a broad range of clients in the areas of corporate and commercial law and financial services, with a focus on acquisitions, restructurings and reorganizations, subordinated debt and private equity financing, and forestry law. Tim has represented local, national and international businesses, commercial lenders and merchant banks in connection with acquisition, investment, lending and restructuring transactions of all kinds. Tim also acts for a number of local and U.S. based forestry companies, advising them with respect to operational matters and the acquisition and divesture of public and private timber holdings and related assets.

PREFERRED AREAS OF PRACTICE

- Commercial and Corporate Law
- Corporate Finance
- Corporate Mergers, Acquisitions and Reorganizations
- Forestry Law

EDUCATIONAL BACKGROUND

- Year of call to the Bar: 1987 (British Columbia)
- University of British Columbia, LL.B., 1986
- University of British Columbia, Bachelor of Science in Forestry, 1983

OTHER PROFESSIONAL ACTIVITIES

- Member Business Law, Banking Law and Forestry Law Sections of the Canadian Bar Association
- Former Chair, Banking Law Section, B.C. Branch, Canadian Bar Association



Colin Emslie
Partner, Vancouver

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Colin divides his practice between insolvency-related matters and commercial lending for our financial institution clients. On the insolvency side, Colin has extensive experience dealing with foreclosures, receiverships, workouts and bankruptcies. In the lending area, he is involved with all facets of commercial lending with a special emphasis on corporate and trade finance.

PREFERRED AREAS OF PRACTICE

- Counsel regarding matters of corporate finance, trade finance and commercial insolvency

BACKGROUND

- Year of call to the Bar: 1981 (British Columbia)
- University of British Columbia, LL.B., 1980

OTHER PROFESSIONAL ACTIVITIES

- Member, Canadian Bar Association, B.C. Branch, Banking and Insolvency Subsections
- Member, Vancouver Insolvency Discussion Group
- Institute of Canadian Bankers: Past Course Coordinator and Lecturer of courses on “Law and Commercial/Consumer Banking Services”
- Continuing Legal Education: Past Lecturer of various courses on personal property security, foreclosures, receiverships and insolvency matters generally
- Canadian Institute: Past Lecturer of course on Mortgage Enforcement
- PLTC (Bar Admission Program): Past lecturer on Foreclosures
- Canadian Insolvency Practitioners Association: Past Lecturer of course on Priorities
- Contributor to British Columbia Personal Property Security Act Practice Manual
- Guest Lecturer for HSBC Bank Canada Commercial Account Managers Training Course on Insolvency
- Contributor to the Continuing Legal Education publication “Advancing B.C. Business”



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Gordon is a senior partner in Fraser Milner Casgrain LLP's Vancouver office with a practice focused on corporate finance and merger and acquisition activity. Gordon represents several of the major Hollywood studios, U.S. television networks and U.S. based independent production companies in the media, communications and entertainment law area. LEXPERT recognizes Gordon as one of the leading lawyers in Canada in the Entertainment Industry.

PREFERRED AREAS OF PRACTICE

- Corporate Mergers and Acquisitions
- Media, Communications and Entertainment Law
- Canada-U.S. Cross-border Transactions
- Corporate Financings

EDUCATIONAL BACKGROUND

- Year of call to the Bar: 1977 (British Columbia)
- University of British Columbia, LL.B., 1976
- University of British Columbia, B.A. (Economics), 1973

CURRENT FIRM ACTIVITIES

- National Practice Group Leader of the Entertainment Practice Group
- Member of the Vancouver Management Committee

OTHER PROFESSIONAL ACTIVITIES

- Lectures and writes materials for various groups including the Continuing Legal Education Society of British Columbia in the areas of cross-border financing and film production and financing
- Chair of the New York State Bar Association International Law and Practice Section Committee on International Entertainment
- Director of B.C. Film
- Named Paul Harris Fellow by Rotary International
- National Chair of the Canadian Bar Association Business Law Section, 1991-1992



John R. Sandrelli

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John is the Vancouver Chair of the Insolvency and Workout Group and regularly acts for companies in need of restructuring as well as for trustees, receivers, financial institutions, commercial lenders, noteholders and other creditors. John attended the University of Toronto and received his LLB in 1989. Thereafter, he practiced in the insolvency area with a major Toronto firm until 1997 when he relocated to Vancouver.

John has extensive experience with restructurings under both the Companies' Creditors Arrangement Act, the Canadian Bankruptcy and Insolvency Act and working familiarity with the United States Bankruptcy Code. Additionally, in his practice, John regularly advises internationally based companies on lending and remedy issues in Canada and is frequently retained by major United States based law firms on Canadian bankruptcy issues. John has specific expertise in the area of fraudulent transactions, particularly in the context of multi jurisdictional insolvency cases involving the coordination of foreign legal proceedings to effect recovery, and has been a driving force in Canada with respect to developing joint insolvency protocols to harmonize legal proceedings in the context of cross border insolvencies.

John has authored, presented and published several articles and papers in the insolvency and creditors' rights areas, is a member of the Insolvency Institute of Canada, an executive member of the Insolvency Section of the Canadian Bar Association and an active member of the insolvency sections of the Turnaround Management Association, the International Bar Association and the American Bankruptcy Institute. John is also a member of the Board of Trustees of the BC Sports Hall of Fame and Museum.

John has been recognized by the Global Insolvency and Restructuring Review as one of the top 40 insolvency and restructuring lawyers under the age of 40 years old in the world.

PREFERRED AREAS OF PRACTICE

- Counsel regarding matters of commercial insolvency with a particular focus on restructurings, creditors' rights, lending issues and security and banking and insolvency related litigation.

