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REVIEW OF THE JAMESON HOUSE RESTRUCTURING

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Jameson House Properties Ltd. and Jameson House Ventures Ltd. (the Jameson Companies) were incorporated to develop a 37-storey mixed-use building in downtown Vancouver called Jameson House. By 2008, after many years of planning and development, the Jameson House project was well underway. After more than one year of construction under the stewardship of an experienced head contractor, the Jameson companies had pre-sold a majority of the units in the building, and despite having nearly spent their existing interim financing, the Companies were in the process of finalizing sufficient construction financing to build out the project.

Since the latter part of 2008 was also a time of financial turmoil, capital was in short supply and lenders around the world were taking a serious second look at their loan portfolios. For Jameson House, this environment seemed to give the lenders cold feet, and despite existing financing commitments the Jameson companies

found themselves without their construction financing. This left the companies in mid-construction with no available capital, depleted their interim financing, and construction deadlines looming in relation to their existing pre-sale agreements.

By early November, 2008 the Jameson Companies had turned to their restructuring advisors for help. As there was no money left for construction activities, workers were preparing to down-tools. The interim financing loans were about to become due and lenders were anxious to be paid out. However, there was value in the Jameson House project. A majority of the units had already been sold, and based on the existing pre-sale agreements there was significant value in the project if it could be built out. The Jameson Companies needed a new plan, and time to formulate one.

The solution was to file for protection under the *Companies' Creditors Arrangement Act* (the CCAA). The CCAA is a Canadian statute, which was enacted during the great depression, designed to give a company relief from its creditors when it is in a stressed financial position. The CCAA permits the courts to grant broad relief and effectively pause all actions against a company while the company formulates a plan that will allow it to continue on its business. The purpose is to preserve the social and economic benefits that exist in an ongoing business entity.

The Jameson Companies filed for CCAA protection on November 14, 2008, and commenced what would turn out to be a nine-month restructuring with important implications not only for the restructuring profession, but also for developers and lenders who may find themselves in similar situations down the road. The purpose of this article is to review the Jameson restructuring experience, examine some of the unique aspects of this process, and identify any helpful lessons for future real estate development restructurings.

1. THE CCAA – REQUIREMENTS, PROCESS, AND RESULTS

Before reviewing the Jameson case, it will be useful to provide an overview of general insolvency processes. A CCAA proceeding is the result of one of three situations

(bankruptcy, receivership or restructuring) that an insolvent company may find itself in if pressed by its creditors, or financially stressed as a result of weakened cashflow or capital.

Bankruptcy (insofar as a corporation is concerned) is a statute-driven process designed to liquidate assets quickly, efficiently and transparently. Although the terms “insolvent” and “bankrupt” are often used interchangeably, they are distinct concepts. An “insolvent” company is not necessarily “bankrupt” – the former refers to a state of financial difficulty, the latter means a court has declared a person or company to be “bankrupt”. A company may assign itself into bankruptcy, or be petitioned into bankruptcy by its creditors. In a bankruptcy, any active business activities are shut down, and assets are sold off by a trustee appointed by the court.

Receivership is strictly a creditor-driven process. A receiver is appointed under either a security agreement or a statute. There is more flexibility for methods of realization in a receivership; as the receiver may carry on the business for some period of time, or immediately terminate ongoing operations to sell off assets. Ultimately, however, the receiver’s goal is essentially the same as a trustee in bankruptcy – liquidate the assets or business, and distribute the proceeds to creditors.

Finally, there is restructuring. Restructuring is unique from bankruptcies and receiverships in that it is a debtor-driven process. It can only be invoked by a debtor, and the debtor generally retains control of its assets, business and operations during the process. The purpose is to give a debtor a period of time to come up with a “plan” that represents a compromise with the creditors, aiming to preserve going concern value in a viable business entity that has simply fallen on hard times.

Restructurings can take place under the *Bankruptcy and Insolvency Act* (the *BIA*) or the *CCAA*. The *BIA* process is fairly regimented, providing fixed deadlines and procedures. The *CCAA*, on the other hand, is a “skeletal” statute, which gives the court and restructuring advisors the ability to tailor a restructuring process to the particular company. The result is that the *CCAA* can be a more complicated (and therefore expensive) process for restructuring, but it provides the flexibility required to deal with the myriad of issues that invariably arise in the course of most restructurings.

The *CCAA* is only available for mid to large sized companies, in that the company must have at least \$5 million in debt to invoke the statute. In addition, the company must be insolvent; it must be unable to meet its

liabilities as they become due, or its total liabilities must be greater than its total assets.

Assuming these requirements are met, the first step to initiating a *CCAA* proceeding is to apply for an “initial order”. It is possible to apply for the initial order without notice to creditors, although this approach typically requires extenuating circumstances (i.e. a serious risk that creditors will enforce security if given notice). The initial order sets out the procedures that will be followed through the restructuring process, so can vary depending on the type of business filing for protection. However, there are two crucial elements to every initial order: a stay of proceedings, and the appointment of a monitor.

The stay of proceedings is the backbone of a restructuring. The stay prevents all (or most) creditors from attempting to collect on an existing debt, from suing or taking other legal proceedings against the debtor, or otherwise interfering with the debtor’s restructuring efforts. In addition, the stay can extend to non-creditors, such as contracting parties and others doing business with the debtor. The purpose of the stay is to provide a debtor with “breathing space” from its creditors so it may have the necessary time to formulate a plan. The initial stay is limited to 30 days, however it may be extended on subsequent applications so long as the court is satisfied the restructuring is not doomed to failure.

