REAL ESTATE DEVELOPMENT AND CONSTRUCTION PROJECT INSOLVENCIES: IS DEBT RESTRUCTURING FEASIBLE?

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I. INTRODUCTION

While the global economy has cooled, the insolvency practice is certainly experiencing its own boom at the present. One of the hardest hit industries after the large run up in prices has been real estate development, particularly in Alberta and British Columbia.

While each insolvency creates certain challenges, real estate development insolvencies present unique challenges. Many trade creditors, who in any other industry would normally be unsecured creditors, have enhanced security rights and trust rights pursuant to the various construction and builders' lien statutes. Cash flow during construction is usually solely from construction advances by lenders and has certain restrictions or limits placed on it by the construction liens statutes through the hold back requirements. The long-term viability of the project is dependent on selling or leasing units or space, and being able to close those deals in a timely fashion. If the project is not completed in time, counterparties may exercise termination rights under their agreements.

A real estate development insolvency is fraught with risk for all stakeholders. The developer risks losing significant investment dollars. The lenders risk losses on amounts already advanced in a falling market with potentially significant costs to complete. The trade creditors find themselves in a position where they cannot complete a job which they may have committed significant financial resources, and risk receiving very little. Purchasers and tenants may have deposits at risk; further, they may be at risk of not having a place to live or to conduct business. It is obviously in the best interest of all parties concerned to try and maximize recovery, but the question remains how to accomplish that objective while balancing the interests of all stakeholders.

It has been the traditionally accepted notion that a court supervised, debtor controlled restructuring process tends to enhance recovery for all stakeholders in insolvency situations. However, recent cases have cast a shadow over the ability to do so in the real estate development industry. This paper will review those cases and offer suggestions to address the raised concerns, with the purpose of showing that a court supervised restructuring process is still possible, though perhaps not in the traditional sense.

II. CLIFFS OVER MAPLE BAY INVESTMENTS LTD. – THE CCAA CONTEXT

A. Background

The British Columbia Court of Appeal raised some doubt about the feasibility of debt restructurings for real estate developments under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA") with its decision in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. et al* (2008) BCCA 327 (CanLII) [*Maple Bay*].

The debtor company was established to develop a 300 acre site near Duncan, British Columbia consisting of single-family lots, multi-residential units, a hotel, apartments and a golf course. The development was to be carried out in five phases, with the golf course being the central feature.

The first phase consisted of 70 single-family lots and 60 multi-residential units. At the time of the Court of Appeal hearing, construction was 95% complete and 54 of the 70 single-family lots had been sold. Phase 2 consisted of 76 single-family lots which were 50% complete. Phase 3 consisted of 69 single-family lots, 112 multi-residential lots and 225 hotel units. It was only 5% complete. Phases four and five consisted of 131 single-family lots and 60 multi-residential units, each of which was 1% complete.

The golf course itself was only 60 to 70% complete. A restrictive covenant in favor the municipality stipulated that the golf course had to be 80% complete before more than 200 lots could be sold.

With respect to its debt, the company owed mortgage lenders in excess of $30 million and had trade and other debt totaling $7,340,000. The company had run into difficulties regarding the development prior to March of 2008 as a result of construction delays and budget overruns. Its two main mortgages had matured and it was unable to secure a water source for irrigation of the golf course.

The company applied for and obtained an initial order under the CCAA, without notice to its lenders or any other creditors, two days after the lenders had appointed a receiver. The company made a further application at the comeback hearing for an extension of the stay and authorization for debtor-in-possession financing in the amount of $2,350,000. The lenders opposed that application and made a concurrent application requesting that the initial order be set aside and that an interim receiver be appointed pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "BIA"). The chambers judge granted the company's application and dismissed the lender's application.

The Monitor's Report filed in support of the debtor's application estimated the value of the project under three scenarios:

1. Liquidation value with no source of water for irrigation -- $10 million;
2. Liquidation value with a source of water for irrigation – $28 million; and
3. Going concern value with completion of the development -- $50 million.

The lenders appealed.