EDUCATIONAL BACKGROUND

- Year of call to the Bar: 1991 (Ontario); 1997 (British Columbia)
- University of Toronto, LLB, 1989

OTHER PROFESSIONAL ACTIVITIES

- Member, British Columbia Law Society (1997 - present)
- Member, Law Society of Upper Canada (1991 - present)
- Member, Insolvency Institute of Canada
- Member, International Bar Association, Insolvency and Creditors' Rights Section
- Member, The American Bankruptcy Institute
- Member, Editorial Board of the National Creditor Debtor Review
- Past Executive of the Insolvency Subsection (British Columbia) of the Canadian Bar Association and current Executive Member of the National Bankruptcy & Insolvency Section
- Member, The Turnaround Management Association
- Member of the Board of Trustees of the BC Sports Hall of Fame & Museum

PAPERS & PRESENTATIONS

- "Cross-Border Insolvency Remedies in Canada", John R. Sandrelli and Christopher J. Ramsay, presented to the 19th Annual Northwest Bankruptcy Institute, Portland, Oregon (April 14-15, 2006) (Published, Oregon State Bar [2006])
- "Canadian Landscape Changing for IP Licenses in Bankruptcy", (Published: "The Journal of Corporate Renewal", Turnaround Management Association [March 2006])
- "The Year in Review from British Columbia: Significant Cases in Commercial Insolvency and Corporate Restructuring", presented to the Canadian Bar Association Pan Canadian Conference on Bankruptcy and Insolvency Law, Quebec City, (September 2005)
- "Jurisdiction of the Court in CCAA Proceedings: Inherent Jurisdiction vs. Statutory Discretion", presented to the Canadian Bar Association Pan Canadian Conference on Bankruptcy and Insolvency Law, Quebec City, (September 2005)
- "Case Study: Commercial Restructuring", presented to the Canadian Association of Insolvency and Restructuring Professionals Annual Conference, Kelowna, (August 2005)
- "Statutory Considerations When Dealing with Agricultural Insolvencies", John R. Sandrelli and Christine N. Matthews, presented to the Canadian Bar Association Legal Conference and Expo 2005, Vancouver, (August 2005)
- "Investigation and Pursuit - on the Asset Trail, Unique Canadian Tools and Issues", presented to a conference of the Insolvency, Restructuring and Creditors' Rights Section of the International Bar Association, Salzburg, Austria (May 2005)
- "CCAA - Priorities. Ability to Register in Personal Property Registry Not Automatically Stayed by CCAA Initial Order - Case Comment; Re Western Express Air Lines Inc." John R. Sandrelli and Sherryl A. Dubo, Credit and Banking Litigation, Volume IX, No. 4, December 2004
- "Collections", Contributing Author to the Annual Review of Law and Practice, Continuing Legal Education Society of BC (2000 - Present)
- "The Role of Court-Appointed Officers in the Governance of Financially Distressed Corporations", UBC Conference on Corporate Governance, February 8 and 9, 2002 (Revised for publication September 3, 2002) (Published: J. Sarra, "Corporate Governance in Global Capital Markets", UBC Press [2003])
- "Remedies under Security Interests in Canada: an Overview", John R. Sandrelli, Christopher J. Ramsay and Anjili I. Bahadoorsingh, International Bar Association, July 2002 (Published: I.M. Fletcher and O. Swarting, "Remedies Under Security Interests", Kluwer Law International and International Bar Association [2002])
- "Canada-U.S. Cross-Border Insolvencies: Ancillary Proceedings", National Insolvency Review, Volume 19, Number 3, June 2002
- "Canada-U.S. Cross-Border Insolvencies: Ancillary Proceedings", Continuing Legal Education Society of BC, Bankruptcy & Insolvency Practice, May 17, 2002

PAPERS & PRESENTATIONS (CONT'D)

- “True Leases vs. Financing Leases: Competing with CCRA”, National Creditor Debtor Review, Volume 16, Number 4, November 13, 2001
- “True Leases vs. Financing Leases: Treatment During a Restructuring under the CCAA and the BIA”, John R. Sandrelli and Jason W. Levine, Continuing Legal Education Society of BC, Banking and Insolvency Litigation 2000, October 30, 2000 and National Insolvency Review, Volume 18, Number 1, February 2001
- “Business Suits: Expanding your Commercial Litigation Wardrobe - New Developments in Bankruptcy and Insolvency: Priority Issues”, Trial Lawyers Association of BC, December 1999
- “Receiverships and Enforcement of Debentures and General Security Agreements - Priority Issues”, John R. Sandrelli and Christopher J. Ramsay, Continuing Legal Education Society of BC, October 8, 1999
- “Deemed Trusts - Reg. 2201 of the *Income Tax Act* and it's Significance to Financial Institutions”
- “National Insolvency Forum Discussion Paper”, Spring 1999
- “The Major New Changes to the *Bankruptcy and Insolvency Act* and *Companies' Creditors Arrangement Act*”, November 5, 1997