The monitor also plays a crucial role in *CCAA* restructurings. The role of the monitor is to act as the “eyes and ears” of the court. While the monitor does not have authority to carry on business operations, it is given significant access to the debtor company so it may report to the court on the progress of the restructuring. In many circumstances, the opinion of the monitor will carry significant weight with the court when it is deciding whether or not to grant orders. In addition, the monitor can be an effective party in assisting with the development of a plan.

Once the process is started, the debtor needs to come up with a plan of compromise. While technically there is no deadline for proposing a plan, subsequent extensions of the stay will become increasingly difficult if no plan is proposed or no progress is made towards one. A typical plan involves paying most pre-filing creditors a portion of their claim. As the majority of creditors will need to approve a plan, it is necessary to offer something better than what would be received in a liquidation scenario. Methods of funding a plan, however, are virtually unlimited, for example converting debt to equity, refinancing debt, diluting existing shareholders, or selling some or all of the assets.

A plan of compromise must be accepted by the creditors and approved by the court before it becomes binding. Approval from the creditors must be by majority in number of creditors voting, and 2/3 in value of claims. If the creditors approve a plan, the debtor company must apply for court approval. The court will not necessarily “rubber stamp” a creditor approved plan, as it has to assess the fairness and reasonableness of the plan. However, it is relatively rare for the court to refuse approval after the creditors have signed off on a plan.

2. VERSATILITY OF THE CCAA

As discussed, the major benefit of the CCAA is that it provides debtor companies with a flexible vehicle to address a variety of issues that may arise in a restructuring. The Jameson proceeding was an example of this flexibility, as there were a number of novel issues that had to be dealt with to complete the restructuring.

The source of the CCAA’s flexibility is the “skeletal” nature of the statute. Despite the broad application of the *Act*, it is surprisingly short (just over 60 sections). The main provision is section 11, which gives the court power to stay proceedings against a debtor, and further broad discretion to grant “any order that it considers appropriate”¹. In addition, the court can (and has) used its inherent jurisdiction to control its own process and supplement the CCAA where necessary to facilitate a restructuring. Thus, if a debtor company can convince the court that the circumstances exist to justify a particular order, the court likely has the jurisdiction to grant it.

In the Jameson proceedings, one important issue was the enforceability of the pre-sale contracts. In particular, pre-sale purchasers were alleging they had various contractual and statutory rights to rescind their agreements, and were seeking to recover their deposits. The Jameson Companies required certainty that the pre-sale contracts were enforceable to complete their restructuring. As a result, the court was asked to exercise its discretion under the CCAA to make orders overriding potential contractual or statutory rights of rescission, to the extent any existed, and bind purchasers to their contracts.

The main problem with this request was that, as pre-sale purchasers were found not to be “creditors” of the Jameson Companies, they were not entitled to vote on the plan of compromise. Thus, the court was being asked to affect the rights of parties that did not have a direct “say” in the terms of the plan. This was not the first

time courts had been asked to make such orders in CCAA proceedings, but it is an extraordinary form of relief.

In Jameson, both the B.C. Supreme Court and Court of Appeal ultimately held that pre-sale purchasers had no right to rescind (either contractual or statutory). However, the B.C. Supreme Court further held that to the extent such rights did exist, it would exercise its discretion to prevent pre-sale purchasers from relying on those rights. From a legal perspective, this is of particular significance as courts generally do not have the authority to override an express statutory right. In this case, the court held it was able to use the CCAA to override statutory rights that arose under the *Real Estate Development Marketing Act* (REDMA) (a provincial statute) pursuant to the doctrine of paramountcy.

Beyond the court’s versatility to make orders that facilitate restructurings, it will often also assist debtors in resolving issues in an expedited manner. In the Jameson case, for example, pre-sale purchasers sought to litigate a number of issues:

1. Did pre-sale purchasers have claims against Jameson such that they were creditors entitled to vote on a plan of arrangement?
2. If not creditors, were the pre-sale purchasers otherwise relieved from their contractual obligations, such that they were or should have been outside the umbrella of the CCAA?
3. What was the drop dead date for completion of the units?

These were substantial issues which, in normal litigation, could have required a lengthy process and hearing to resolve. However, in the Jameson proceeding, as in most CCAA proceedings, there was not enough time to engage in protracted litigation and still succeed in a restructuring. Thus, the court allowed the applications to be brought in a relatively short time span, having all of the issues decided in a matter of months.

As the Jameson House proceedings have shown, under the CCAA a debtor company may seek broad relief in pursuit of a restructuring, and is typically able to do so on a relatively expedited basis. This versatility was key to a successful restructuring in Jameson, and provides a useful benchmark for companies in the future.

¹ *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s.11

3. REDMA CONSIDERATIONS

As most real estate development companies are aware, *REDMA* imposes broad disclosure obligations on a developer. *REDMA*, and its attendant policy statements, set out a number of particular facts which a developer must disclose to its pre-sale purchasers. Failure to follow these requirements and disclose these facts can have drastic consequences for a developer, including granting purchasers a right of rescission and allowing them to walk away from their agreements altogether.

In the Jameson House proceeding, the main problem that arose as a result of *REDMA* (which would be common to any insolvent developer) was the need to provide continuous disclosure of changes to “material facts” about the development. The fact that was the focus of those proceedings was the existence (or non-existence) of construction financing. Under their amended disclosure statements, the Jameson companies had told purchasers there was a firm financing commitment. However, until the conclusion of the *CCAA* proceedings, there was no further disclosure regarding the state of the companies’ financing, or their financial condition.

The regulatory issues contemplated in the Jameson proceedings were:

Does a *CCAA* filing trigger a requirement to file a new disclosure statement under section 16(2) of *REDMA*?

Does a *CCAA* filing require a developer to file an amended disclosure statement under section 16(3) of *REDMA*, and if so when?

