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Drug-Related Seizure of Property Amounts to "Lien"; Mortgage in Default

In the case of *CIBC v. Allen*, CIBC had agreed pursuant to a credit agreement to provide Allen with a revolving line of credit which was secured by a mortgage/charge. The mortgage was duly registered; it provided that on default, both principal and interest were due and CIBC would be entitled to quiet possession of Allen's property.

However, Allen was subsequently charged with unlawfully producing marijuana on his property, which was a criminal offence under the *Controlled Drugs and Substances Act*. Based on a judge's finding that there were reasonable grounds to believe that a forfeiture order could be made, the Crown seized Allen's property in accordance with the authority granted to it under the Act. The resulting Restraint Order prohibited any disposal or dealing with the property, except as ordered by the court. However, an express exception to the Order provided that "[a]ny financial institution … may take possession, repair and sell the property pursuant to the rights assigned to it under any charge, mortgage or encumbrance that was registered prior to date of this order." Under this provision, CIBC was obliged to provide a full accounting to the Crown in connection with any proceeds arising from the sale.

CIBC claimed that the registration of the Restraint Order amounted to a "default" of the mortgage by Allen, and that it was therefore entitled to possession and to take steps under its power of sale. CIBC pointed to the fact that the mortgage's standard charge terms define "default" to include "any lien or notice of lien" registered against the property without CIBC's prior written consent. Furthermore, "lien" was defined as "any mortgage, charge, lien, assignment, security interest, execution, attachment or other encumbrance (whether given by statute or otherwise)."

CIBC, relying on the assertion that the Restraint Order amounted to a "lien" which in turn amounted to a default under the standard charge terms, brought a motion for summary judgment for possession, and for the money due under the mortgage.

The court observed that the forfeiture provisions in the *Controlled Drugs and Substances Act* are punitive and deterrent, and are intended to deprive an accused person of specific crime-related property. Conceptually, the effect of a restraint order is to freeze property, to place it under the legal and actual control of the criminal justice system, and to render the person in possession to be a mere caretaker or administrator. Such orders have been held to amount to a "seizure" within the meaning of s. 8 of the *Charter* (which protects citizens against unreasonable search and seizure).

By extension, the court held that the Restraint Order against Allen's land amounted to an "encumbrance" within the meaning of "lien" as defined by the mortgage's standard charge terms. Moreover, this lien attached to the property in the same manner that it would attach to the proceeds of sale if CIBC were to take steps to sell it. The mortgage was accordingly in default, and CIBC was entitled to summary judgment. See *CIBC v. Allen*, 2012 (ONSC).

Financial Products and Services Subject to New Regulatory Requirements

Three new regulations promulgated by the federal government impose restrictions affecting financial institutions, specifically to address the hold period for cheques, the use of credit card cheques, and the requirements relating to certain optional financial services.

These regulatory measures, enacted under various statutes including the *Bank Act*, the *Cooperative Credit Associations Act*, the *Trust and Loan Companies Act*, and the *Insurance Companies Act*, augment other recent, government-imposed consumer protection and disclosure initiatives aimed at enhancing consumer awareness and decision-making in connection with products and services offered by financial institutions.

Credit Business Practices Regulations

These regulations focus on "credit card cheques," which are essentially cash advances by which credit card companies allow funds to be withdrawn directly from a cardholder's credit card. Because they are considered to be cash advances, they bear higher interest rates and fees, and do not qualify for an interest-free grace period.

In order to educate consumers, the new regulations mandate that federally-regulated financial institutions must first obtain a borrower's express consent before issuing credit card cheques to him or her, and – if the consent was given verbally – must give the borrower written confirmation of that consent in paper or electronic format within a certain time-period.

These regulations are specifically aimed at preventing the use of unsolicited credit card cheques by borrowers, thereby reducing the likelihood of increased debt levels for Canadians. The regulations were published by the government on March 10, 2012 and will be effective as of that date once a 30-day comment period has expired.

Access to Funds Regulations

These new regulations make changes to the rules relating to cheque hold periods, specifically for paper cheques drawn in Canadian dollars from Canadian financial institutions.

First of all, the maximum cheque hold periods for consumers and "eligible enterprises" (defined as a business with authorized credit of less than $1 million, fewer than 500 employees, and annual revenues of less than $50 million) have been changed as follows:

- cheques of $1,500 or less that are deposited in person with a branch employee of the financial institution: —

four business days;

- cheques of $1,500 or less that are deposited in any other manner (e.g. through an Automated Banking Machine): — five business days;
- cheques greater than $1,500 that are deposited in person: — seven business days; and
- cheques greater than $1,500 that are deposited in any other manner: — eight business days.

Financial institutions must disclose these maximum hold periods in writing, and must also display them on their websites and make them available at each branch that offers personal deposit accounts.