SAMPLE OF RECENT MAJOR CASES

- *Re: Napier Environmental Technologies Corp.* - acted for two private investment firms which ultimately financed and completed, as new majority owners, a successful restructuring of this publicly traded environmental paint product company;
- *Re: Portus Alternative Asset Management* - currently acting as court appointed representative counsel for the approximately 26,000 investors in this collapsed hedge fund and asset management company;
- *Re: Western Express Airlines* - acted for the lead subordinated debt and equity lender in this local airlines' CCAA and subsequent receivership proceedings;
- *Re: North American Tungsten Ltd.* - acted as counsel for North America's largest tungsten mining company in its successful restructuring under the CCAA;
- *Re: Exchange Bank and Trust* – currently acting as Canadian counsel for the receiver of this Nevis based Bank;
- *In the Matter of Financial Asset Management Foundation* – acted as counsel for the debtor in this cross-border restructuring under the *Bankruptcy and Insolvency Act* involving an ancillary proceeding under Section 304 of the United States Bankruptcy Code in San Diego. The case involved a judicially approved protocol and joint hearings of both the Canada and US courts held by video conference;
- *Re: Novus Communications Inc.* – acted as counsel for the company in the reorganization of Novus under the CCAA and then as counsel to the interim receiver in the sale of the company on a going concern basis to a major property company in Vancouver;
- *Re: Tilsonberry Farms Ltd.* – acted as counsel for the company in this successful reorganization under the CCAA involving the last independent cranberry farm in British Columbia;
- *Re: United Used Auto and Truck Parts Ltd. et al.* – acted as counsel for the company in the CCAA proceeding;
- *Re: Agro Pacific Industries* – acted as independent counsel to the Board of Directors in this major Fraser Valley producer of feed and seed products for agriculture, poultry and livestock producers in the successful CCAA reorganization;
- *Re: Quinsam Coal* – acted as counsel for the monitor in the CCAA restructuring launched by a Vancouver Island based coal mining company;
- *In the Matter of the Bankruptcy of James Blair Down et al.* – acted for the petitioning creditor in appointing an interim receiver in a bankruptcy case brought on behalf of a large number of individuals. The case involved the issuance of various relief and included seizure of assets around the world in a multi-jurisdictional asset seizure;
- *Re: Vantage Securities Inc.* – acted as representative counsel for the 3500 RRSP customers in the first securities firm bankruptcy filed under Part XII of the *Bankruptcy and Insolvency Act*.



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Juliet's practice concentrates on entertainment and corporate/finance law. She represents a cross section of U.S. Networks and Hollywood Studios, Canadian and U.S. banking institutions, Canadian independent production companies, producers and directors, in all areas of production including interim financing, tax shelter transactions, tax credits and errors and omissions insurance matters.

PREFERRED AREAS OF PRACTICE

- Entertainment
- Finance
- Corporate/Commercial

EDUCATIONAL BACKGROUND

- Year of call to the Bar: 1992 (British Columbia)
- University of Victoria, LL.B., 1991
- Simon Fraser University, B.A., Criminology, 1988

OTHER PROFESSIONAL ACTIVITIES

- Lecturer at the UBC Continuing Studies Certificate of Entertainment Administration Course
- Former Chair of the Entertainment Law Subsection, British Columbia Branch of the Canadian Bar Association
- Member, British Columbia Branch of the Canadian Bar Association, Business Subsection
- Member, Academy of Canadian Cinema and Television and Vancouver Women in Film

Intercreditor Agreements

- MONTREAL
- OTTAWA
- TORONTO
- EDMONTON
- CALGARY
- VANCOUVER
- NEW YORK




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A. INTRODUCTION


- Senior lenders typically want to retain control over common collateral – require junior secured lender to enter an intercreditor agreement that relegates the junior to a subordinate position
- No standard set of terms between senior and junior lenders


2

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Intercreditor Agreements

- Purpose of intercreditor agreements:
 - Certainty
 - Set out rules of engagement
- Types of intercreditor agreements:
 - Senior vs. Subdebt
 - Term vs. Current


3

B. Priority Provisions

- Primary feature of an intercreditor agreement
- Typical provision provides that junior lender's security is subordinate in all respects over all property and assets, present and future of borrower
- Statutory provisions generally provide that first to register has priority
- Intercreditor agreements allows you to modify this (eg. refinance)



Priority Provisions

Senior vs. Subdebt

- Senior lender will want unlimited priority over all asset categories
- Junior lender may negotiate cap on senior lender's priority – net realization proceeds in excess of limit paid to junior lender before further amounts paid to senior lender
- May also be able to negotiate *pari passu* priority with respect to out-of-pocket costs and expenses incurred in administering, monitoring and enforcing security



Priority Provisions

- Non-traditional asset classes
- Junior lender may seek to subordinate any senior lender prepayment penalty or early termination fee until junior lender has recovered its principal and interest
- Junior lender's rights under any personal guarantees and collateral security in support may be excluded from subordination if lender intends to have prior charge
- Care should be taken to ensure that junior security is not inadvertently subordinated to unsecured claims where senior security found to be void or unenforceable



Priority Provisions

Term Lender vs. Operating Lender

- Typically, term lender will get priority over fixed assets (land, buildings, capital equipment) while the current asset or operating lender will want priority over inventory and accounts receivable
- Operating lender will want to have priority with respect to funds on deposit in borrower's accounts
- Issues can arise with respect to proceeds of fixed assets



C. Payment Blocks

- Issue of whether junior lender will agree to some level of subordination or payment postponement
- Junior lenders reluctant to give up right to be paid following default under the senior loan
- Usually will accept some level of debt subordination



Payment Blocks

Standard Terms:

- Not to accept any prepayment without senior lender's consent
- Not to accept any regular principal or interest payments while senior debt in default



Payment Blocks

Subordinate lender may negotiate:

- Senior debt defaults limited to financial covenants and designated "material" covenants
- Entitled to regular payments until receipt of written notice of default from senior lender



Payment Blocks

- Payment blocks restricted to principal – not interest and administration fees during standstill period
- Senior lender will provide prompt notice of remedy of default, entitling payments to subordinate lender to resume



D. Standstill Provisions

- Senior lender usually requires subordinate lender to give covenant not to enforce junior lien security for specific period
- Friction between senior lender's desire to control its exercise of remedies against the collateral vs. junior lender's desire for freedom to exercise its right after certain period of time.



