

focus

on Financial Services



FRASER MILNER CASGRAIN LLP

Issue No. 57 March 2003

MORE TO COME ON CRIMINAL INTEREST

The Ontario Court of Appeal's decision in the *Transport North American Express* case (discussed in Issue Nos. 52, 54 and 56) is going to the Supreme Court of Canada. The Court of Appeal had rejected the lower court's new approach of "writing down" the effective rate to the legal limit of 60%. On the appeal, **the Supreme Court of Canada will consider and finally settle the issue of whether "writing down" is a permissible approach**, or whether the Ontario Court of Appeal was correct. The majority of judges of the Court of Appeal said that the conventional approach to severance is the only severance consistent with the aims of deterrence for those who violate the criminal law. This approach requires the court to disallow all interest, or in some circumstances the entirety of one type of "interest" (eg. a bonus or up front fee that falls within the extended definition of "interest") that takes the effective rate over the legal limit.

The Supreme Court of Canada will also soon be considering another issue in the *Garland v. Consumers Gas* case. *Garland* is a class action claiming the return of 5% late payment penalties (LPP) charged to customers who pay their gas bills late. The majority of customers who pay late pay only a few days late, at a time when the LPP amounts to an effective rate of interest over 60%. In the Supreme Court of Canada's earlier 1998 decision in *Garland*, the Supreme Court of Canada decided that these LPPs fell within the *Criminal Code* extended definition of "interest". The other issues in the case which determine **whether the customers who paid LPPs at a criminal rate are entitled to a refund** will be argued before the Supreme Court of Canada later this year. Our firm acts for the Appellant in *Garland*.

We will report further on these criminal rate cases after the Supreme Court of Canada decisions are released.

If you would like to discuss these cases, or if you would like more information about criminal rates of interest, please contact **Barbara Grossman** (Toronto office) at (416) 863-4417, **Chris Woodbury** (Toronto office) at (416) 863-4773 or **Stephanie Campbell** (Calgary office) at (403) 268-7186.

2002 ISDA MASTER AGREEMENT

On January 8, 2003, **the International Swaps and Derivatives Association, Inc. published a new version of the industry standard Master Agreement**. The Master Agreement is used by a majority of participants in the financial risk and treasury management industry, and is intended to govern a number of different types of interest rate, currency, commodity and other types of derivative transactions that are entered into by two parties.

The first ISDA Master Agreement was published in 1987 and was subsequently revised in 1992 (the old agreement). The release of the 2002 Master Agreement (the new agreement) marks the first substantial revision to the ISDA Master Agreement over the last decade or so. The new agreement is a reflection of input from over 100 ISDA member firms, including FMC, in over 80 countries across the world. Some of the more significant changes are described below:

- Close-out Amount replaces Market Quotation and Loss as the new measure of damages in the event of early termination of the new agreement, and stresses the use of commercially reasonable procedures to produce commercially reasonable results when measuring such damages;
- A Force Majeure clause has been included as an event that can trigger early termination of the new agreement and reflects a need to wind up agreements in the wake of world events such as 9/11;
- Events of default may be triggered more quickly with the introduction of shorter grace periods throughout the new agreement; and
- Concepts specific to physically-settled derivative transactions have been included in the new agreement making the new agreement more user-friendly to parties engaging in these transactions.

ISDA has also prepared a form of amending agreement to the old agreement to allow industry participants with outstanding transactions under the old agreement to incorporate the principal changes of the new agreement into the old agreement architecture. In addition, it is expected that a User's Guide to the new agreement will be circulated by ISDA later this year.

Other new developments at ISDA include the release of the 2002 Energy Agreement Bridge which seeks to achieve cross-product netting in such a way that the new agreement can be used in conjunction with other energy industry-standard master agreements. Also of note, the 2002 Equity Derivatives Definitions have been released and the 2003 Credit Derivatives Definitions will soon be released, both of which provide for a standard meaning of terms commonly used by industry participants.

If you would like more information on the recent events at ISDA, please contact any of the following people: **Tom Pepevnak** in our Calgary office at (403) 268-7198; **Marc Mercier** in our Toronto office at (416) 863-4372; **David Zacks** in our Vancouver office at (604) 443-7149; **Robert Turner** in our Edmonton office at (780) 423-7226; and **Allan Mass** in our Montreal office at (514) 878-8813.

RECEIVABLES GET CARRIED AWAY

Creditors of companies which arrange for goods to be carried by another person should note the recent Ontario decision in *TCT Logistics*.

When it was unable to use its own carriers, TCT, a major trucking company, used other carriers to act for it. TCT went into receivership and was ultimately petitioned into bankruptcy. Some of the other carriers had not been paid for work done prior to the date of the receivership despite the fact that TCT had collected the fees.

The carriers said that despite TCT's receivership and bankruptcy, they were entitled to the pre-receivership receivables. The monies were trust funds under the *Truck Transportation Act* (Ontario) and an accompanying regulation.

One of TCT's lenders said, among other things, that as a result of its general security agreement, its interest attached to the receivables prior to the creation of any trust and that it was entitled to the funds.

The court agreed with the carriers. **The combination of the regulation and the *Bankruptcy and Insolvency Act* created a trust that preserved the fees and receivables for the benefit of the carriers, in spite of the lender's security agreement.** In fact, the regulation was there to protect carriers from the very scenario which arose in this case.

However, creditors may not have to worry about this decision for long. The *Truck Transportation Act* has been repealed by the Ontario government, although the date that this is to take effect has not yet been determined.

If you would like to discuss the *TCT Logistics* case, please contact **Michael Bubas** of our Toronto office at 416-862-3410.

PRODUCTION FINANCING AND THE BUDGET

The recent federal budget included some points of interest to the Canadian film and television production industry. **The Department of Canadian Heritage has reduced its contribution to the Canadian Television Fund's budget** by \$25-million, to \$75-million per year over the next two years.

In what is good news for Canadian-foreign co-productions, **the Film and Video Production Services Tax Credit**, aimed at encouraging foreign production in Canada, **will be increased to 16% of Canadian labour used in foreign films** and videos made in Canada; the Canadian Film or Video Production Tax Credit for domestic productions remains unchanged at 25% of labour costs.

For more information on production financing and the budget, please contact **Elisabeth Colson** of our Toronto office at 416-361-2346.

WHO AND WHAT IS NEW AT FMC:

J. Curtis McDonnell recently joined our Toronto Labour/Pension/Research department. Curtis was in-house counsel to the Ontario Workers Compensation Board for 14 years and then joined Canadian National Railway as in-house counsel in Toronto for 14 years. Curtis will continue his practice in employment law and corporate/commercial law.

Patrick Boyle (Taxation) recently gave a presentation at an Insight Conference entitled "*Advanced Transfer Pricing Course*." Patrick presented on "*Transfer Pricing Penalties: The Risks of Selecting Unwisely*."

Jeff Barnes (Securities) recently chaired a Strategy Institute Conference entitled "Developing Toronto's Waterfront", where the effect of the Toronto Waterfront Revitalization Plan on business was discussed by leading experts.

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:

- Acting for a leading U.S.-based real estate development, investment and management company in establishing standby letters of credit between several large international banking institutions for a large real estate project in Germany
- Assisting a deposit-taking institution in updating its customer account documentation
- Acting for a bank in connection with land acquisition and construction financing for 4 commercial property sites in Ontario
- Assisting private clients holding defaulted vendor take-back debt and security to preserve their investment and maximize their recovery