B. Decision of the Court of Appeal

The lender's primary argument on appeal was that the CCAA should not apply to companies whose sole business was a single land development, or to companies whose business was essentially dormant. The Court of Appeal rejected that argument. Tysoe J., writing for the British Columbia Court of Appeal, stated that the debtor company fell within the definition of "a debtor company" in section 2 of the CCAA, and satisfied the criterion established in the CCAA of requiring liabilities in excess of $5 million. The court stated that the real question was whether it was appropriate for the chambers judge to grant the company a stay of proceedings under section 11 of the CCAA.

Tysoe J. agreed with the debtor company that the nature and state of the company's business are factors to be taken into account when considering whether it is appropriate to grant or continue a stay under section 11 of the CCAA. Tysoe J., however, considered that there was another, more fundamental, factor which was not considered by the chambers judge: whether the company intended to make a plan of arrangement to put to its creditors for a vote.

While in this case, the debtor company described a restructuring plan in its petition commencing the proceedings, that plan did not disclose an intention to put a plan of arrangement or compromise to its creditors. It involved simply securing sufficient funds to complete phases two and three of the development, securing access to water for irrigation for the golf course and finishing construction of the golf course. There was no evidence given by the company respecting a proposed plan of arrangement, nor were there any comments made in relation to a prospective plan in the Monitor's Report.

The Court of Appeal reviewed the fundamental purpose of the CCAA and the integral part that the stay of proceedings plays in furtherance of that purpose. In this regard, Tysoe J. states at paragraph 26:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose.

The Court then reiterated the fundamental purpose of the CCAA as previously articulated in two often quoted decisions: *A.G. Can v. Que.* (sub. Nom. Reference re: *Companies' Creditors Arrangement Act*, [1934] S.C.R. 659), and *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) [*Chef Ready*]. Tysoe J. cited with approval the following passage of the *Chef Ready* decision at paragraph 29:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

In the view of the Court of Appeal, the presentation of a compromise or arrangement to the debtor company's creditors is fundamental to the question of whether a stay should be granted or continued under the provisions of the CCAA. The court accepted that the filing of the draft plan of arrangement or compromise is not a prerequisite to the granting of the stay order under section 11, particularly at the initial stage (*Re Fairview Industries Ltd.* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43). The debtor company may well need further time to formulate its plan. The court did, however, make it clear that the intention of the debtor company could be scrutinized at the initial comeback hearing and a determination made then as to whether the debtor company did truly intend on proposing a true compromise arrangement with its creditors.

The debtor company also argued before the Court of Appeal that there were other decisions where the court approved the use of the CCAA to effect a sale, winding up or liquidation of the company such that its business would not be ongoing following an arrangement with its creditors: *Re Lehndorff General Partner Ltd* (1992), 17 C.B.R. (3d) 24 (Ont. Ct. Jus. – Gen. Div.) and *Re Anvil Range Mining Corp* (2001) 25 C.B.R. (4^{th}) 1 (Ont. S.C.J) aff'd (2002) 34 C.B.R. (4^{th}) 157 (Ont.C.A.). Justice Tysoe noted that in each of those cases, the proposed course of action was part of a plan of arrangement approved by the creditors and sanctioned by the court.

The court was also asked to apply *Re Skeena Cellulose Inc.* (2001), 29 C.B.R. (4^{th}) 157 (B.C.S.C.) [*Skeena*] on the ground in that the restructuring plan in that case was wholly dependent upon the debtor finding a purchaser for its assets. Again, the Court rejected the application of *Skeena*, noting that the company in *Skeena* was planning to make an arrangement with its creditors, and the sale of the assets was a critical prerequisite to its plan.

The principal problem in *Maple Bay,* according to the Court, was that the debtor company did not indicate an intention to propose an arrangement or compromise to its creditors before embarking on the restructuring plan. Accordingly, in the absence of that intention, the Court did not believe it was appropriate for a stay to have been granted or extended under section 11 of the CCAA. As per the Court at paragraph 38:

> What the Debtor Company was endeavoring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

The Court allowed the appeal and set aside the order.

