

focus

on Financial Services

The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a blue square background, with a thin blue arc below it.

FRASER MILNER CASGRAIN LLP

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MORTGAGE LENDERS — WATCH OUT FOR CLASS ACTIONS!

Recently, eleven different class actions were launched against various Canadian financial institutions. The plaintiff borrowers in the class actions had all prepaid their mortgages at a time when their mortgages did not permit prepayment. **They are now seeking a refund from their mortgage lenders of what they claim to be the overpaid amount of the prepayment penalty, plus interest and costs.**

The plaintiffs in all of the class action proceedings were mortgage borrowers with closed mortgages. The wording in each financial institution's standard mortgage documents varies, but generally they had annual prepayment rights of between 10 and 20% of the principal amount of their mortgage.

The plaintiffs prepaid their mortgages prior to the maturity date. The applicable prepayment penalty was charged on the entire prepaid amount. The plaintiffs are arguing that their mortgage lenders ought to have given them credit on the discharge statement for a reduction in the prepayment penalty, to reflect the repayment without penalty of the principal amount for which they had an annual prepayment privilege. The statements of claim also state that the reduced amount should have been provided to them on the discharge statement without the borrowers having to ask for a prepayment reduction. The borrowers are also arguing that because mortgage agreements are standard forms drafted by their mortgage lenders, any ambiguity in the mortgage documents ought to be resolved in favour of the borrowers.

Most of the class actions have not been settled and are still ongoing. Regardless of the outcome of the various class actions, **we recommend that all mortgage lenders review the terms of standard form mortgage documents to ensure they clearly provide that in circumstances where the mortgage is being discharged, the borrower cannot exercise its prepayment privileges.**

If you would like to discuss the mortgage penalty class actions, please contact **Yvonne McAndrew** of our Toronto office at (416) 863-4672.

APPEAL VESTING ORDERS QUICKLY

Recently, in *Re Regal Constellation Hotel*, the Ontario Court of Appeal clarified the law in Ontario with respect to the use by court-appointed receivers of vesting orders as a means of transferring interests in real property. Specifically, the court said that upon the registration of a vesting order in a Land Titles Office, any appeals regarding the granting of the vesting order become moot.

The court recognized that the granting of vesting orders in Ontario is purely a creature of statute under the *Courts of Justice Act* (Ontario), not common law. The court also said that a vesting order had a dual nature. It is simultaneously a court order and a conveyance of title, which, when registered in a Land Titles Office, is an immediate conveyance.

In order to preserve the integrity of the guarantee of title under the *Land Titles Act*, the court said that **upon registration, title passes and is guaranteed under the *Land Titles Act*, and therefore, any appeal of the order becomes moot.** A party objecting to the vesting order could still apply under the *Land Titles Act* to rectify title or to have the vesting order expunged because of fraud or other misrepresentation.

In order to prevent the registration of the vesting order in the Land Titles Office from making any appeal moot, the court recommends that **any party who wishes to appeal a vesting order should immediately make this intention known to the receiver** and immediately seek a stay of proceedings of the vesting order.

If you would like to discuss the *Regal Constellation* case, please contact **Alex Ichenko** of our Toronto office at (416) 863-4748.

ALBERTA INCOME TRUSTS LIABILITY ACT

The popularity of income trusts continues to grow; approximately 150 income trusts are now listed on Canadian stock exchanges with an estimated market capitalization exceeding \$90 billion. Income trusts are of particular importance to Alberta's energy sector.

An income trust is a publicly traded, unincorporated, open-ended, limited purpose trust established by an underlying operating business. These include royalty trusts, real estate investment trusts (REITs), and business trusts. As between the business and the trust, the trust has ownership of all the securities of the corporation for which it was established. Net of debt service payments, maintenance capital expenditures and other cash requirements, the trust receives all cash flow available for distribution to trust unitholders. It is the after-tax return on investment which is the trust's key benefit; the personal income tax resulting from the cash distribution is significantly less than the combination of corporate and dividend taxes that would otherwise be payable.

In response to this growth, and in order to further promote investment in income trusts, the Alberta legislature enacted the *Income Trusts Liability Act* on July 1, 2004. **The primary goal of the Act is to provide unitholders with the same personal liability protection that common shareholders currently enjoy.** Corporate statutes grant corporations separate legal status from shareholders, thereby providing shelter from liability incurred by the corporation. In contrast, a trust is not a separate legal entity from its unitholders; the trust simply describes the relationship between the trustee and the beneficiary. The new statute addresses this by ensuring liability

protection for unitholders, making income trusts more attractive to smaller, risk-averse investors.

The key provision of the statute is as follows:

...the beneficiary [or unitholder of a trust] is not liable for any act, default, obligation or liability of the trustee of the Alberta income trust.

Similar legislative activity is also occurring in Ontario.

If you would like more information on income trusts, or if you would like to discuss the *Alberta Income Trusts Liability Act*, please contact **Jason Barabash** of our Calgary office at (403) 268-7171.

WHO AND WHAT'S NEW AT FMC?

Ron Clark has recently joined our Toronto office as a partner and member of the Toronto Energy Law Group. Ron will further strengthen FMC's position in the energy area and bring additional leadership to this important practice area of the firm. Ron brings a wealth of general corporate, commercial and energy specific experience, both in Canada and internationally to FMC.

Pamela Leiper of our Toronto Employment & Labour Group wrote an article for Canadian Corporate Counsel Magazine entitled, *Top Secret: Keeping it Under Wraps*. The article addresses how to protect confidential information within an organization.

The National Employment & Labour Law Group is hosting a dynamic one-day seminar on October 27, 2004 focused on current issues in employment and labour law. The seminar will be held in Calgary and will provide an opportunity for senior management and corporate counsel of multi-jurisdictional employers to receive an update on the most recent developments in employment, labour relations and pensions law.

Numerous FMC practice groups contributed to the recently released 2004 edition of *Mergers and Acquisitions in Canada*. This national FMC publication has been prepared to provide a general overview of the principal securities, tax, competition and employment considerations that would be applicable in the acquisition of a Canadian business. The publication can be accessed on our website at www.fmc-law.com

If you would like to speak with any of these lawyers regarding their areas of practice, please contact them through our main number in Toronto at (416) 863-4511.