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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Corporate/Commercial Group, John C. Papadakis at 416.597.3998 or jpapadakis@blaney.com.

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NEW REGULATION PROMISES TO BOOST LENDER CONFIDENCE WHEN BORROWERS ASK FOR LONG-TERM MORTGAGES

Kym Stasiuk

With interest rates hovering around all-time lows, the desire of commercial borrowers to lock-in long-term mortgages has, arguably, never been greater. A new federal regulation which has just taken effect should give certainty to long-term lenders regarding loans to entities that are not corporations or individuals.

The new regulation, which revises Section 10 of the federal *Interest Act* and took effect Jan. 1, 2012, aims to ensure that businesses will have access to long-term mortgages. The impetus for the new regulation was the concern that lenders had over the years about uncertainties and potentially negative business impacts related to long-term mortgages that borrowers had been permitted by law to pay down early.

Ultimately, the revised Section 10 should bring greater stability, predictability and uniformity to an area of law in which the rules had become outdated.

A Brief History of Section 10 of the Interest Act

Section 10 of the *Interest Act* was enacted in the late 1800s. Its purpose was to provide relief to farmers who were being locked into high-interest, long-term mortgages with hefty prepayment penalties. The legislative remedy, then, was to give borrowers the right to prepay the principal of their mortgage with interest, together with a further three months interest, at any time after five years. The law did not bode well for lenders, who naturally became reluctant to provide mortgages with a term greater than five years. This, in turn, created difficulty for corporations, in particular railway companies, who were trying to obtain long-term loans secured by mortgages of real property. So, a decade later, a new law was passed [Subsection 10(2) of the *Interest Act*] which stated that the prepayment rights afforded by Subsection 10(1) did not apply to corporations.

Fast-forward nearly 100 years -- after it had become common practice for owners to structure commercial real estate acquisitions using limited partnerships, trusts and other business entities -- and the problems associated with the application of Subsection 10(1) resurfaced. For example, since partnerships and real estate investment trusts (REITs) cannot hold title to real property in their own name, they do so by using a nominee corporation. There was a question, then, of whether non-corporate entities such as limited partnerships and trusts, as beneficial owners, were entitled to the prepayment rights under Subsection 10(1).

The answer to this question was decided in *Litowitz v. Standard Life Assurance Co.(1996)*, where the Ontario Court of Appeal held that the mortgagor, who in this case was a nominee corporation, did not have the prepayment right under subsection 10(1), *"As lenders will now have greater certainty when granting long-term financing secured by a mortgage, borrowers likely will have more options available to them when seeking such loans."*

Kym Stasiuk is a member of Blaney McMurtry's corporate/commercial practice group. Kym has worked as an equities trader and has completed the Canadian Securities Course offered by the Canadian Securities Institute.

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even though the beneficial owner was a partnership. Moreover, to further complicate matters, in Quebec, there is no distinction between legal and beneficial ownership. So *Litowitz*, if tried in Quebec, may have received a different judicial result. With this in mind, it became evident that Section 10 was outdated and that there was a need for consistency in this area of the law across all Canadian jurisdictions.

What Exactly Has Changed?

As of last January 1, there is a longer list of prescribed entities that are not permitted under Subsection 10(1) to pay down mortgages early. Now, in addition to joint stock companies, corporations, and debentures issued by corporations, the following are added to the list set out in Sub-section 10(2):

i) Partnerships,

ii) Trusts settled for business or commercial purposes,

iii) Unlimited liability corporations as defined in the *Business Corporations Act*, R.S.A. 2000, c. B-9,

iv) Unlimited liability companies as defined in the *Business Corporations Act*, S.B.C. 2002, c. 57, and

v) Unlimited companies as defined in the *Companies Act*, R.S.N.S. 1989, c. 81.

With respect to trusts, these are often used by individuals, so one must be particularly mindful of the objects and purposes of a trust when creating and using one as a borrower.

Implications

As lenders will now have greater certainty when granting long-term financing secured by a mortgage, borrowers likely will have more options available to them when seeking such loans. Legal practitioners will benefit, too, in that they should have increased certainty when giving an enforceability opinion to a lender.

