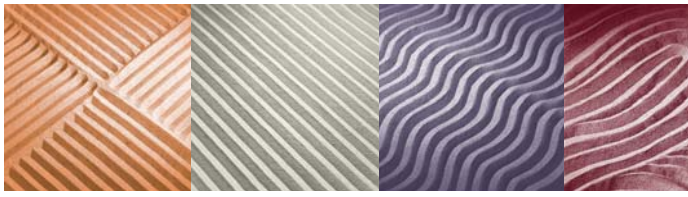
MILLER THOMSON LLP
Barristers & Solicitors
Patent & Trade-Mark Agents



FINANCIAL SERVICES & INSOLVENCY NEWSLETTER

February 2007

Financial Services & Insolvency Newsletter is published periodically by Miller Thomson LLP's Financial Service Group and Insolvency & Restructuring Group as a service to our clients. We encourage you to forward the e-mail delivering this newsletter to anyone (internal or external to your organization) who might be interested. Complimentary e-mail subscriptions are available by contacting newsletters@millerthomson.com

Inside:

The following is a summary of recent cases of note which may be of interest to lenders and those engaged in enforcement of security.

UNREPORTED CASES

1. Limitation Periods for Demand Promissory Notes Governed by on Ontario Law :

***HARE* V. *HARE*, [2006] O.J. 4955,**

- son issued demand note to mother in Feb. 1997

- interest last paid by son on Oct. 26, 1998 [this payment acknowledged the debt; 6 year limitation period in effect at that this time; limitation period ends Oct. 26, 2004]

- *Limitations Act*, 2002 in force on January first, 2004 [2 year limitation period for debt enforcement commences, subject to transition rules]

- demand letter Nov. 10, 2004

- action against son started Feb. 17, 2005

Held: the mother's claim was out of time and statute barred.

In addition to analyzing the transition rules in the Act, the Court of Appeal followed Ontario common law as stated in the decision in *Royal Bank* v. *Hogg*, [1930] 2 D.L.R. 488 (Ont. S.C.(A.D.)) and held that:

> The common law authorities reasoned that since a demand loan is fully mature and repayable when it is made, a cause of action to collect on a demand note accrues as soon as the note is delivered. [at paragraph 69]

Editorial Note:

Most non arms length Ontario lenders will be unaware of the new shorter two year period and that it starts upon the delivery of the note. Examples of these non arms length loans will arise among family members, loans made by estates to beneficiaries, and loans by friends and families to start up businesses.

Arms length lenders will be unlikely to suffer the same fate, as they usually collect interest monthly, and each interest payment is an acknowledgment of the debt, restarting the limitation period clock. By contrast related parties often fail to collect interest at regular intervals, or at all, and the new two year limitation period terminating their rights is unknown to them.

To preserve these debts the OBA is recommending to the Attorney General that Ontario amend the Act to provide that a claim arises upon dishonour of a demand obligation. Such clarifying provisions are found in:

1. the Alberta *Limitations Act,* R.S.A. 2000, c. L-12 which provides in subsection 3(3)(c) as follows:

> (c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;

and

2. the *Uniform Limitations Act* prepared by the Uniform Law Conference of Canada, which provides in subsection 6(4)(c) as follows:

> 6(4) For the purposes of this section, the day an act or omission on which a claim is based takes place is,
>
> > c) in the case of a default in performing a demand obligation, the day on which the default in performance occurs after a demand for performance is made.

Solicitors should be sure to highlight in their reporting letters to clients the two year limitation period for the collection of debts arising upon the delivery of the note.

2. exemption from seizure for aboriginal assets

McDiarmid Lumber Ltd. v. God's Lake First Nation [2006] S.C.J. No. 58 (S.C.C.), on appeal from (2005), 251 D.L.R. (4th) 93, 8 C.B.R. (5th) 244 (Man. C.A.).

After default in payment by the Bank under a construction contract, the parties entered into a consent judgment against the Band for some $1.1 million. The construction company garnished Band funds paid under a federal funding agreement with the Band, held in a bank account maintained off the reserve.