Standstill Provisions

- Typically 90-180 days
- Standstill is what makes junior lien "silent" or "quiet"
- Junior lender may get senior lender to agree to:
limit on total number of standstill periods (1-2),
limit on number of standstill periods in 12-month
period (1), ability to take non-enforcement action,
and ability to lift standstill if borrower does not
provide additional security or increased rate of
interest



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A. Intellectual Property

1. What is “intellectual property”?
Why protect it?
2. Common types of intellectual property rights
3. Steps / Strategies to protecting intellectual property
4. Due Diligence and third party interests




16

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B. Security Interests in Intellectual Property

1. Security Documents
2. Common Due Diligence Searches
3. Personal Property Security Act
4. Canadian Intellectual Property Office
5. Priority and Subordination
6. Restrictions and Conditions



17

What is Intellectual Property?

- Intangible assets that can have very tangible benefits and consequences
- Working definition: Creations of the mind; ideas designs, products of creativity



What is Intellectual Property? (cont'd)

Examples:

- Brand names e.g., "GAP", "NIKE", "SONY"
- Formula used by Coca-Cola to produce its cola
- Software produced by Microsoft
- Harry Potter series written by J.K. Rowlings
- Computer technology produced by Hewlett Packard



Other Examples of Intellectual Property

- Client list/Supplier list
 - Publication: book, pamphlet, presentation
 - Software
 - Business model or plan
 - Product specifications
 - Blue prints or models
- All of these add value to a business!*



Why Secure Intellectual Property?

- Competitive advantage
 - Exclusivity/monopoly
 - Strengthen market share
- Sources of Revenue
 - Generate revenues through use or application
 - Revenue through licensing to others
 - Revenue through sale of intellectual property



Why Secure Intellectual Property? (cont'd)

- Strategic Planning
 - Strategic expansion or exploitation – control third party access by industry, product, region
 - Strategic Alliances – cross-licensing
- Limit liability and exposure
- Maintain or protect value of intellectual property assets
- Assess investment opportunities



Types of Intellectual Property

- Traditional / Defined Categories:
- Patents
 - Trade-marks
 - Copyright
 - Trade secrets



Types of Intellectual Property (cont'd)

New / Amorphous Categories:

- Know-how
- Business information
- Domain names
- Software
- Application of intellectual property principles in Internet context



What is Trade Secret?

- Protection of confidential information
- No statutory regime for protection
- Conditions
 - not generally known or accessible
 - potential/actual commercial value because of secrecy
 - steps taken to ensure secrecy
- Loss of protection if becomes public



What is Copyright?

- Applies to literary, dramatic, musical and artistic works – (includes software)
- Provides exclusive right to produce or reproduce such works
- Owner of copyright may exclude others from reproducing, translating (e.g., literary work), performing (e.g., musical or dramatic work), recording, broadcasting
- Duration: 50 years



How does Copyright arise?

- Automatically arises upon creation of work
- Registration is not required
- Governing statute: *Copyright Act*



Benefits of Registration

- Notice of interest available to public
- Presumption of ownership
- Can assist owner in negotiating sale or license of rights
- Strengthens position for enforcement of rights (e.g., litigation context)
- Relatively inexpensive



Moral Rights

- Author (not owner) of a work has
 1. the right to the integrity of the work
 2. the right to be associated with the work as its author by name or under a pseudonym
 3. the right to remain anonymous
- Cannot be assigned or transferred but can be waived
- Assignment of copyright does not imply transfer or waiver of moral rights



Ownership

- General rule: the author of a work is the first owner of the copyright in the work
- Contract of services vs. contract for services (employee vs. contractor)



Ownership (cont'd)

- Employment: where author is an employee and the work is made in the course of employment, employer is first owner absent a contract to the contrary
 - factual determination
- Generally, independent contractor will be first owner



What is a Trade-mark?

- Word, symbol or design, or combination of these, used to distinguish wares (goods) or services of one entity from those other entities
- Brand names, marketing, goodwill / reputation



What is a Trade-mark? (cont'd)

- Ownership of trade-mark allows owner to exclude others from using the trade-mark in association with certain wares and services
- Duration: may be perpetual (15 years plus renewals for registered trade-marks)
- Jurisdiction: limited geographically to:
 - region in which used, if unregistered trade-mark
 - Canada, if registered trade-mark



How does a Trade-mark arise?

- By use of mark to distinguish an entity's wares / services from those of others – automatic
- Registration provides additional protection and rights
- Governing statute: *Trademarks Act*



Why Register a Trade-mark?

- Evidence of exclusive right to use the trade-mark across Canada
- Onus is on infringer to prove its rights
- Rights throughout Canada
- Registrations searchable by public – preventive measure
- Prerequisite for franchising



Why Register a Trade-mark? (cont'd)

- Foundation for goodwill / value of goods, services and business
- Assists with licensing of trade-mark
- Limited incontestability after five years of registration
- Trade-mark infringement as a cause of action – broader scope of protection than passing off



Restrictions on Registrability

- Clearly descriptive or deceptively mis-descriptive of character or quality of wares/services
- Primarily merely the name or surname of an individual who is living or died not more than thirty years ago
- Confusing with a registered trade-mark
- Prohibited mark – attributes of governmental body or organization; official marks



What is a Patent?

- Owner of patent has the right to exclude others from making, selling or using the invention defined by the patent
- Registration is required for protection – not automatic
- Statutory rights only
- Governing statute – *Patent Act*



What is a Patent? (cont'd)

- Definition: invention means any new and useful art, process, machine, manufacture or composition of matter or any new and useful improvement in any art, process, machine or composition of matter.