Next, in connection with eligible enterprises, a financial institution can use its discretion to not comply with the maximum cheque hold periods if it has reasonable grounds to believe that there is a material increased credit risk, or that the deposit is being made for fraudulent purposes.

Also the maximum hold periods can be deviated from if: 1) the account has been opened for less than 90 days; 2) a cheque has been endorsed more than once; or 3) the cheque is deposited at least six months after the date of the cheque. A financial institution that relies on one of these grounds to apply a different hold period must provide the person making the deposit with written notice, together with a statement that he or she may contact the Financial Consumer Agency of Canada (FCAC) with any complaints.

These regulations, which come into force on August 1, 2012, essentially codify the "Voluntary Commitment on Cheque Holds" published by the Canadian Bankers Association.

Negative Option Billing Regulations

Under these new regulations, federally-regulated financial institutions are required to obtain the express verbal or written consent of consumers before providing them with any new "optional product or service" (which is defined as a "product or service that is offered or provided to a person by an institution … for an additional fee and is available only with an agreement for a primary financial product or service provided by the institution").

Effective consent by the consumer is contingent upon him or her first receiving from the financial institution a summary of the key information relating to the product or service. Also, once consent is received and the agreement is entered into, the financial institution must provide the prescribed information within 30 days of the agreement being signed, and must include: 1) a description of the product or service; 2) the term of the agreement; 3) the charges for the product or service (or else the method for calculating them, together with an example of that method); 4) the conditions under which the product or service may be cancelled by the consumer; 5) the date on which the product or service commences; and 6) the steps required for the consumer to use the product or service.

The regulations also stipulate certain procedures to be followed by a financial institution that intends to make changes to the terms and conditions, and mandates a pro-rated refund of charges in the event of cancellation. The new regulations come into force on August 1, 2012.

Creditor's Writ Does Not Extend to Land Held in Trust by Debtor

A recent Ontario court decision examines the interplay between a creditor's rights and a debtor's role as trustee of land.

The dispute before the court pertained to certain parcels of lands in Collingwood that were owned by a corporation. On the advice of a lawyer, and strictly for severance and *Planning Act* purposes, one parcel was placed in the name of an individual named Michaud as trustee for a corporation, by way of an unregistered declaration of trust.

Unfortunately, Michaud had personal debts; he owed money to a creditor named Coreslab Structures (Ont.) Inc. ("Coreslab"). When Michaud defaulted on his loan, Coreslab registered a writ of execution (the "writ") against Michaud in his personal capacity.

Meanwhile, certain third parties had expressed interest in purchasing the Collingwood land owned by the corporation. But when these potential buyers performed a standard search for registered executions, the writ against Michaud came to light. The writ effectively blocked the sale, since it legally prevented Michaud as trustee from conveying the land he held in trust for the corporation.

Michaud applied to the court to determine whether the unregistered declaration of trust in relation to the lands took priority over the writ that had been registered against him in his personal capacity.

First of all, the court confirmed the legitimacy of the unregistered trust declaration: it was not a manufactured document but rather had been entered into on the advice of a lawyer. Also, while it was true that Michaud was technically a corporate officer of the company for whose benefit he held the lands in trust, he had never been financially involved in that company; it was owned by various other shareholders. Instead, Michaud's role was limited to that of trustee of the lands.

Next, the court considered Coreslab's rights as execution creditor. It referred to the Ontario *Execution Act*, which provides that a sheriff's authority to sell lands belonging to an execution debtor such as Michaud specifically includes land that was being held in trust *for him*. However, it did not apply to land that was being held *by him* as trustee for another. Therefore, in its role as execution creditor Coreslab could claim no more than the extent of Michaud's interest in the land, which in this case was limited by his status as trustee, not owner.

Accordingly, Coreslab's writ against Michaud could not attach to the lands held by him in trust. See *Michaud v. Coreslab Structures (Ont.) Inc.*, 2012 (ONSC).

LEGAL ALERTS

***Canadian Payments Act* Regulations**

New amending regulations under the *Canadian Payments Act* affect the Canadian Payments Association (CPA), which is a not-for-profit organization responsible for establishing and operating systems for the clearing and settlement of payments. Under these amendments, which are in force as of March 2, 2012, "payments" include bills of exchange drawn on CPA-member financial institutions such as trust companies, life insurance companies, securities dealers, and co-operative credit associations.

New Additions to the Firm

David Markowitz has recently joined BSR. He has extensive experience in mortgages and conveyancing, and his law practice focuses on serving financial institutions in connection with real estate financing. He was called to the Ontario bar in 2005.

Ryan Solomon has also joined the firm after his call to the Ontario Bar in 2011. Adding to his previous experience in the real estate and corporate law groups at another Toronto law firm, he currently practices in the litigation and real estate areas for BSR.