III. 1252206 ALBERTA LTD. v. BANK OF MONTREAL – THE BIA CONTEXT

A similar matter, although on a smaller scale, was before the court recently in Alberta in *1252206 Alberta Ltd. v. Bank of Montréal,* 2009 ABQB 355 [*Bank of Montréal*]. In this case, the debtor company, a single purpose entity, was the developer of lands upon which it planned to build a 38 unit wood framed duplex project. The debtor had commenced construction on 12 of the planned units. At the time of its insolvency, those units were approximately 45% complete. It owed the bank $2,900,000 and trade creditors approximately $29,000. Construction stopped due to a shortfall of funds, and the bank's loan matured on December 1, 2008. The bank demanded on its loan and the company responded by filing a notice of intention to make a proposal pursuant to section 50.4 of the BIA.

Unlike the situation in *Maple Bay*, the debtor company in *Bank of Montréal* did have the outline of a proposal it hoped to be in a position to make to its creditors. The proposal was to pay everyone in full, including the bank, after completion and the subsequent sale of the units. The proceeds would be used to pay out debtor-in-possession ("DIP") financing which it was seeking, and then obtain refinancing which would enable it to pay out the bank. That proposal, however, was contingent upon the company obtaining DIP financing in the amount of $1.1 million. Furthermore, all of this had to be accomplished within a six-month timeframe (the maximum period of time within which a company could utilize the provisions of the BIA to stay its creditors).

The matter came before the court on two applications. The first application by the debtor company was for an extension of the time period within which to file its proposal and for approval of a $1.1 million DIP financing ranking ahead of the bank. The second application by the bank was for the early termination of the stay, pursuant to the provisions of section 50.4 (11) of the BIA. The Bank made this application on the basis that the debtor was not likely to be able to make a viable proposal that would be accepted by its creditors. The company's applications were dismissed. The bank's application was allowed.

In rejecting the debtor company's applications and granting the bank's application, it is clear from the decision that the court was concerned with two primary factors. First, the bank gave evidence that it had lost all confidence in the debtor and its ability to complete the development. As such, it was not prepared to vote in favor of any proposal that the company would put forward. Considering that the bank controlled 100% of the secured indebtedness, the proposal was doomed to failure. Second, the effect of allowing the application for DIP financing would have been to remove control from the bank of the means for recovery. The proposed plan appeared to give the insolvent debtor an opportunity to complete the project by imposing a lending regime on the bank which no other lender was apparently prepared to entertain.

The Court applied the rationale in *Maple Bay,* indicating that the legislative purpose of the proposal provisions of the BIA is similar to that under the CCAA. The central feature of both a proposal or plan of compromise to the creditors was to give the creditors an opportunity to vote on the debtor's plan. While there was a plan outlined to the Court in *Bank of Montréal*, the Court noted as follows, at paragraphs 30 to 32:

> With the DIP financing in place it hoped to finish construction of the 12 units, sell them and use the proceeds to pay off the Bank during the period of the stay without any proposal being developed or at least voted upon.
>
> Applicant's counsel sought to distinguish the *Maple Bay* decision by arguing that he has already presented a plan for a proposal and that the proposal would go to a vote, albeit at a point where it would be able to repay the bank in full. He thus considered the requirement for a vote on a proposal as a technicality.
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> The court in *Maple Bay* was not concerned with the absence of a technical requirement, however. It was concerned with a scenario which would see a proposal implemented through the use of DIP financing before any creditor would be able to cast a negative vote against it. That, in substance, is exactly what the applicant proposed here.

IV. CASE CONCLUSIONS

Neither *Maple Bay* nor *Bank of Montréal* should be viewed as authority prohibiting a debtor from making efforts to restructure its debts. Traditionally in a restructuring, a stay is obtained through Court Order or on the appropriate BIA filing. A subsequent application is then made for an extension of the stay, and/or DIP financing approval. However, it is clear that the "traditional" approach to a restructuring needs to be reconsidered in the context of real estate development, particularly an incomplete development. This was certainly not lost on the Court of Appeal in the *Maple Bay* decision where the Court notes, at paragraph 36:

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by new partner or DIP financing.