1. Requirement to File New Disclosure Statement

As discussed above, *REDMA* imposes an obligation on developers to provide ongoing disclosure of all changes to any material facts that affect the development. The definition of material fact and these disclosure obligations are found in the following provisions of *REDMA*:

Definitions:

“Material Fact” means in relation to a development unit or development property, any of the following:

- (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect the value, price or use of the development unit or development property;

- (b) the identity of the developer
- (c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;...¹

“Misrepresentation” means:

- (a) a false or misleading statement of material fact, or
- (b) an omission to state a material fact.²

Non-compliant disclosure statements

16 (1) If a developer becomes aware that a disclosure statement does not comply with the *Act* or regulations, or contains a misrepresentation, the developer must immediately

- (a) file with the superintendent, as applicable under subsection (2) or (3),
 - (i) a new disclosure statement, or
 - (ii) an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation, and ...

(2) A developer must file a new disclosure statement under subsection (1)(a)(i) if the failure to comply or misrepresentation referred to in that subsection

- (a) is respecting a matter set out in paragraph (b) or (c) of the definition of “material fact” ...
- (b) is of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed.

(3) A developer must file an amendment to the disclosure statement under subsection (1)(a)(ii) in any case to which subsection (2) does not apply.

As set out above, certain changes require the developer to file a new disclosure statement, while others require

¹ BC Laws, <http://www.bclaws.ca/>

² *Ibid*

only an amended disclosure statement. The significance of filing a new, as opposed to amended, disclosure statement arises from section 21 of *REDMA*, which states that receipt of a new disclosure statement gives pre-sale purchasers a seven-day right of rescission. Receipt of an amended disclosure statement, on the other hand, gives no statutory right of rescission.

Under *REDMA*, the obligation to file a new disclosure statement arises in three circumstances:

1. where there has been a failure to comply or misrepresentation in respect of the identity of the developer
2. where there has been an appointment of a receiver, liquidator or trustee in bankruptcy or other similar person acting under authority of a court
3. the nature of the change is so substantial that the Superintendent of Real Estate gives notice to the developer to file a new disclosure statement

The Jameson decisions from the BC Supreme Court and Court of Appeal contain a number of findings regarding the conditions that require a developer to file a new disclosure statement, especially in the context of a company undergoing a restructuring. First, with regard to a change in the identity of the developer, the court found that such a change does not extend to changes in directors, shareholders, or even control of the developer entity. This was a crucial finding in Jameson and is useful for future restructurings. The ability to change shareholders, and even control of the company, without the court viewing the change as a change in the identity of the developer leaves a wide array of restructuring alternatives open to a development company in a *CCAA* proceeding.

Second, the court confirmed that a monitor appointed in a *CCAA* proceeding was not an “other similar person” as that term is used in *REDMA*. The principle difference between a monitor and a receiver or trustee in bankruptcy, as the court found, was that a monitor did not gain control over the business. As discussed, the monitor’s role is limited to “overseeing the operations of the debtor and reporting to court and interested parties” (see paragraph 14, 2009 BCSC 964).

The third circumstance, being a direction from the Superintendent, did not occur in the Jameson case and therefore was not considered by the court. However, the fact that the Superintendent decided not to require a new disclosure statement in the context of a *CCAA* filing

arguably sets an important precedent. Although the Superintendent appears to have discretion to treat any future case differently, the practice for the time being appears to require something beyond mere insolvency for the Superintendent to exercise its discretion. As a practical note, keeping this discretion in mind, it is likely advisable to keep the Superintendent informed as to the status of the project and the restructuring.

2. Requirement to File an Amended Disclosure Statement

In the event there is a change in a material fact (i.e. a fact that affects or could reasonably be expected to affect the value, price or use of the development units in question) which does not trigger the requirement to file a new disclosure statement, a developer is still required to file an amended disclosure statement. *REDMA* requires the developer to file such amendment “immediately”. While filing an amendment does not give rise to a statutory right of rescission under *REDMA*, failure to file an amendment when it should have been filed may result in existing contracts being rendered unenforceable under section 23. In addition, in light of recent case law, failure to file and deliver an amended disclosure statement after a material change takes place could entitle purchasers to rescind their agreements.

As a result, there were three important issues raised by this obligation in the Jameson case. These were:

- (a) was there a “misrepresentation”
- (b) if so when did it occur
- (c) when does the disclosure statement need to be filed by.

In the Jameson case, the court found there was no “misrepresentation” as that term is used in *REDMA*, so it was not necessary to analyze the second two questions in great detail. The court found the financing commitment which was in place, despite eventually falling away, was nonetheless firm. Moreover, the court found the loss of the expected financing did not affect the “value, price or use of the development unit or property”, per the definition of “material fact” in *REDMA*. Chief Justice Brenner (as he then was), in the course of that decision, held:

The Developer was able to continue work on the project until November 12, 2008. The principals of the Developer had an honest belief, until just prior to the filing that they would have access to sufficient construction financing.

More significantly, if this restructuring is approved by the court and if it succeeds, the purchasers will be entitled to receive precisely what it was they contracted for. If the Petitioners fail to deliver, the purchasers will have their full right of recourse under the terms of the agreements of purchase and sale. This being the case it is difficult to see that the value, price or use of the development unit or property has so far been affected.

Thus, in this case, the loss of “firm construction financing” was not a change in a “material fact”.

In the Court of Appeal decision, the court went on to say that even if there was a requirement to file an amendment, “immediately” in a commercial context should be construed as permitting a “reasonable time for compliance” [Para. 42]. This does not provide much certainty on the timing a developer must meet to avoid losing its pre-sale contracts, but it does show the court will likely recognize that a developer is not able to file an amendment the **instant** a material fact changes.