Outstanding Jurisdictional Uncertainty

With the enactment of the new regulation, there remains some jurisdictional uncertainty in the laws. For example, in Ontario, the *Mortgages Act* still contains provisions that mirror the old Section 10 of the *Interest Act*. It is anticipated that this discrepancy will be resolved through further legislative reform. Until then, this should not cause great concern to those involved in commercial mortgage transactions, as they continue to have *Litowitz* and, of course, the new regulation to rely upon. ■

HISTORIC CHANGES IN FEDERAL, ONTARIO LAWS THAT GOVERN INTERNAL AFFAIRS OF NON-SHARE CAPITAL CORPORATIONS, SUCH AS REGISTERED CHARITIES, TRADE ASSOCIATIONS, TAKING EFFECT THIS YEAR

Mona Taylor

Historic changes in the laws governing the internal affairs of both federally-incorporated and, in Ontario, provincially-incorporated non-share capital corporations, which include registered charities and trade associations, are taking place this year.

After many years in the making, the new *Canada Not-for-Profit Corporations Act (CNCA)* has now taken effect. The CNCA replaces the *Canada Corporations Act (CCA)* Part II and eventually will apply to all federally- incorporated non-share capital corporations, which can include federally-incorporated trade associations, religious corporations and registered charities.

Parallel Ontario legislation, the *Ontario Not-for-Profit Corporations Act, 2010 (ONCA)*, concerning provincially-incorporated organizations, is expected to be proclaimed in force in late 2012.

Both the CNCA and the ONCA have been much anticipated as essential updates to the existing

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statutes, which have not been amended meaningfully in nearly 100 years. This article addresses some of the key features of the CNCA and the transitional process it creates.

As described by Industry Canada, the benefits of the CNCA are that it provides a clear set of rules that govern the internal affairs of federal non-share capital corporations; it reduces red tape, and it simplifies the incorporation and amendment processes. In addition, it permits certain fundamental changes that were not permitted under the CCA, such as amalgamation. It also introduces a more objective standard for directors' duties and responsibilities, and this should reassure individuals who may be hesitant to serve on boards of directors.

One of the major highlights of the new legislation is the differentiation between soliciting corporations (which are regulated more closely) and non-soliciting corporations. Generally, corporations that receive certain public funding during a specified financial period in excess of $10,000 will be considered to be soliciting corporations.

In addition, members of non-share capital corporations governed by the CNCA will enjoy enhanced rights because the CNCA, in many ways, treats members as analogous to shareholders of share corporations. Under the CNCA, members will be able to bring oppression actions and, with leave of the court, derivative actions. (In oppression actions, minorities seek to have their interests incorporated into majority decisions. In derivative actions, shareholders/members sue directors and management for allegedly failing to exercise their authority for the benefit of the corporation and all of its shareholders/members.)

The CNCA also provides certain minority groups in a non- share capital corporation with a veto power on certain fundamental changes. Of much interest is the ability of non-voting member classes to vote separately as a class in respect of certain fundamental changes.

The CNCA was proclaimed in force last October 17. Non-share capital corporations currently incorporated under the CCA were given three years to transition to the CNCA (by October 17, 2014). Corporations that fail to transition by that date will be deemed to be inactive and will be dissolved. Until federal non-share capital corporations have made the transition, the provisions of the CCA will continue to apply to them. (When the Ontario legislation takes effect, those corporations that choose not to file articles of amendment will be deemed to have amended their letters patent and by-laws on the third anniversary date of its coming into force, thereby being brought into conformity with it.)

In order to transition to the CNCA, a federally-incorporated non-share capital corporation will be required to replace its letters patent, supplementary letters patent (if any) and by-laws with new charter documents by submitting articles of continuance and creating and filing new by-laws.

For federal non-share capital corporations that are also registered charities, care is required during the transition process so as not to affect the corporation's registered charity status. Once the transition is complete, the charity must file certain documents with the Charities Directorate of the Canada Revenue Agency.

If a registered charity does not apply for a certificate of continuance by October 17, 2014, and Industry Canada dissolves the charity's corporate status, its charitable registration may also be revoked, resulting in very serious consequences.

The best way to approach the required transition is to review existing letters patent, supplementary let-

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Barry Prentice is a senior litigation partner in Blaney McMurtry's Employment and Labour Law practice group. With more than two decades of experience in employment law, Barry acts as counsel for a broad range of clients both inside and outside the courts of Ontario.

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ters patent, by-laws and corporate policies. If a corporation cannot locate any of these documents, copies may be obtained from Industry Canada.

When reviewing existing governing documents, one should consider the following: Do existing governing documents accurately reflect the corporation's current governance structure? Will any aspect of the current governing structure be inconsistent with the new legislation? Has the corporation been considering changing its current structure and what changes are desired? Under the CNCA, will the corporation be considered a soliciting corporation and, if it will, what are the implications?