The *Maple Bay* and *Bank of Montréal* decisions do provide some practical and legal guidance when assessing the viability of a real estate development restructuring. From a practical perspective, if the primary mortgage lenders are no longer willing to support the existing management of the development, absent some radical change in management, it is unlikely that a restructuring involving anything other than the sale of the development is in the offing.

From a legal perspective, it is fundamental, as part of the stay under either the CCAA or the BIA, that the debtor company develop a plan to put to its creditors for a vote. Further, the plan should not be contingent upon the company being able to obtain DIP financing ahead of its primary lenders, particularly where those lenders have the ability to veto the plan and are not prepared to allow their security position to be eroded by the DIP.

V. CONSIDERATIONS IN REAL ESTATE DEVELOPMENT RESTRUCTURINGS

The decisions in Maple Bay and Bank of Montréal certainly make it clear that other alternatives need to be considered in the absence of primary lender support. Obviously, if the primary lender of the development project is willing to continue to work with the debtor, then the task of restructuring the debt becomes much easier. They may be willing to extend additional funds if circumstances warrant. However, the lender is usually in a position to impose conditions on their continued support, and may even be in a position to assert a level of control over the proceedings. This, as we know, is usually accomplished through the use of forbearance agreements outlining strict terms and conditions upon which the lender's continued support will be maintained.

The greater difficulty is presented when the debtor loses the support of its primary lenders and funds are needed to assist in completion of the project before the end product can be sold or leased. That does not mean, however, that the debtor company is without options. Furthermore, a restructuring through the utilization of the insolvency statutes may be needed to preserve capital losses and to effect a compromise with trade creditors. This is particularly so where claimants may have remedies under the construction lien statutes, depending on the jurisdiction, against the directors of the debtor if there are shortfalls to the trust created by the statutes.

The first step, as with any other insolvency, is to assess the viability of the project. Pre-sales or leasing are critical. Other critical factors to assess are the costs to complete the project, the timeline within which to bring the project to completion, a timeline for concluding sales and the ultimate value or profit at the conclusion of the project. Management will always be positive, at least in the writer's experience, so it is important to have an independent assessment of these matters as early on in the process as possible. The engagement of an insolvency/financial adviser, who will ultimately become the monitor, early on is key in assessing whether some form of restructuring is even feasible and if so, what form it might take.

Where the primary lenders are not supportive of management, there may be no alternative but to proceed with a sale as part of the restructuring process. The sale concept is not so much a means to salvage the existing corporate body which holds the development; rather, it is to salvage the development or business itself by moving it to a new entity with resources available to it to complete the project. The principals may or may not be part of that new entity. It is not the intent of this paper to review whether a sale of assets or liquidation through the CCAA/BIA process is appropriate. Suffice to say there is abundant support for doing so in the case law in all jurisdictions in Canada to varying degrees.[1] The debate, it would appear, is about to end, with the coming into effect of the amendments to the CCAA. As at September 18, 2009, the ability of the debtor to make an application to the Court to allow it to sell assets out of the

[1] The reader is referred Holden and Morawetz Bankruptcy and Insolvency Analysis N§1, Introduction to the Companies' Creditors Arrangement Act, as well as the following articles: Shelley Fitzpatrick "Liquidating CCAA's – Are We Praying to False Gods?", and Bill Kaplan "Liquidating CCAA's: Discretion Gone Awry?", in J. Sara, ed., Annual Review of Insolvency Law, 2008 (Toronto: Carswell, 2009).

ordinary course of business will be enshrined in section 36 of the CCAA. In the writer's view, the legislative change does not mean that the CCAA can necessarily be utilized as a liquidation tool. Rather, it means that the debtor has been afforded additional options, provided that the Court is satisfied that the factors listed in section 36(3) have been met. These factors are not exhaustive but include:

a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

b) Whether the Monitor approved the process leading to the proposed sale or disposition;

c) Whether the Monitor filed with the Court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

d) The extent to which the creditors were consulted;

e) The effects of the proposed sale or distribution on the creditors and other interested parties; and

f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

In terms of sales to related persons, section 36(4) of the CCAA has also been added which provides that:

> If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Under the BIA, there are no proposed amendments of a similar nature. However, if a liquidation or sale of assets is contemplated as part of a proposal to creditors and the creditors approve it, it is the writer's experience that the Court is often inclined to accept the will of the creditors (assuming the proposal meets all other factors in terms of fairness and appropriateness).