What is a Patent? (cont'd)

- New inventions and improvements
- Duration of protection: 20 years from date of filing
- Protection limited to Canada
- Mandatory disclosure of information



What is a Patent? (cont'd)

- No protection available if more than 1 year has passed since invention made public. Considered made public if:
 - a) There has been disclosure to a party that is not obligated to keep the invention in Confidence; or
 - b) Someone else has "practiced" or sold the invention
- First to file rule



What Constitutes an Invention?

- Definition: invention means any new and useful art, process, machine, manufactured or composition of matter or any new and useful improvement in any art, process, machine or composition of matter.



What Constitutes an Invention? (cont'd)

Key Features:

- Novelty – new
- Utility – useful
- Ingenuity – non-obvious



What Constitutes an Invention? (cont'd)

Types of inventions:

- Product
- Composition (chemical)
- Apparatus (machine)
- Process (method)
- Improvement on any of the above



What Constitutes an Invention? (cont'd)

Not patentable inventions:

- Scientific principle
- Abstract theorem
- Idea
- Method of doing business
- Computer program per se
- Method of medical treatment



Ownership of Patent Rights

- Inventor vs. Owner
- General rule: inventor is first owner
- Exception: if inventor employed *for the purpose of inventing*, then employer may be owner, **BUT** cooperation of inventor may still be required
- Joint inventorship and ownership



Strategy – I.P. Protection / Due Diligence

Steps for Conducting Review

- Identify intellectual property
- Classify intellectual property
- Evaluate strategy and methods of protection
- Review documentation



Strategy – I.P. Protection/Due Diligence (cont'd)

Types of Documents to Review

- Canadian Intellectual Property Office (CIPO)
 - registration / grant
 - prosecution / file history
- Litigation searches
- Legal records pertaining to intellectual property prosecution
- Contractual documents relating to intellectual property



Strategy – I.P. Protection/Due Diligence (cont'd)

Key Issues

- Validity / existence of enforceable intellectual property rights and grants
- Ownership and rights: Consider the who, what, when, where, why and how of creation, development, use, protection needed, etc.
- Assess whether contractual definition of relationship required



Strategy – I.P. Protection/Due Diligence (cont'd)

- Ownership and rights – some issues:
 - who is inventor / author / creator / owner – assignments or other agreements in place?
 - joint ownership/development – rights, restrictions and obligations
 - key employees or founders – cooperation assured
 - ownership or licence
 - confidentiality / non-disclosure agreement
 - non-competition agreement



Strategy – I.P. Protection/Due Diligence (cont'd)

- Scope and duration of protection
 - scope of intellectual property
 - geography – whether key jurisdictions covered
 - term of protection
- Cost effectiveness – consider long term
 - investment in intellectual property
 - investment in protection



Strategy – I.P. Protection/Due Diligence (cont'd)

- Surrounding intellectual property, technology or prior art
 - need for acquisition or licensing of intellectual property from a third party
 - conflicting intellectual property
 - impact of competing intellectual property
 - scope of searching – patents (international), trade-marks (by region of use), etc.



Strategy – I.P. Protection/Due Diligence (cont'd)

- Terms of any licenses:
 - exclusivity
 - term
 - geographic limitations
 - scope of rights granted
 - ownership or assignment of improvements or derivative works



Strategy – I.P. Protection/Due Diligence (cont'd)

- Terms of any licenses:
 - allocation of risk – indemnities, exclusion of damages, cap on liability
 - rights of termination
 - rights of first refusal
 - representations and warranties



Strategy – I.P. Protection/Due Diligence (cont'd)

- Value from use of I.P. vs. sale or license of I.P.
- Impact of licensing of I.P.
- Registration documents and records – searching may be specialized
 - patents – prior art
 - trade-marks – common law sources
 - international elements
 - whether registrations reflect correct/desired particulars



Strategy – I.P. Protection/Due Diligence (cont'd)

- File / prosecution history – insight as to scope limitations and competing intellectual property
- Technology or IP-specific issues
- Software issues:
 - Form of Protection
 - Escrow Agreements
 - Sufficiency of Documentation
 - Open Source Code



Strategy – I.P. Protection/Due Diligence (cont'd)

- Litigation / opposition or threatened proceedings
- Other agreements and interests pertaining to intellectual property

Due diligence is very important!



B. Security Interests in Intellectual Property

1. Security Documents
2. Common Due Diligence Searches
3. Personal Property Security Act
4. Canadian Intellectual Property Office
5. Priority and Subordination
6. Restrictions and Conditions



Security Documents

- Loan agreement
- Security agreement
- Copyright mortgage and assignment



Common due diligence searches

- Personal Property Registry
- Canadian Intellectual Property Office (trade-marks, copyright, patents and industrial designs)
- Litigation and Bailiff
- Bankruptcy
- s.427 *Bank Act*



Personal Property Security Act

- Search the Personal Property Registry
- Filing a financing statement
- All PAAP versus a specific security interest



Canadian Intellectual Property Office (CIPO)

- Search the CIPO databases for trade-marks, copyrights, patents and industrial designs
- Ensure intellectual property is registered in a database prior to registering your interest
- Filing your "interest"
- Notice system only



Priority and Subordination

- Third party security interests
- Priority agreements



Restrictions and Conditions

- In addition to registrations, consider placing restrictions on use, licensing or disposition



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Intellectual Property Rights in Insolvency and the Real Risk

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A Significant Issue

- Over the last two decades, an ever-increasing reliance on IP
- An incredible percentage of businesses and industries license IP for one purpose or another




67

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A Significant Issue (cont'd)