REDMA is relatively new legislation, and has not been considered in many cases (likely due to the fact that, until recently, the real estate market was strong enough that purchasers were not seeking to avoid their pre-sale agreements). These court decisions, therefore provide valuable insight into how this statute will be interpreted going forward, which is useful for real estate developers generally, and not just those in insolvent situations.

4. BENEFITS OF CCAA PROTECTION

As discussed, the CCAA process is designed to preserve and restructure viable business entities, and provides the flexibility and versatility necessary to address the unique issues faced in restructuring different types of businesses. In the case of insolvent real estate development companies, there are a number of advantages to restructuring under the CCAA, as opposed to simply attempting to work through financial difficulties outside a court process.

Prior to the Jameson House case, however, the question of whether CCAA relief was available to real estate development companies was arguably an unresolved issue. In earlier cases, both the B.C. Supreme Court and Court of Appeal had set aside CCAA proceedings invoked by real estate development companies, essentially on the grounds that the process was being misused to prevent secured creditors from enforcing their rights. In addition, real estate development companies are not typically ongoing businesses, but rather one-time entities existing only for the completion of a particular project.

Notwithstanding those legal challenges, there are now a number of proceedings, including Jameson House, which confirm that real estate development companies can file for CCAA protection. The common theme in those successful proceedings is generally the support of secured creditors – a factor which was not present in any of the decisions setting aside the CCAA process. While it has not necessarily been decided that this support is required to permit a real estate developer to seek CCAA protection, in practise it is very helpful if at least the senior creditors buy into the process.

There are, therefore, a number of challenges for real estate developers to meet before they can obtain CCAA protection in the first place. However, assuming it is available, what are the advantages to this process?

The main advantage, as discussed above, is the stay of proceedings. An insolvent company will typically be faced with a variety of issues which, if it is forced to deal with, could effectively prevent it from developing any kind of meaningful restructuring plan. Courts therefore have the power to prevent third parties from taking any kind of action against the debtor company, ranging from limiting collection remedies to providing broad protections for ongoing directors. All of these powers could be exercised by the court if it is convinced such orders are necessary to facilitate a restructuring.

In addition, the issues which arose in the Jameson proceeding illustrate a number of other benefits to the CCAA process for real estate developers. First, the CCAA provides a controlled environment to work with government regulators. In the course of the Jameson proceedings, the court granted an order temporarily preventing the Superintendent of Real Estate from exercising its discretion under section 16(2)(c) of *REDMA*, to require the filing of a new disclosure statement. This allowed the Jameson companies to work with the Superintendent throughout the restructuring without the immediate concern of being compelled to issue a new disclosure statement. In the end, after working with the Jameson companies and examining all the changes that took place as a result of the restructuring, the Superintendent decided there had not been any substantial change which required it to exercise its discretion.

A second advantage to the CCAA process is the ability to retain contracts valuable to a restructuring. As has now been discussed a number of times, the pre-sale contracts were vital to the restructuring of Jameson House. As a result, the court in the Jameson proceedings granted an order prohibiting pre-sale purchasers from exercising any right of rescission they may have during the restructuring process. At the end of

the process, the court also granted an order permanently preventing pre-sale purchasers from rescinding their agreement as a result of any event that occurred prior to the CCAA proceedings (although, as discussed above, the courts had already found no such right existed).

Generally speaking, a real estate development company may wish to preserve a variety of contracts beyond pre-sale agreements. For example, city service agreements, fixed price construction agreements, or favourably-priced supply agreements could all provide value in a restructured enterprise. Even if the insolvency has led to a breach of these valuable agreements, the court may determine that the contracts are binding notwithstanding the breach, if such an order is necessary to the restructuring process.

In addition, new amendments to the CCAA allow the court to order an assignment of a debtor company's contracts to a third party. While the provision has not yet been considered by the courts, it may be possible to liquidate valuable contracts (i.e. sell and assign the contract to a third party who would benefit from the agreement) in order to provide working capital to facilitate a restructuring.

A further advantage, being the flip side of preserving contracts, is the ability to disclaim agreements that are no longer advantageous to the CCAA company. In the Jameson case, given the number of changes implemented to the debtor's business, there were a number of pre-existing agreements that would have interfered with the restructuring plan. In the CCAA, the Jameson companies were able to terminate all of these agreements, and deal with any damage claims in the claims process, thus giving the Jameson companies the flexibility necessary to carry out their restructuring.

A third advantage, which is key to many industries that operate on low cash flow for periods of time, is the ability to borrow funds on a priority basis, ahead of all existing secured and other creditors, to facilitate ongoing business operations. This is typically referred to as "debtor in possession" or "DIP" financing. In the context of a real estate development company, this means an ability to borrow funds to continue with construction through the restructuring process. In Jameson, DIP financing was important for a number of reasons, but notably two. First, construction on the Jameson House initially stopped in the middle of building the parking garage. As a result, the work site was a large hole in the middle of downtown Vancouver, which was causing some concern for the City and neighbouring buildings. By resuming construction under DIP financing, the companies were able to address these concerns in a

timely manner without the need for further litigation or dispute.

Second, construction deadlines for Jameson pre-sale purchasers were fast approaching. As is common in pre-sale agreements, purchasers would acquire the right to walk away from their agreements if a completed unit was not delivered by a certain date. Ensuring that construction could resume as quickly as possible was crucial to meeting these deadlines and maintaining viability of the project.

As an alternative to DIP financing, a developer may be able to continue with construction under the "critical supplier" amendments to the CCAA. Under these provisions, if the court finds a supplier is "critical" to a company under CCAA protection, it may order the supplier to continue to provide goods and/or services throughout the restructuring process (with post-CCAA expenses secured by a priority charge, similar to DIP financing, ahead of existing lenders). In essence, the court may compel suppliers to provide goods or services on credit, notwithstanding the insolvency. Again, as this provision is new to the CCAA, it has not yet received judicial consideration, however in theory it could be a less expensive method of facilitating ongoing construction through a restructuring, or possibly an alternative where a DIP lender is not forthcoming.