Both the Manitoba Court of Appeal and the Supreme Court of Canada held that these funds in a bank account located off the reserve were not exempt from seizure by under ss. 87, 89(1) and 90 of the *Indian Act.*

3. claim to constructive trust denied

Caterpillar Financial Services Ltd. v. 360networks corp. [2007] B.C.J. No. 22 (B.C.C.A.) on appeal from 4 C.B.R. (5th) 4

The Court of Appeal upheld the trial decision that Caterpillar could not claim a constructive trust for proceeds of sale where Caterpillar had failed to perfect its leases of certain construction equipment and the lessee sold the machines to third parties.

4. no PPSA late registration after filing of bankruptcy proposal

Pioneer Grain Co. v. Sullivan & Associates Inc. (2006) not yet released (Sask. C.A.), appeal from (2006), 24 C.B.R. (5th) 247; [2006] S.J. Nos. 451 and 563 (Sask. Q.B.)

This case was reported in the December issue of *Imperfections*. The trial court rejected Pioneer's claim as a secured creditor for a PPSA registration made after the debtor's proposal was filed. Counsel has advised that the Sask. Court of Appeal has reversed the trial decision.

5. fishing licence not personal property

Royal Bank v. Saulnier [2006] S.C.C.A. No. 351 (S.C.C.), on appeal from [2006] N.S.J. No. 307, as altered by N.S.J. No. 387 (N.S.C.A.), on appeal from (2006) 17 C.B.R. (5th) 182 (N.S.S.C.)

At trial, the court held that the bank's general security agreement from the fisherman, now bankrupt, attached to his fishing licences, as they were personal property. The court held that the licences were property in his estate as the fair and correct approach was to characterize federal fishing licences as property given:

(i) fishermen sold licences, especially lobster licences, for large amounts of money;

(ii) they were a bundle of rights constituting marketable property; and

(iii) to ignore commercial reality would result in inequitably denying the creditors access to something of significant value in the hands of the bankrupt.

The Nova Scotia Court of Appeal altered the trial court decision by finding that the licences were not an asset in the estate, but the income earned from the licences were part of the estate. The Court held that the licences were not property but that Mr. Saulnier had rights in relation to the licences, such as the income and the right to apply for renewals and the right to have them reissued to a designated third party.

The Supreme Court of Canada has granted leave to appeal.

C. REPORTED CASES

6. assignment of rents and breach of *Planning Act*

Re Elias Markets Ltd. (2006), 25 C.B.R. (5th) 50; 47 R.P.R. (4th) 32 (Ont. C.A.)

Three related businesses had granted real property mortgages and an assignment of rents to Bank 1 as security for loans. The assignment of rents was registered against title and under the PPSA.. The mortgages were in violation the *Planning Act*. Bank 2 later made further loans secured by a GSA registered under the PPSA.

The Court of Appeal held that the funds attributable to the assignment of rents were to be paid to Bank 1 as it had the prior ranking PPSA registration for the rent receivables, and that was valid despite the *Planning Act* violation.

7. subsequent factoring agreement vs. prior GSA

2811472 Canada Inc. v. Royal Bank of Canada (2006) 81 O.R. (3d) 721; 23 C.B.R. (5th) 124 (Ont. S.C.J.)

Debtor granted the Bank a GSA. It subsequently entered into several factoring agreements with A. The debtor shortly thereafter became a bankrupt.

The court held that the factoring agreements were invalid and the Bank had priority to the debtor's receivables. The debtor had no right to assign its receivables which had previously been assigned to the Bank, and A took its own risk when it failed to do a PPSA search. The court rejected the claim that the factoring created a purchase money security interest, since the funds could not be shown to have been used by the debtor for the purpose of purchasing an identifiable asset.

8. objection to retention of the IP collateral

Priority 1 Security Inc. v. Phasys Ltd. (2006), 22 C.B.R. (5th) 258 (Alta. Q.B.)

The debtor objected upon receipt of the secured party's notice of intention to retain certain intellectual property in satisfaction of the debt. The parties were in court over certain questions asked of the director of the secured party upon his examination on his affidavit filed in the matter.

The Court held that the director was compelled to answer certain questions as the issues involved in ascertaining a valid objection to the retention included:

- market value of the collateral;

- good faith and commercial reasonableness in retaining the collateral as opposed to having it sold; and

- principles of equity, as here the director was not at arms length, being the former CEO of the debtor and creator of the intellectual property in issue.