Under the CCA, corporations were required to include a lot of detail in their general operating by-laws. The CNCA does not require the same level of detail since many of the rules are contained in the legislation. Therefore, in many instances, revising a corporation's general operating by-law, for the purpose of transition, will be simplified under the CNCA. With that said, care should be taken in reviewing the "default" rules contained in the CNCA to ensure that default rules not suitable for a corporation are overridden. Care should also be taken in reviewing the few rules that, under the CNCA, apply to all corporations and which cannot be overridden. One of the most important of such rules is the one that provides certain voting rights to otherwise non-voting classes of members in respect of certain fundamental changes.

Clearly the transition to the CNCA raises many questions for existing federally-incorporated non-share capital corporations. Blaney McMurtry is well placed to assist in the transition process and would be pleased to do so. ■

EMPLOYERS FACING UNCOMMITTED CUSTOMERS, COMPETITION, AND COST PRESSURES LOOKING TO "OUTSOURCE" LABOUR SUPPLY, OR SECURE WRITTEN EMPLOYMENT AGREEMENTS

Barry Prentice and Bill Anderson

High technology notwithstanding, wages, salary and benefits remain among the largest costs that businesses must meet. The effective management of these costs remains a key to profitability.

During the last five years, businesses have been warier about labour costs than at any time since the Second World War. Instead of making continuing commitments to full-time staff, employers have increasingly been turning to "independent" contractors. When employers *do* make the decision to commit to a full time position, they have been more prone to setting out their requirements, and the employee's obligations, in a formal, written employment agreement.

Blaney McMurtry's Employment and Labour practice group hosted a seminar for clients recently entitled "HIRING AND FIRING: What you need to know." It included presentations on what to watch for when you retain outside suppliers or prepare to enter into a written employment agreement with a new hire.

Here are some of the basic ideas discussed:

Independent Contractors

- Independent contracting can be attractive for both the employer and the contractor.
- Employers can get a job done without engaging in a permanent employment relationship, all the while conserving cash (no obligations under the *Employment Standards Act*; no regular remittances required for employment, health

"Instead of making continuing commitments to full-time staff, employers have increasingly been turning to "independent" contractors."

A partner in Blaney McMurtry's Employment and Labour Department, William Anderson's experience has led to an expertise in complex labour board and employment litigation.

Bill's practice also includes negotiating severance and wrongful dismissal packages on behalf of executives and other employees. He is particularly active in issues relating to the manufacturing, construction and health care industries.

Bill may be reached directly at 416.593.3901 or banderson@blaney.com.

and worker safety insurance) and saving on HR administration.

- Contractors can enjoy greater freedom, cash flow and net income.
- The key for employers is to make sure that the contractual relationship does not constitute an employer-employee relationship by another name.
- The essential question in making the distinction is, who owns the contractor's business? In other words, who decides what is to be done, the way it is to be done, the means employed in doing it, and the time and place where it shall be done?

For specific guidance on any independent contracting interest or issue that you may have, please contact Barry Prentice, 416-593-3953, bprentice@blaney.com.

For more detailed general information, please see Barry's presentation, THE RISK AND REWARDS OF ENGAGING INDEPENDENT CONTRACTORS, at http://www.blaney.com/articles/risk-and-rewards-engaging-independent-contractors-powerpoint-slideshow.

Written Employment Agreements

- The employer typically has only one chance to get a clear and unambiguous employment contract right -- before the employee starts. If the contract is signed after the new hire shows up for work, it is already too late. Implied terms and conditions will have been created.
- The agreement must set out all terms and conditions clearly. In addition to compensation and benefits (that are consistent with the benefits policies), it must address such matters as confidentiality and the ownership of inventions. Titles, reporting relationships, and work location should not be over-described. The employer wants maximum flexibility – both to facilitate the management of the business and to protect against any future constructive dismissal action.
- The agreement should refer specifically to what the employee has said about his/her skills and abilities "You said you could do…." It must also cover obligations to former employers. "We have told you that we are not interested in confidential information from former employers and we have directed you to stay away from their customers." Overall, you've got to tell the person in the agreement that you are relying on his/her representations.
- The agreement must require, explicitly, that the employee give the company his/her full time and attention and that he/she has no conflicts of interest.
- The purpose and length of any probationary period, the rights of the employer during the probationary period, and what happens if the employee is not successful, must also be set out specifically.
- Performance review – Think about whether you want it in the agreement. Do not promise it if you are not going to do it. If you fail to follow-through, it will make any dismissal decision based on incompetence that much more difficult to defend.
- A strict, unambiguous termination clause is crucial. The employer needs certainty and predictability regarding the end of the relationship. If the clause must be implemented, the employer can be more generous at the time of exit if it wishes.