The above are a few specific benefits to a CCAA filing which came up in the Jameson proceeding, and which may be useful to future insolvent real estate developers. However, as the CCAA is a flexible statute and may be adapted to suit the particular issues of any restructuring, there may be further benefits to each specific case.

5. CONCLUSIONS

The CCAA is a valuable tool that an insolvent real estate developer may invoke to resolve its financial difficulties. The Jameson proceedings provide an example of the flexibility of the CCAA to address unique issues that arise in a restructuring process. In addition, the court decisions made in the Jameson proceedings will help insolvent development companies assess their regulatory obligations under REDMA. Thus, the Jameson proceedings have provided useful insight into how a restructuring could benefit future real estate development companies that find themselves in a similar situation.

A BIRD IN THE HAND: RENEGOTIATING COMMERCIAL LEASES

BY MARK HECK

While there may be no obvious reasons to do so, renegotiating the terms of an existing lease can make sense for both landlord and tenant – especially in difficult economic times where a tenant may be struggling to make ends meet. In this case, it may be wiser for a landlord to accept less rent, temporarily, than to force a tenant into economic ruin by insisting on the original terms of the deal. This article will highlight some of the options to consider, as well as some points to keep in mind when renegotiating a commercial lease.

Rent Reductions

The most commonly sought amendment in lease negotiations is a reduction in rent. However, a rent reduction can be combined with other amendments which, over the remaining term of the lease, would be designed to minimize the economic loss to a landlord. The landlord could agree to a reduction or abatement of rent for a certain period of time in exchange for an extension of the lease during which rent would be increased allowing the landlord to recapture some or all of the foregone rent.

A landlord could also take the opposite approach by agreeing to a rent reduction along with revising the lease to a month-to-month term. This allows a landlord to still earn some income yet is in a position to terminate the lease in short order should a more able tenant be found.

A landlord may also consider changing the rent structure from that of a fixed rent to a percentage rent. This would alleviate some of the stress on the tenant during a slow sales period while allowing the landlord to recover higher rents when tenant sales revive. However, this requires more management on the part of the landlord, and the landlord must often rely on statements regarding sales prepared by the tenant.

A tenant may also want to take advantage of an economic slowdown to renovate the premises. A landlord may consider a reduction or abatement of minimum rent during renovations in return for the benefit of improving the premises.

Additional Security

The renegotiation of rent also provides the landlord with the opportunity to request additional security from the tenant. As such, a landlord may consider asking for an

indemnity or guarantee from the principal or principals of the tenant, or increasing the limits of an existing guarantee. A landlord may also go so far as to ask that the principal(s) support the guarantee with a collateral mortgage against properties owned by the principal(s).

More sophisticated landlords and tenants may consider a cash security deposit or a letter of credit securing the performance of the tenant's rental obligations. However, both forms of security have their advantages and disadvantages. Letters of credit are easier to deal with and less expensive for the tenant, but have finite terms and often must be renewed from year to year. Cash security deposits held by the landlord are more accessible by the landlord, but form part of the estate of a bankrupt tenant. As such, the trustee in bankruptcy could require the landlord to pay over the security deposit.

A landlord may also require the tenant to provide the landlord with a security interest over the personal property of the tenant. However, to be perfected, such interests usually must be registered with the appropriate personal property registry and must be monitored for renewals. In addition, the tenant's lender will invariably require postponement of landlords' security interest. Nonetheless, a general security agreement may still be worthwhile for a landlord especially where there is significant value in the tenant's personal property.

Partial Surrender of Premises

Rather than reducing the rental rate, a landlord and tenant may simply reduce the amount of space that the tenant is leasing. However, this is of little use to a landlord unless the surrendered space is marketable and the landlord has another party ready to lease the surrendered space. Any agreement to surrender space should also take into account the costs to the landlord to re-demise the space.

Other Considerations

Before agreeing to any amendments, the landlord must consider whether revisions to the lease run afoul of contractual arrangements with other parties. For example, the landlord's financing may prevent the landlord from agreeing to reduce rent, or reduce or extend the term of the lease, without the lender's consent. Most non-disturbance agreements also require the lender's consent to material changes to a lease.

A landlord should also consider predecessor tenant(s) or indemnifiers or guarantors. If an indemnity or guarantee was given in the context of an assignment of the lease,

such predecessor tenant(s) or indemnifiers or guarantors may not be liable for such amendments.

Finally, and perhaps most importantly, a landlord should consider whether a renegotiation of lease terms is actually warranted. In other words, a landlord should require the tenant to demonstrate that reduced rent will enable the tenant to continue to operate its business and pay rent. To this end, a landlord may request the tenant to provide the following:

- audited financial statements of the tenant for the last two or three fiscal years
- the monthly financial statements of the tenant for the last few months
- statements of cash flow for the last few months;
- cash flow budgets and forecasts for the upcoming year
- a revised business plan

The landlord may also consider requesting that the tenant's lenders/creditors be involved in any discussions that might occur.

Where a perfectly valid lease is in place, most landlords will instinctively resist changing its terms, especially if such changes mean accepting less if only for a short period of time. However, some short term pain on the landlord's part may go a long way to enabling the survival of a tenant which in most cases will benefit the landlord in the long run.

TORONTO'S NEW ZONING BY-LAW: ARE YOUR RIGHTS BEING PROTECTED?

