

focus

on Financial Services



FRASER MILNER CASGRAIN LLP

Issue No. 64 May 2004

COURT SHOWS INTEREST IN INTEREST RATES

The Ontario Court of Appeal has rejected an antiquated approach to determining the post-maturity interest rate on a promissory note when the note is silent on the issue. Prior to the *Pizzey* case, courts would look to the *Bills of Exchange Act* and the *Interest Act* to determine what interest rate would apply to a note if it was silent on the matter. In the *Pizzey* case, the court said that **absent exceptional circumstances, where the note is silent on the post-maturity rate of interest payable, the appropriate post-maturity rate is the rate set prior to maturity.**

The *Interest Act* presently prescribes five percent per year. In *Pizzey*, interest payable on the note from the date of issue to the date of maturity was ten percent per year.

The court found that the previous method of determining the rate of interest was inequitable. It allowed a defaulting party to rely on its own breach to gain a material advantage (that is a lower rate of interest payable on the note). The court stated that the provision fixing the interest rate payable under the *Interest Act* should be limited to the rare situation where there are no other means for a court to establish the rate of interest payable.

In its new approach, the court found that the *Courts of Justice Act* allowed it to vary the rate of interest payable based on the circumstances of the case. No exceptional circumstances were found to exist in the facts of the *Pizzey* case, and the post-maturity rate of interest payable was accordingly set at the rate set out in the note prior to maturity — ten percent per year.

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

LOCATION, LOCATION, LOCATION

Are you a lender or equipment lessor who has taken a security interest in goods that are normally used in more than one jurisdiction? If so, it is **critical that you register your security in all of the correct jurisdictions.**

In a recent Ontario Court of Appeal decision, the court looked at the choice of law provisions of the Ontario *Personal Property Security Act* as they related to a dispute over personal property. The case involved a priority contest between, on the one hand Xtra, a Canadian lessor of truck trailers to the bankrupt TCT Logistics group of companies and, on the other hand, TCT's principal lender. **The court said that even where registration of a lease is unnecessary under the Ontario PPSA, the conflict of law provisions of the Ontario PPSA would still apply.**

The principal lender of TCT had a security interest over all of the assets of Expressways, one of TCT's bankrupt subsidiaries. The security interest had been registered under the Alberta *Personal Property Security Act*. Xtra had registered its lease in Alberta, but against a trade name of Expressways. The trial judge determined that Xtra's registration in Alberta was invalid because the lease agreement was in fact with Expressways.

In Ontario, leases intended to secure payment or performance of an obligation require registration. True leases do not. Xtra had not registered its security interest in Ontario, because it took the position that the lease agreement between it and Expressways was a true lease. Ontario law would see the trailers returned to Xtra because of its prior right as owner. Xtra argued that Ontario law governed the dispute.

The court agreed that the lease was a true lease. However, the court said that the conflict of law provisions of the Ontario PPSA still applied. Those provisions say that where lease goods are of a type normally used in more than one jurisdiction (as was the case with the truck trailers), then the validity of perfection of a security interest in those goods is determined by the law of the jurisdiction where the debtor is located at the time the security interest attaches. In this case, since the principal place of business of Expressways was Alberta, the dispute as to priority was governed by Alberta law. Since Xtra did not correctly register its security interest as required in Alberta, the lender had priority.

If you would like more information on the TCT decision, please contact **Anita Joshi** of our Toronto office at (416) 863-4590.

NO LIMITS FOR FAMILY OR ARE THERE?

The British Columbia Supreme Court has said that, **in certain cases, a lender is not entitled to enforce its rights under a mortgage more than 6 years from the date the mortgage is made.** This case illustrates the vital importance of considering statutory limitations when lending money, particularly in non-arm's length situations where the possibility of litigation may not be seriously contemplated.

In the *Bilkey* case, two sisters made a loan to their father, payable on demand, and took a mortgage over his house. Although they had never intended to make demand until their father died, the mortgage documents failed to reflect that intention. Fourteen years after the mortgage was signed and the funds advanced, the father died and the sisters attempted to foreclose.

The court held **that the six year limitation period under the B.C. Limitations Act began to run on the date the mortgage was signed, rather than the date on which the sisters made demand.** The action was statute-barred and the debt extinguished accordingly.

The court said that **a limitation period for debt runs from the time the lender is entitled to sue for an ascertainable amount.** In this case, the limitation period ran from the date of the demand mortgage because interest and principal were not payable other than on demand. If the sisters had made it clear in the mortgage document that they intended to make demand only on their father's death, the limitation period would have run from the date of his death. Alternatively, the sisters could have arranged some payment schedule or had their father acknowledge the debt in writing within the limitation period and within each renewed limitation period thereafter.

If you would like to discuss the *Bilkey* case or the B.C. *Limitations Act*, please contact **Jennifer Dezell** of our Vancouver office at (604) 443-7146.

RETAIN OR SELL IN ALBERTA

In a recent decision, the Alberta Court of Queen's Bench reminded secured parties that under the Alberta *Personal Property Security Act*, **the "retain or sell" enforcement options available to a secured party are mutually exclusive.** The court also stressed the importance of compliance with the notice requirements.

Under Alberta's PPSA, a secured party may either dispose of the collateral, or retain the collateral in full satisfaction of the debt. Only in the first instance does the secured party have the right to pursue the debtor for any deficiency in the security. Under either option, the debtor is to receive the benefit of the fair market value of the collateral.

The secured party appointed a receiver, had the collateral appraised and purchased the collateral for the appraised value. However, because the secured party failed to provide a copy of the appraisal to the debtor and did not provide notice of any of its actions, **the court deemed the "sale" of the collateral to be the equivalent of the secured party retaining the collateral** in full satisfaction of the debt. The court denied the secured party the right to pursue the debtor for the deficiency. To allow the secured party to do so in the circumstances would be "manifestly unfair".

If you would like to discuss this decision, please contact **Stephanie Campbell** of our Calgary office at (403) 268-7186.

WHAT'S NEW AT FMC?

Don Houston and **Jeanne Pratt** of our Toronto Competition Law Group presented at the American Bar Association's Antitrust Law Annual Meeting in Washington, D.C. Their presentation was entitled *Canadian Predation Laws and Their Application to the Airline Industry*.

A new edition of *Tax Evasion* has been released by Carswell. The text, originally authored by **William Innes**, has been updated by **Ralph Cuervo-Lorens, Brian Leonard, Brendan Bissell** and **Kate Broer**, of our Toronto Litigation Group. The text focuses on the prosecution and defence of federal fiscal offences, including those relating to G.S.T.

Jules Lewy of our Toronto Tax Group had his article entitled "Interesting Recent Developments on Interest Withholding in Canada" published in *Tax Notes International*.

WHAT WE'VE BEEN DOING IN FINANCIAL SERVICES

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

- Advising a foreign bank on regulatory issues in lending to a Canadian borrower outside of Canada, and on regulatory issues and structural alternatives in lending within Canada
- Providing legal advice to a consortium bidding on a public-private partnership construction transaction
- Advising a foreign bank and its related Canadian entity in connection with the reorganization of a Canadian borrower and guarantor