"A strict, unambiguous termination clause is crucial. The employer needs certainty and predictability regarding the end of the relationship."

- Reference and police record checks – Make them BEFORE you make an offer. It may seem self-evident, but....

For specific guidance on any employment contract interest or issue that you may have, please contact Bill Anderson at 416-593-3901, banderson@blaney.com.

For more detailed general information, please see Bill's presentation, THE WRITTEN EMPLOYMENT CONTRACT – Minimizing future disputes, at http://www.blaney.com/articles/written-employment-contract-minimizing-future-disputes-powerpoint-slideshow. ■

HIRING AND FIRING SEMINAR

Blaney McMurtry's Employment & Labour Law Group

The Blaney McMurtry HIRING AND FIRING seminar, which focussed on managing the process of joining and leaving a workplace and the need for flexibility, certainty and predictability in that process, included six presentations. Here is a list of all six, the Blaney counsel to contact for guidance on any specific issue/interest that you may have concerning the subjects, and the links to the presentations themselves:

THE RISK AND REWARDS OF ENGAGING INDEPENDENT CONTRACTORS
Barry Prentice , 416-593-3953 or
bprentice@blaney.com, and:
http://www.blaney.com/articles/risk-and-rewards-engaging-independent-contractors-powerpoint-slideshow.

THE WRITTEN EMPLOYMENT CONTRACT
Bill Anderson, 416-593-3901 or
banderson@blaney.com, and:
http://www.blaney.com/articles/written-employment-contract-minimizing-future-disputes-powerpoint-slideshow.

FACEBOOK – FRIEND OR FOE? The impact of social media on hiring and firing.
Jack B. Siegel , 416-593-2958 or
jsiegel@blaney.com;
Catherine Longo, 416-593-2998 or
clongo@blaney.com, and:
http://www.blaney.com/articles/facebook-friend-or-foe-impact-social-media-hiring-and-firing-powerpoint-slideshow.

HUMAN RIGHTS OBLIGATIONS WHEN HIRING OR FIRING
Elizabeth Forster, 416-593-3919 or
eforster@blaney.com;
Maria Kotsopoulos, 416-593-2987 or
mkotsopoulos@blaney.com, and:
http://www.blaney.com/articles/conducting-effective-interview-dos-and-donts-during-hiring-process-human-rights-perspective.

HIRING AND FIRING IN THE UNIONIZED ENVIRONMENT
Mark Geiger, 416-593-3926 or
mgeiger@blaney.com, and:
http://www.blaney.com/articles/hiring-firing-unionized-environment-powerpoint-slideshow.

CAUSE… OR NO CAUSE? The ins and outs of terminations for cause.
David Greenwood, 416-593-2879 or
dgreenwood@blaney.com;
Melanie Francis, 416-593-4895 or
mfrancis@blaney.com, and:
http://www.blaney.com/articles/causeor-no-cause-ins-and-outs-terminations-cause-powerpoint-slideshow.

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Blaney McMurtry's Employment and Labour Law practice is rooted in the premise that employees are an employer's most important asset. Blaneys' workplace lawyers support frontline managers and supervisors in their efforts to establish, sustain and enhance the constructive workplace relationships that are the foundation of the most productive and profitable enterprises. While it is impossible to avoid all problems in the employment relationship, sound personnel policies, set out clearly and understandably and applied positively and proactively, can reduce conflict significantly. ■

Blaney McMurtry is pleased to announce

Dennis J. Tobin

has joined the firm, where he will continue his practice in corporate/commercial law and commercial and retail leasing.

Dennis is regularly involved in mergers and acquisitions, venture capital transactions, shareholder agreements and disagreements, start-ups and providing strategic corporate advice for small, medium and large corporations.

His leasing experience extends to most major retail centres in Canada's major cities, and his expertise includes negotiating and drafting retail, commercial and industrial leases. Dennis provides strategic advice for small, medium and large corporations, and represents a number of overseas companies in Canada in their retail and corporate operations.

Dennis was called to the bar of Ontario in 1986.

Dennis can be reached directly at 416.596.2897 or dtobin@blaney.com.

Blaneys on Business is a publication of the Corporate/Commercial Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Kylie Aramini at 416 593.7221 ext. 3600 or by email to karamini@blaney.com. Legal questions should be addressed to the specified author.

EXPECT THE BEST

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