BY MARK PIEL

In April 2009, the City of Toronto announced its intention to harmonize the existing 43 comprehensive zoning by-laws of the former municipalities that make up the City of Toronto. On November 4th, 2009 the City's Planning and Growth Management Committee recommended that City Planning Staff table a second draft of the Draft Zoning By-law to the Committee for comments before City Council is asked to consider the new by-law. While landowners will have to wait until February 12, 2010 for the release of the second version of the Draft Zoning By-law, the City has made available a draft for public consultation purposes which proposes significant change for developers of high-density residential buildings, owners of land currently regulated by area and site-specific by-laws, landowners facing delays in the start of construction who have acquired minor variances, and landowners with industrial operations in the City.

Tall Building Regulations

Currently, the design of tall buildings in the City is regulated by guidelines in the City's Official Plan and other planning documents.¹ Unlike a zoning by-law, the Official Plan is a general statement of intention and is not meant to regulate the use of land.² Likewise, design criteria that have not been incorporated into the existing zoning by-laws are intended to provide flexible criteria when assessing a development proposal. The City proposes to radically change the role of existing guidelines for tall buildings by incorporating provisions respecting tall building design directly into the Draft Zoning By-law.

While the incorporation of the existing tall building guidelines into the Draft Zoning By-law is still a work-in-progress³, under the Draft Zoning By-law, any party

¹ See Toronto Planning Division, *Toronto Official Plan, 2007*, online: City of Toronto <http://www.toronto.ca/planning/official_plan/pdf_chapter1-5/chapters1_5_aug2007.pdf>, s. 3.1.3; HOK Architects Corporation, *Design Criteria for Review of Tall Building Proposals*, June 2006, online: City of Toronto, <http://www.toronto.ca/planning/urbdesign/pdf/tallbuildings_udg_aug17_final.pdf>.

² *Re Woodglen & Co. Ltd. and City of North York et al.* (1984), 47 O.R. (2d) 614 (H.C.J.).

³ City of Toronto Planning Division, *Staff Report – Draft Zoning By-law: Results of the Public Consultation Process*, 21

intending to construct a tall building will have to file an amendment to the Draft Zoning By-law if the tower portion of a proposed residential-use tall building has a floor plate larger than 750 square metres.⁴ In addition, a zoning by-law amendment will also have to be filed if the exterior wall of a tower is closer than 25 metres to the exterior wall of another building on the site.⁵ These changes, if approved by City Council, will result in additional costs for residential-use developers, and will limit the flexibility of developer-clients to maximize the potential of a difficult or small site, and potentially frustrate in-fill development objectives of the Official Plan.⁶

Transition Issues

One of the trickier aspects of harmonizing 43 individual zoning by-laws into one comprehensive by-law is protecting and carrying forward existing development rights. Whether those rights were originally included in the individual 43 zoning by-laws or added over time to the individual 43 zoning by-laws by amendment, initiated either by a landowner's private application or through City Council's adoption after a public consultation process, harmonization introduces the significant risk that existing development rights will no longer be preserved once the new single by-law is in effect.

1. "Holes"

In the case of the Draft Zoning By-law, the City is considering a number of strategies to address these transition issues. In some cases, the City is willing to consider the exclusion of some properties currently regulated by existing zoning by-laws from the Draft Zoning By-law altogether, constituting "holes" in the Draft Zoning By-law. Where there is a "hole" the existing zoning by-law will continue to apply to those lands. This *ad hoc* approach allows clients looking to protect development interests often acquired through a lengthy

October 2009, online: City of Toronto <<http://www.toronto.ca/legdocs/mmis/2009/pg/bgrd/backgroundfile-24425.pdf>> at p. 7.

⁴ City of Toronto, *City of Toronto Proposed Zoning By-law: Version Date 5/29/2009*, online: City of Toronto <http://www.toronto.ca/zoning/bylaw/pdf/chemical_separation_distances.pdf>, s. 10.10.40.40(2), 15.10.40.40(2), 40.10.40.40(2).

⁵ *Ibid.* at s. 40.10.40.80(2).

⁶ *Toronto Official Plan, 2007*, *supra* note 1 at s. 3.2.1.2, 4.1.9, 4.2.3.

and costly approval process to maintain the *status quo* for their lands.

2. Area and Site-Specific By-laws

In other cases, City Staff have stated their intent to respect existing area and site-specific zoning by-laws and carry them forward by either re-writing their provisions in the language and terms of the Draft Zoning By-law or including a “prevailing by-laws” section in the Draft Zoning By-law. Area and site-specific by-laws typically provide specific exceptions to the general comprehensive zoning by-law and often contain fewer restrictions on development for a site or area. Clients owning properties regulated by these types of by-laws should be aware of the drafting pitfalls of either approach under consideration. Although this may be well-intended, wholesale redrafting of existing regulations runs the risk of losing the original drafter’s intent and changing development rights. On the other hand, appending existing area and site-specific by-laws originally drafted using certain language and terms, to a new comprehensive zoning by-law without properly appending the entire existing comprehensive by-laws upon which they are based, risks a host of interpretation issues. Owners of property in the City regulated by area or site-specific by-laws are advised to monitor the process as it moves its way towards the March 2010 statutory meeting, and to make deputations or file written submissions before the Planning and Growth Management Committee to voice their concerns or objections so as to protect their appeal rights to the Ontario Municipal Board.

3. Minor Variances

Thirdly, the City does not intend to acknowledge “unperfected” minor variances (i.e. a building permit has not been obtained for the variance) once the Draft Zoning By-law is adopted by Council.

Applying for a minor variance from the existing zoning by-law is often an attractive means for a landowner to acquire additional development rights for its property as the approval process is streamlined in comparison to applying for an amendment to the zoning by-law, saving applicants time and money. In addition, case law respecting the meaning of “minor variance” allows landowners in some cases to acquire significant increases to existing development rights. In light of the streamlined administrative process, and decisions of the Ontario Municipal Board and the Courts, the minor variance process can provide “big bang for the buck” for owners of land in high-density, mixed-use zones where it is often possible to significantly increase density permissions.