If it is clear that a sales process must be undertaken and there is perceived value in moving forward with a sale and a plan, then a number of questions must be asked:

1. How much time will the sales process take?

2. Who should be responsible for managing the sales process: the debtor or the monitor?

3. What is the market for this particular project? Is there a market for this particular project or does the project model need to be changed?

4. Are there lenders willing to loan to a prospective purchaser in an amount sufficient to satisfy the secured lenders and provide sufficient funding to complete the project? If so, is the financing priced appropriately such that a further insolvency will not result a year down the road?

5. If there are lenders willing to loan, is it possible to put together a "stalking horse" bid in place prior to putting the project to the market? Or will the debtor be in a position to put together that sort of bid itself, in an effort to recoup its investment through a new entity? Does the debtor have the ability from a management perspective to carry on? If so, does the project need to be put to the market?

6. Will there be sufficient funds generated to allow an offer to be made to the trade creditors, many of whom will be needed to assist in completion of the project? Alternatively, are there other means of addressing trade creditor claims, whether through the use of holdbacks or otherwise? In terms of trade creditor support, are they hostile to management or are they generally prepared to offer support? Have they liened? What is the size of that creditor pool?

7. Are there any prospective purchasers or tenants for the project, or have they started to terminate their contracts as a result of continuing delays? What is the status of their agreements?

8. Do the principals of the debtor hold security over the assets of the debtor to secure shareholder advances?

Answers to these questions should assist the debtor in determining whether some form of compromise arrangement is possible under either the CCAA or the BIA. Some patience will be required on the part of the primary lenders. On a consensual basis, the primary lenders may seek additional oversight through the engagement of their own financial advisors to “monitor the monitor.” The cost of this additional oversight will of course be passed on to the debtor.

Once the primary lenders are prepared to support the reorganization, the next group of creditors to consider is the lien claimants. The lien claimants do have enhanced rights both in terms of security and, in several jurisdictions, enhanced trust rights in relation to funds flowing from the owner and owing to that claimant. While these claimants do enjoy enhanced rights which in virtually all of the lien statutes cannot be eroded by contract, it is important to note that none of the lien statutes prevent the lien claimants from compromising their claims. They can all agree to take less after they have exercised their rights of lien. There is nothing in any of the lien statutes which says clearly that the lien or trust claimants must be paid in full. Of course, the key to accomplishing this objective will be in establishing a plan or proposal which garners enough support to take less from the requisite majority.

If faced with difficulty with this particular group, the debtor may choose to threaten or, for strategic reasons, the debtor may choose to apply for the appointment of the receiver on its own accord. It may want to limit the scope of the appointment and have more control over costs of the process. It may be that loans are available to pay out the secured creditors and fund completion, but not fund a proposal for creditors. There could be any number of reasons why the debtor may choose to proceed with a receivership or at least threaten it.

If the principals have some form of security, or even unsecured shareholders’ loans in the company, there is nothing preventing the company or its principals from making an application to the court for the appointment of a receiver of their choosing. Sections 46, 47 and 47.1 of the

BIA respecting the appointment of interim receivers do not restrict who may make an application to the court for the appointments. It is of course normally a step brought by a creditor, not the company itself or its principals, but there is nothing in these sections which precludes the company or the principals from making the application.

We do note that the amendments to section 243(1) of the BIA, which will come into effect on September 18, 2009, only give the right to apply for a receiver under that section of the BIA to secured creditors. However, each of the provinces have legislation similar in form to section 13 (2) of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2. This section provides the court with jurisdiction to appoint a receiver where it is just and convenient to do so.