MILLER THOMSON FINANCIAL SERVICES & INSOLVENCY GROUP

Toronto/Markham

E. Peter Auvinen	Tel: 416.595.8162
Jennifer E. Babe	Tel: 416.595.8555
Douglas F. Best	Tel: 416.595.8588
Jeffrey C. Carhart	Tel: 416.595.8615
John J. Chapman	Tel: 416.595.8547
Anthony K. Crossley	Tel: 416.595.8689
Maurice V.R. Fleming	Tel: 416.595.8686
James D.M. Fraser	Tel: 416.595.8527
Jennifer Hewitt	Tel: 416.595.2972
Elizabeth Hutchison	Tel: 416.595.8190
Michael W. Kerr	Tel: 416.595.8620
Richard D. Leblanc	Tel: 416.595.8657
F. Max E. Maréchaux	Tel: 416.595.8522
Craig A. Mills	Tel: 416.595.8596
Nora F. Osbaldeston	Tel: 416.595.8680
James Proskurniak	Tel: 416.595.8598
Arthi Sambasivan	Tel: 416.595.2980
Robert Shipcott	Tel: 416.595.8628
Margaret R. Sims	Tel: 416.595.8577
Tom Tower	Tel: 416.595.8674
Judson D. Whiteside	Tel: 905.415.6701

Vancouver

Karen A.R. Dickson	Tel: 604.643.1210
John P. Ferber	Tel: 604.643.1241
Gordon G. Plottel	Tel: 604.643.1245
Stephen R. Ross	Tel: 604.643.1205
James R. Taylor	Tel: 604.643.1283
So Yin Woo	Tel: 604.643.1253

Calgary

Kent R. Anderson	Tel: 403.298.2408
Paige Coulter	Tel: 403.298.2450
Jaime E. Evaskevich	Tel: 403.298.2468
Richard L.G. Gushue	Tel: 403.298.2444
David L. Sevalrud	Tel:.403.298.2444
Nicole T. Taylor-Smith	Tel: 403.298.2453
Jeffrey N. Thom, Q.C.	Tel: 403.298.2436

Edmonton

Edwin S. Cook, Q.C.	Tel: 780.429.9746
John A. Cross, Q.C.	Tel: 780.429.9745
Geoffrey N.W. Edgar	Tel: 780.429.9760
Willam J. Kenny, Q.C.	Tel: 780.429.9784
Bryan J. Kickham	Tel: 780.429.9713
Monique M. Petrin Nicholson	Tel: 780.429.9704
Rick T.G. Reeson, Q.C.	Tel: 780.429.9719
Jordan A. Slator	Tel: 780.429.9781
G. James Thorlakson	Tel: 780.429.9721
Kevin D. Trumpour	Tel: 780.429.9707
Terrence M. Warner	Tel: 780.429.9727
Barrett K. Westerlund	Tel: 780.429.9705

London

Blair P. Fantillo	Tel: 519.931.3512
A. Duncan Grace	Tel: 519.931.3507
Glenn F. Jones	Tel: 519.931.3508
Kristina M. Shaw	Tel: 519.931.3511
Alissa Mitchell	Tel: 519.931.3508
Ryan T. Sills	Tel: 519.931.3514
Anthony G.J. Van Klink	Tel: 519.931.3509

Kitchener-Waterloo

John J. Griggs	Tel: 519.593.3231
Gregory P. Hanmer	Tel: 519.593.3233
Robert L. Warren	Tel: 519.593.3265
Ian C. Wismer	Tel: 519.593.3232

Guelph

Robert R. Berry	Tel: 519.780.4636

Montréal

Ronald M. Auclair	Tel: 514.871.5477
Yvon Brizard	Tel: 514.871.5470
Nicole Chouinard	Tel: 514.871.5457
Pascale Cloutier	Tel: 514.871.5486
Louis Coallier	Tel: 514.871.5488
Daniel Gagné	Tel: 514.871.5422
Marie-Hélène Gay	Tel: 514.871.5485
Jules Hamelin	Tel: 514.871.5480
Stéphane Hébert	Tel: 514.871.5466
David Johnston	Tel: 514.871.5471
Gilles Landreville	Tel: 514.871.5493
Pierre Marquis	Tel: 514.871.5425
Pierre Paquet	Tel: 514.871.5427
Micheline Perrault	Tel: 514.871.5497
Maxime B. Rhéaume	Tel: 514.871.5461
Stéphane Teasdale	Tel: 514.871.5465
Robert Tessier	Tel: 514.871.5474