- In 1996, U.S. corporations earned \$66 billion in royalty income by licensing technology
- Thus, most bankruptcies of a commercial enterprise involve a license of technology



68

The Problem

- Best way to describe the problem is by example
- The most known is *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*
- Licensee's business depended entirely on particular license and licensor filed for bankruptcy



The Problem (cont'd)

- Trustee permitted to reject (or disclaim) the license (contract)
- Lubrizol left with a claim for damages as unsecured creditor
- Catastrophic, not just for licensee but for lender



U.S. Congress Acts Quickly

- §365(n) of the U.S. Bankruptcy Code
- Licensee has protections and can elect:
 - (a) accept the rejection of a contract and rely upon damage claim or
 - (b) retain rights under license and maintain obligations without right of set-off



Canada

- Uncertainty
- No legislative protection (yet) similar to §365(n)
- Common law and property rights govern



What Happens?

- Bankruptcy and restructurings. Same result but get there a different way
- Characterization of a license is really just a contractual right to do what would otherwise be prohibited



What Happens? (cont'd)

- Upon bankruptcy, or in a restructuring, Courts can permit cancellation of contracts
- Then sell or re-license to third party and new party can enforce IP rights against original licensee
- No privity of contract



Recent Case

- B.C.C.A. – *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*
- No provision in BIA providing for disclaimer of IP license
- Concluded that trustee has a common law right to disclaim a contract



Recent Case (cont'd)

- CCAA – similar result in *Skeena Cellulose (Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.)*



Solutions?

- Ownership of the property!
- Partial assignment of IP
- Source code escrow agreements



Doom and Gloom? Help on the Way!

- Bill C-55, chapter 47
- BIA and CCAA will protect licensees – almost absolute
- Timing? Still not clear



In Conclusion...

IN THE MEANTIME –
BE CAREFUL!!!



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Canadian Landscape Changing for IP Licenses in Bankruptcy

BY JOHN R. SANDRELLI, PARTNER, FRASER MILNER CASGRAIN LLP

The technology explosion, the dot-com boom and its subsequent demise, and the continuing expansion of the North American economy — the constant thread through the last two decades has been the ever-increasing reliance by almost all businesses and industries on licensing intellectual property, technology, and other forms of intangibles for one purpose or another.

As early as 1996, U.S. corporations earned \$66 billion in royalty income by licensing technology to unaffiliated entities.¹ From the golf course developer that licenses sophisticated mapping technology to the video game producer that develops much of its own technology but must license significant components from others to create its games, no business is immune. Thus, it is rare for a bankruptcy of a commercial enterprise not to involve a license of technology in one form or another. Yet, one of the most overlooked areas in negotiating licenses is the possible bankruptcy of the licensor.

In the past, Canadian insolvency law has been ineffective in providing commercial certainty to licensors and licensees — and, in turn, their lenders — in the event of bankruptcy. Parliament has finally acted on this problem, but more remains to be done. This article explores various issues one faces in Canada in dealing with the licensing of technology and bankruptcy, discusses the changing landscape as a result of the two recent decisions on the point and proposed amendments to Canada's insolvency legislation, and addresses some practical considerations for those who contract for intellectual property and those who lend to licensors or licensees.

The *Lubrizol* Problem

The U.S. Bankruptcy Code was amended in 1988 following the prominent case of *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers,*

Inc.,² to allow a licensee to elect to retain its rights under an intellectual property licensing agreement — or to require the trustee to permit it — if the agreement is rejected by the trustee. In *Lubrizol*, the licensee's business depended entirely on a particular license. Nonetheless, the trustee was permitted to reject (the Canadian equivalent is to disclaim) the contract, leaving *Lubrizol* with a claim for damages as an unsecured creditor. Section 365(n) of the Bankruptcy Code was added in response in an effort to protect licensees of intellectual property.

It is rare for a bankruptcy of a commercial enterprise not to involve a license of technology in one form or another.

Under Section 365(n), a licensee of rights to intellectual property can elect one of two sets of consequences upon rejection or disclaimer of the contract:

- Treat the rejection as a termination of the license, leaving the licensee with its various rights as a contract creditor under the Bankruptcy Code, including its breach of license (rejection) damage claim
- Elect to retain its rights under the license, in which case the licensee must continue making royalty payments due, without right of setoff. This is intended to strike a balance between the interests of a debtor licensor and a licensee of the debtor's intellectual property.

In Canada, it is less than clear how the insolvency of a licensor will affect a license and the licensee's rights. Canada has two primary insolvency statutes, the Bankruptcy and Insolvency Act (BIA)³ and the Companies' Creditors Arrangement Act (CCAA).⁴ Until recent proposed reforms to the BIA and

CCAA — the fate of which remained uncertain at the time of this writing — little legislative guidance existed in Canada. As a result, both licensors and licensees had to look to common law and traditional concepts of property in determining the rights of parties under a license.

Given the absence of any similar statutory direction in Canada, the nature of a license is important because, upon bankruptcy, all property owned by a debtor devolves to a trustee. Courts have characterized this situation in two different ways. If the licensing contract provides for an assignment of technology to a licensee, arguably the debtor licensor no longer has an interest in it, leaving nothing to devolve to the trustee. Such a result would support the licensee's right to continue to operate its business in reliance on the technology unfettered.

