



## FRASER MILNER CASGRAIN LLP

### **WHAT'S IN AN OWNERSHIP STRUCTURE?**

When developing and/or financing land, the ownership structure of the purchaser/borrower is of significant importance to both the lender and to the purchaser/borrower and requires careful consideration. The ownership structure can be more complicated or layered depending on the nature of the development and the financial, strategic and tax objectives of the purchaser.

There are various forms of ownership structures, some involving single purpose corporations, partnerships, joint ventures, co-tenancies or trusts. Mixed use developments often require more complicated ownership structures, particularly where the various elements of the development will be retained or operated by different parties. For example, if the objective of the purchase is for development and sale, a simple ownership structure might be most appropriate whereby a bare trustee or nominee owns the land (with or without significant assets) holding the land for an underlying (usually undisclosed) beneficial owner.

However, when purchasing the land but retaining all or part of the developed property as an income source, a multi-layered ownership structure where the beneficial owner is “buried” under different entities for tax purposes, as well as for lower risk exposure, may be more appropriate. Further, where the purchaser is interested in certain types of business operation, a partnership or joint venture structure may be more appropriate to bring the experienced developer client together with the additional resources needed for that particular type of project.

From the lender’s perspective, ownership structures are an important element of the lending assessment as this will affect the covenants the lender will require on the loan, particularly where title is taken in a nominee/bare trustee rather than the underlying beneficial owner(s). The lender will most certainly want to look to the beneficial owner(s) to provide some level of financial covenant for all or part of the loan, typically by way of a guarantee. The lender will also want to review current and past financial statements of all entities providing financial covenants. The lender will want evidence that the corporate borrower(s) and any guarantors are validly

subsisting corporations, authorized to conduct business in the province, free of any registered security interests under the applicable personal property security legislation that may negatively impact the lender's position and confirmation that the parties are not in bankruptcy/insolvency proceedings. Shareholders of all entities in the ownership structure will have to be disclosed to the lender.

Frequently, and particularly where the named borrower does not have a strong financial history, a lender will likely require the borrower to put up collateral or secondary security which is intended to act as a fall back for the lender if the primary security (i.e., the land) fails. Collateral security is in certain circumstances of equal significance to the primary security. Collateral security provides the lender with additional remedies and flexibility to the enforcement of the loan. Examples of collateral, additional or secondary security are: general assignment of rents (for income producing properties); specific assignment of leases (particularly in the case of major tenants of mortgaged properties); general security agreement (security over personal property and assets of the borrower); assignment of contracts (to help the lender operate the business of the borrower or complete the project in the event of default) and guarantees (personal or corporate).

From a risk tolerance perspective, it is important to consider the position of each entity in the ownership structure and how it may be exposed to financial or other risks through its involvement in the development. Distinct from contractual or financial liabilities or obligations under the lender's security documentation, there may be other legally binding or statutory obligations that arise under legislation applicable to the development to be considered, such as for example, under the Construction Lien Act, the Condominium Act, 1998, employment or planning legislation and/or other applicable legislation. All of these issues should be canvassed thoroughly with your solicitor when planning your next development. In summary, before finalizing the purchase agreement, give careful consideration to the proposed ownership structure and the financial status and business nature of the entity(ies) that will act as title holder, beneficial owner, borrower, guarantor or business operator. Consider these four points for each entity involved in the ownership structure:

- what is this entity's financial strength and assets – will these be sufficient? Do the assets need protection?
- what are its present and future borrowing needs – how will these be impacted by its involvement in this development?
- what are the entity's risks if involved – financial or otherwise? Are these risks appropriate or reasonable?
- consider the business of each corporate entity – how will its relationship in this project affect its business objectives.

The foregoing constitutes a very brief overview of some of the underlying considerations and the different types of ownership structures that may be suitable for mixed use developments; however, many of the legal or technical issues that may arise have not been discussed due to the brevity of this article. Feel free to contact the writer at 416.863.4404 to discuss the details of your particular development.