However, under the Draft Zoning By-law, if a landowner has not “perfected” a minor variance, all permissions under that minor variance will be lost. Despite the current uncertain economic climate and difficulty in accessing credit, which has created unforeseen delays in the start of construction for many landowners who have acquired minor variances, the City has not indicated that it intends to change its approach. Therefore, any landowner in the City who knows it will not act on a minor variance before the adoption of the Draft Zoning By-law should consider retaining counsel to ensure existing minor variance permissions are not lost.

Chemical Separation Distances

Finally, all corporate clients conducting industrial operations or businesses on lands in the City should be aware of the City’s intent to regulate the location of chemical storage facilities in the City. In the interests of protecting the health and safety of the public, the Draft Zoning By-law proposes to regulate the storage locations of hazardous chemicals within the City by requiring minimum separation distances between lots in a zone containing a chemical identified as hazardous by the Draft Zoning By-law and lots containing sensitive uses, such as residential uses and schools. However, the means by which City Staff propose to achieve the above goal remain questionable. In some cases, the minimum separation distances range as high as 11 km, depending on the type and quantity of chemicals stored on a property.

If implemented, the Draft Zoning By-law minimum chemical separation distances will eliminate the use of available employment lands in the City for a large number of otherwise acceptable employment uses.

Appealing the Draft Zoning By-law

Under subsection 34(19) of the *Planning Act*⁷, appeals of the Draft Zoning By-law must be filed to the Ontario Municipal Board by no later than 20 days after the day City Council issues its notice of passing of the Draft Zoning By-law. However, persons who have not made oral submissions at a public meeting, or written submissions to City Council before the Draft Zoning By-law is passed will not have a right of appeal.

All parties with interests in land in the City are advised to conduct a review of existing zoning standards and standards of the Draft Zoning By-law in order to properly assess whether they will lose existing development rights for their properties after the adoption of the Draft Zoning By-law and, if they stand to lose development

⁷ R.S.O. 1990, c. P.13, as amended.

rights, we would strongly recommend making the necessary deputation before the Planning and Growth Management Committee or filing written submissions to City Council prior to the adoption of the Draft Zoning By-law. FMC has been contacted by many clients in this regard and would be pleased to conduct the necessary investigations and make the requisite submissions.

LICENSED TO LEND: LICENSING OBLIGATIONS AND VENDOR TAKE-BACK MORTGAGES

BY ANDREA CENTA AND TIMOTHY BANKS

In an [earlier issue](#), we noted that the new *Mortgage Brokerages, Lenders, and Administrators Act, 2006* (the *New Act*),¹ which came into force on July 1, 2008, broadened the scope of the regulatory regime and set out new licensing requirements for those entities engaged in regulated activities.

In this update, we describe the circumstances in which a vendor may be required to be licensed under the *New Act* when it gives a vendor take-back (VTB) mortgage to a purchaser/borrower.

First a Recap: What Activities are Regulated under the *New Act*?

A person or entity is required to be licensed or must be exempt from the requirement to have such a licence if it “carries on business” in Ontario as a mortgage lender, or “carries on the business” in Ontario of dealing in mortgages, of trading in mortgages, or of administering mortgages.

It should be noted, however, that financial institutions are excluded from the licensing requirements.

Who is a mortgage lender?

A “mortgage lender” includes a person or entity that is engaged in lending money in Ontario on the security of real property.

This broad definition will cover vendors who grant VTBs.

What does it mean to “carry on business” as a mortgage lender?

There is no definition in the *New Act* to provide guidance on what it means to “carry on business.”

Courts have generally accepted that a single or isolated act does not constitute carrying on the business of an activity.² Instead, “carrying on business” requires a

succession, repetition or series of acts or a pattern of conduct normal to the business in issue.³

What if the vendor “holds himself, herself or itself out” as a VTB?

The definition of “mortgage lender” also includes a person who holds himself, herself or itself out as engaging in lending money in Ontario on the security of real property.

This means that a vendor who advertises as offering VTBs could be considered a mortgage lender even if the vendor has not yet actually completed a VTB transaction. Care should be taken, therefore, when listing or advertising the property for sale not to represent that it is part of the vendor’s business to earn income from mortgage lending.⁴

What are the relevant considerations?

As yet, there have been no significant cases to resolve the issues.

In every case it will be necessary for the vendor to consider whether the vendor has held itself out as a mortgage lender. What did the listing or any advertising say? Were there any written or oral representations or statements made to the purchaser or prospective purchasers? Considered fairly, did the listing, advertisement, representations or statements give the impression that the vendor was in the business of earning income from mortgage lending?

In addition, a vendor should consider whether it could be considered to be a mortgage lender based on its past conduct or future business plans. A vendor with a portfolio of properties in which the vendor regularly trades, and which it has in the past granted a VTB as part of its trading activities, is much more likely to be considered to be carrying on business as a mortgage lender than a vendor who infrequently trades in property and has never before granted a VTB. A vendor whose business plan⁵ going forward includes provision for VTBs as a means of earning income from the sale of properties is more likely to be considered to be carrying on business as a mortgage lender than a vendor who simply needed to give the VTB on a property in order to dispose of it under current market conditions.

¹ Mortgage Brokerages, Lenders and Administrators Act, 2006, S.O. 2006, c. 29.

² *Mississauga (City) v. Gray*, 1997 Carswell Ont 2798 (C.A.) per Laskin J.A. at para. 12, citing with approval *R. v. Stimmel*, [1923] 3 W.W.R. 1185 (Alta. C.A.).