On the other hand, most licenses of intellectual property are properly construed as merely allowing a licensee to do what otherwise is prohibited. Since the decision of the Supreme Court of Canada in *Compo v. Blue Crest Music Inc.*,⁵ this latter characterization of a license generally has been well-settled in Canada and has governed or at least influenced judicial decisions made in the area of insolvency and licenses. What followed in Canada have been efforts by licensees of intellectual property — and sometimes lenders to those licensees — to structure contractual arrangements in such a way as to strengthen their position that property resides with the licensee, as distinct from the licensor.⁶

Those efforts and the ability of a licensee to maintain its intellectual property rights in the event of a bankruptcy of a licensor reached their zenith in Canada in 1991, following the decision of Donald J. of the British Columbia Supreme Court in *Re Erin Features No. 1 Ltd.*⁷

continued on page 2

continued from page 9

In that case, a movie distributor had purchased exclusive Canadian distribution rights of a film that had been started by the debtor and ultimately was completed by its creditors following a bankruptcy.

The trustee applied for a determination of whether it could disclaim the distribution contract, thereby generating further recovery from the sale of the rights or direct distribution of the film. In finding for the film distributor, the court held that the marketing rights had been sold (property was essentially transferred). As a result, even though certain elements remained to be carried into operation (the contract was “executory”), the contract could not be disclaimed. At first blush, the conclusion that a licensee held a property interest and not merely a contractual interest was received enthusiastically by licensees and arguably provided some protection in the event of a bankruptcy. But the judge did not stop there, and an analysis of his subsequent findings in that decision tempered that initial enthusiasm.

Having found that the debtor had transferred a property right, the judge did not need to address the issue of when, if ever, a trustee could disclaim an executory contract, such as a license. The court went on to address the issue anyway and found that a trustee in Canada had the power to disclaim an executory contract, opening the door to a *Lubrizol* problem, which the U.S. Congress had hurried to cure with its amendment to that country’s Bankruptcy Code.

As a number of authors have said, the *Lubrizol* decision was potentially devastating for licensees of intellectual property. Following *Erin Features*, that potential became very real in Canada, despite conclusions by case commentators at the time that once the issue was put squarely before the court and the law was analyzed correctly, Canadian courts likely would conclude that trustees have no general right to disclaim contracts in Canada.⁸

The issue did not come to the forefront again until recently, when the British Columbia Court of Appeal, in *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*,⁹ concluded that a trustee has a common law right to disclaim a contract entered into by a bankrupt entity.¹⁰ In *New Skeena*, the issue before the court was whether a receiver could disclaim a forestry contract which, pursuant to unique

British Columbia legislation, entitled logging contractors to nearly perpetual rights or replaceability of contract.

Notwithstanding that it has been relatively clear in Canada for some time that a receiver is not bound by existing contracts made by a debtor and can disclaim them, it was argued that a receiver could have no such power because no similar statutory power existed for trustees. For this reason, in part, the court in *New Skeena* agreed to review the issue in light of the confusion in Canadian law regarding the power of trustees to disclaim contracts.¹¹

As a number of authors have said, the *Lubrizol* decision was potentially devastating for licensees of intellectual property.

As there is no general provision in the BIA that gives a trustee power to disclaim a contract¹² — or an intellectual property license, for that matter — the Court of Appeal focused on common law as it existed in England prior to enactment of the English Bankruptcy Act in 1869, which first gave trustees in that country the power to disclaim.¹³ The court also noted that trustees in both Australia and the U.S. have statutory power to disclaim contracts.

While academics and others who have analyzed common law and the result in *Erin Features* might find the issue much more difficult to resolve, the Court of Appeal concluded unequivocally that there is a common law power in trustees to disclaim executory contracts. As a result, the *Lubrizol* problem is now very real in Canada and potentially places the future of businesses that rely heavily on licensed assets in jeopardy. Given this and the ineffectiveness of some of the contractual solutions that creative parties have negotiated into licenses,¹⁴ only an amendment to Canada’s insolvency legislation can provide the necessary commercial certainty for both licensees and their lenders.

CCAA Restructurings

Despite a dearth of authority supporting the proposition, it has long been recognized that a receiver can disclaim contracts of a debtor, including intellectual property licenses, a position confirmed recently in *New Skeena*. In Canada, a court-appointed receiver is often used to effect a sale of a business as a going concern, although in recent years the CCAA also has been used as a means of doing so as part of a court-supervised restructuring.

As most readers may be aware, the CCAA is the primary statute in Canada used by companies to restructure and compromise their obligations to creditors. The CCAA has always been a flexible and accommodating statute, giving courts broad discretion to balance the interests of various stakeholders with a view to bettering the collective interests as a whole.

Notwithstanding the lack of any statutory provision in the CCAA with respect to the disclaimer of executory contracts, a standard CCAA order provides for a debtor to terminate contracts, including intellectual property licenses, if there is an economic advantage in doing so. Accordingly, a debtor can disclaim a contract, terminating its obligation to perform and thereby relegating a licensee’s claim to that of an unsecured claim in damages. Therefore, as in the context of a trustee in bankruptcy, a licensee is left particularly vulnerable in the event of a restructuring under the CCAA.

This vulnerability was highlighted in a case involving the restructuring of Eaton’s Department Stores in the late 1990s, when the court had to decide whether Eaton’s could terminate a contract for credit card services with a third party.¹⁵ In rendering his decision, Farley J. emphasized that one of the underpinning policies of the CCAA is to balance the interests of various stakeholders, which could only be served by recognizing that a debtor has the power to terminate or disclaim a contract in conjunction with a plan of arrangement. Farley dismissed an application by the credit card service company to compel Eaton’s to honor the agreement.

Most recently, in a decision involving *Skeena Cellulose (Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.)*,¹⁶ the British Columbia Court of Appeal reaffirmed the court’s jurisdiction to permit a debtor to disclaim executory contracts in CCAA proceedings. In *Skeena*, the Court of Appeal similarly noted the court’s broad discretion under the CCAA and the necessity to balance a variety of interests, guided by fundamental concepts of fairness and reasonableness. With this in mind, the court went on to uphold the decision of the lower court, which had the effect of sanctioning the disclaimer of certain replaceable, or perpetual, logging contracts. Thus, in the context of restructuring, the licensor can terminate further obligations to the licensees and restrict them to a claim in damages.

Yet, some good news is on the way for licensees in Canada: legislative reform.

continued on page 3

continued from page 2

Legislative Reform

Bill C-55 is the culmination of the Canadian insolvency law reform process that began in 1997, when the BIA and CCAA were last amended. At that time, provisions were added requiring that both be reviewed by a committee after five years to identify areas in which further amendments might be advisable. This task was assigned to the Senate Standing Committee on Banking, Trade and Commerce, which conducted hearings at which representatives for a number of organizations spoke. At the same time, Industry Canada, the Ministry responsible for insolvency in Canada, consulted extensively with various interest groups. Bill C-55 is the result.

Notwithstanding that the bill did not incorporate various recommendations of the Senate Committee and was fraught with various difficulties and problems, it was rushed through various levels of study and passed into law the day before the government's dissolution on November 25, 2005, which led to a federal election on January 23. Given the Senate's vocal objections to the bill being passed in a rush, a deal was struck under which the government agreed to refer the bill — now an act — to the Senate Committee for further study. It also agreed that the act would not come into force before June 30.

That is how the landscape remains today. A proposed reform is law but is not yet in force, and the law may be changed further. In any event, it appears that most of the act's provisions likely will come into force later this year. Significantly, the BIA and the CCAA both will be amended specifically to permit a debtor to disclaim agreements. The act excepts from that certain types of agreements and provides for a process and a determination by the court as to the ultimate propriety of disclaimer in particular circumstances.

Notably, in the case of licenses of intellectual property, the BIA and the CCAA will protect the continued use of intellectual property by licensees, notwithstanding the disclaimer, so long as the party continues to abide by the obligations for its use. As this protection is close to absolute, the landscape in Canada will change significantly from what

currently exists, in which the *Lubrizol* problem and the potential for the devastating impact of a disclaimer are very real, to a statutory scheme similar to that of U.S. Bankruptcy Code Section 365(n).

The licensees' right to use licensed intellectual property notwithstanding, the disclaimer is intended to protect the interests of a licensee whose business may be materially impacted by the disclaimer. While the inability to enjoy the full benefits of disclaimer may have a negative financial impact on a debtor/licensor, the potential serious harm to the licensee mitigates in favor of the continued right to use the intellectual property. However, interestingly the act does not purport to give a court the authority or discretion to balance these interests, even in circumstances in which a licensee's business will not be adversely affected by the disclaimer.

Such an absolute approach seems inconsistent with the policy generally underlying both the new amendments to the CCAA and the CCAA itself — that is, to balance the interests of various stakeholders in particular circumstances. Further, the provisions respecting intellectual property licenses are counter to the recommendation by the Senate Committee that there should be flexibility and a balancing of interests built into any law permitting the disclaimer of executory contracts.¹⁷ It is for this reason, in part, that at least one reputable and reasonably balanced interest group — the National Bankruptcy and Insolvency Law Section of the Canadian Bar Association — has criticized the proposed amendment.¹⁸

Help on the Way

The significance of technology licensing to Canadian business is immeasurable, as is the importance of ensuring a continuing right to use business-reliant technology following the insolvency of a licensor. Although it has taken almost 15 years since the decision in *Erin Features*, it seems that in Canada this is now being statutorily recognized. While the outcome of further study of the act remains to be seen, it also seems likely that licensees in Canada will receive some protection as a result and no longer will be exposed to the potentially devastating loss of technology rights upon termination of a license following the insolvency of the licensor. [\[E\]](#)

¹ Degan, S.A., 1998, "The Licensing Payoff from U.S. R&D," *Journal of the Licensing Executives Society International*, 33 1-8

² 756 F. (2d) 1492 (Ninth Cir. 1985), cert. denied, 475 U.S.C. 1057 (1986)

³ R.S.C. 1985, c. B-3

⁴ R.S.C. 1985, c. c-36

⁵ [1980] 1 S.C.R. 357

⁶ Possible techniques include a transfer of the property, partial assignments of the technology itself, or an escrow agreement allowing a licensee to gain access to source codes for software in the event of default. While each of these techniques may be valuable in some circumstances, none is truly effective in protecting the licensee in the event of certain kinds of defaults and certain kinds of proceedings.

⁷ (1991), 8 C.B.R. (3d) 205

⁸ Gabor G.S. Takach and Ellen L. Hayes, Comment, 15 C.B.R. (3d) 66

⁹ [2005] B.C.J. No. 546

¹⁰ Although Southin J.A. concurred, she indicated that she was "uneasy," as she did not have the opportunity to study the issues sufficiently. As time was of the essence, she concurred in the decision without further comment.

¹¹ In Canada, such analysis is technically obiter, although the decisions of Courts of Appeal are usually entitled to significant deference.

¹² The one exception being in relation to real estate leases.

¹³ 1869 (32 & 33 Vict.) c. 71

¹⁴ *Supra*, at Note 7.

¹⁵ *Re Eaton's* (1999), 14 C.B.R. (4th) 288

¹⁶ 2003 BCCA 344; [2003] B.C.J. No. 1335 (C.A.)

¹⁷ *Debtors and Creditors Sharing the Burden: a Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003.

¹⁸ See the submission on Bill C-55, Bankruptcy Reform, prepared by the National Bankruptcy and Insolvency Law Section of the Canadian Bar Association, November 2005, F-9.

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