³ *Ibid.*

⁴ E.g. *R. v. Goldin*, [2002] O.J. No. 1808 (O.C.J.) per Quon J.P.

⁵ E.g. *R. v. Carmichael*, [1997] O.J. No. 6177 (Prov. Div.) per Watson J.P.

What if the vendor closes the deal through a lawyer?

The fact that a vendor retains a lawyer to negotiate, draft and/or register its VTB is not sufficient to exempt the vendor from being licensed under the *New Act*. Lawyers are exempt only from the requirement to be licensed to deal, trade or administer mortgages. For example, a lawyer is exempt from being licensed when negotiating or arranging a mortgage. However, this does not exempt a lender from the requirement to be licensed.

What are the Consequences for Non-Compliance?

As we mentioned in our previous newsletter, the Financial Services Commission of Ontario can enforce administrative penalties on those persons or entities who do not comply with the *New Act*. Fines, regulatory measures such as compliance orders, licence revocation, court-ordered restitution or compensation can all be imposed. Penalties for non-compliance with the reporting obligations of the *New Act* are found in the regulations.

RECENT HIGHLIGHTS FOR THE NATIONAL REAL ESTATE GROUP AT FRASER MILNER CASGRAIN

Since the issuance of our last newsletter, the National FMC Real Estate Group has been keeping busy serving our clients. Some of the more recent highlights are as follows:

Vancouver

- Millennium Southeast False Creek Properties Ltd., part of the Millennium Group, a long standing client of FMC's Vancouver office recently participated in a formal hand-over ceremony honouring its completion of its Southeast False Creek waterfront development known as Millennium Water. The development which is to be used as the Olympic and Paralympic Village for the 2010 Olympic and Paralympic Winter Games was completed on schedule to allow the City of Vancouver to hand over the keys to the Vancouver Organizing Committee for the games. The village is the leading model of sustainability in North America and will be handed back to Millennium and the City upon completion of the 2010 Olympic and Paralympic Winter Games. Ultimately, this waterfront site will be a mixed-use and mixed-income development with approximately 1100 residential units, including 730 market condos,

120 market rental apartments and 250 affordable housing apartments.

- On October 20, 2009, several lawyers of FMC's Vancouver office made a presentation about its involvement in the successful Jameson House restructuring to a standing room only crowd at the Terminal City Club in Vancouver. In this restructuring FMC pioneered the use of the Companies' Creditors Arrangement Act (CCAA) as a means of providing real estate developers with creditor protection.

Toronto

- On September 28, 2009, Laurentian Bank of Canada completed a mortgage loan to CalEast NAT Canada ULC of three properties operating as truck terminals. The borrower is an affiliate of CalEast Global Logistics LLC, a leading investor in logistics, warehouse and related real estate;
- On July 23, 2009, Redcliff Realty Advisors Inc., on behalf of a Canadian pension fund, completed the purchase and lease-back of a warehouse distribution centre in Milton, Ontario, comprising approximately 572,192 square feet, for a purchase price of approximately \$51 million. Redcliff Realty Advisors Inc. is a leading Canadian real estate investment advisory firm, acting on behalf of Canadian pension funds and other investors, providing acquisition, disposition, portfolio and asset management services;
- On May 28, 2009, Canadian Mortgage Loan Services Limited ("CMLS"), on behalf of an investor client, completed a mortgage loan to Calloway REIT (Rutherford) Inc. of a shopping centre. CMLS is one of the only independent Canadian firms dedicated exclusively to commercial mortgage servicing, and administers a portfolio in excess of \$3 billion;
- The Toronto Real Estate Group has been assisting Markham Stouffville Hospital with various real estate transactions, construction and development matters in connection with the redevelopment and expansion of the Hospital, including the completion of a sale to the Town of Markham of land for the East Markham Community Centre;
- We acted on behalf of Ontario Realty Corporation in successfully achieving Official

Plan and Zoning By-law approval for the construction of a 315-inmate Provincial Detention Centre in the City of Windsor. To be known as the South West Detention Centre, it will replace the outdated Windsor Jail with a modern, regional facility to be constructed under the Infrastructure Ontario program. Appeals were filed with the Ontario Municipal Board by abutting landowners; however, working together with the City of Windsor, our team was able to negotiate, in record time, a comprehensive settlement which was approved by the OMB on November 5, 2009, bringing the required Official Plan and Zoning By-law Amendment approvals into immediate force and effect;

- We acted for the successful appellant landowner with respect to appeals to the Ontario Municipal Board relating to Official Plan Amendment, Zoning By-law Amendment, Draft Plan of Subdivision and Site Plan Applications to permit the development of former industrial lands for 52 townhouse and semi-detached units;
- We assisted the Goldman Group in obtaining a number of development approvals for lands within the City of Toronto, including Phase 2 of its development at Bathurst Street and St. Clair Avenue West;
- We currently act for a number of landowners and developers with respect to issues relating to the City of Toronto's proposed new Harmonized Zoning By-law.

Ottawa

- We acted for the Broccoli Group and Canderel Management Inc. as co-developers, in their acquisition, development, leasing, construction, financing, and forward purchase of a 19 storey, 520,000 square foot office tower which will be Export Development Corporation's new head office in downtown Ottawa.
- We acted for Morguard Investments Limited on behalf of HOOPP Realty Inc and Morguard REIT on the strategic acquisition and potential

development options of a downtown development site which abuts a multi tower project in downtown Ottawa currently owned by the above investors.

- We continue to represent a number of Federal Crown corporations in their respective acquisitions and dispositions of strategic real property assets throughout the Province of Ontario.

CONTACT US

For further information, please contact a member of our [National Real Estate Group](#)



FRASER MILNER CASGRAIN LLP

YOUR FUTURE IS OUR BUSINESS