Furthermore, each of the provinces has construction lien legislation. In some jurisdictions, there are enhanced provisions for the appointment of receivers or trustees under that legislation. In Alberta, s. 54 of the *Builder's Lien Act*, R.S.A. 2000 c. B-7 reads as follows:

> **54(1)**
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> At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver on any terms and on the giving of any security or without security, as the court considers appropriate.
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> **54(2)**
>
> At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a trustee and the court may, on the giving of any security or without security, as the court considers appropriate, appoint a trustee
>
> (a) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and
>
> (b) with power, on approval of the court, to complete or partially complete the improvement.
>
> **54(3)**
>
> Mortgage money advanced to the trustee as the result of any of the powers conferred on the trustee under this section takes priority over all liens existing at the date of the appointment of the trustee.

54(4)

Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.

54(5)

The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lien holders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

54(6)

The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

54(7)

A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

Equivalent sections, with very similar wording, are found in section 84 of Saskatchewan's *Builders' Lien Act,* S.S. 1984-85-86, c. B-7.1, section 69 of Manitoba's *Builders' Liens Act*, R.S.M. 1987, c. B91; section 68 of Ontario's *Construction Lien Act*, R.S.O. 1990, c. C.30, and section 32 of Newfoundland's *Mechanics' Lien Act*, R.S.N.L. 1990, C. M-3. The other jurisdictions do not appear to have an equivalent section in their legislation.

Where the development exists in one of these jurisdictions, there is further ability given to the court to grant an order in favour of "any person interested in the property" which could include the debtor itself.

VI. OTHER CONSIDERATIONS IN RESTRUCTURING REAL ESTATE DEVELOPMENTS

Most provincial jurisdictions in Canada have now developed template orders for CCAA restructurings and for receiverships. Obviously, in the BIA context, the legislation itself governs. Certainly, at the Initial Order stage, there are some crucial items necessary in those orders to preserve the status quo.

As a general statement, however, it should never be lost on those making applications to the Court that for every provision sought in an Initial Order, the Court must have some evidence before it to satisfy itself that circumstances warrant the granting of that particular provision. The explanatory notes from the Alberta Template CCAA Order, as an example, make it clear in the third paragraph of the introduction that:

> The Alberta Template CCAA Order is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, consistent with the philosophy applied to the Alberta Template Receivership Order, the Alberta Template CCAA Order is meant to serve as a starting point from which any additions, amendments or deletions can be black-lined and brought to the attention of the Justice from whom the Order is sought. The assistance of members of the judiciary to the Alberta Committee does not mean that there is any "arrangement" with the Court that a CCAA Order will be granted in all instances where the proposed order approximates the Alberta Template CCAA Order, or at all. In each application, the discretion of the presiding Justice will be completely unfettered by the use or non-use of the Alberta Template CCAA Order.[2]

Likewise, we have the decision of Justice Slatter, as he then was, in *Re Big Sky Living Inc.,* 2002 ABQB 659 (Alta. Q.B.) [*Big Sky*], which was most recently considered by Justice Yamauchi in *Canadian Western Bank v. 702348 Alberta Ltd. and Guild Developments Inc.*, 2009 A.B.Q.B. 271 [*Guild Developments*]. To summarize with the words of Master Funduk: "When it comes time to give evidence there is no substitute for evidence."[3]

One of the critical elements in any real estate development will be the pre-sale contracts or offers to lease entered into prior to or during the course of constructing the development. Most of these agreements will have flexible possession dates; however, it is critical to the ongoing viability of the development, even in the hands of a new entity, that these contracts not be terminated. The provisions of the CCAA Order and, if appropriate, Receivership Order, preventing parties from attempting to exercise the bargain for rights without leave of the Court are essential and evidence must be led at the initial hearing to confirm it.

The importance of that was brought home in the *Guild Developments* case, although in the context of a receivership. In *Guild Developments,* the Court allowed two tenants to terminate leases in the face of contractual language which appeared to extend possession dates indefinitely and did not include time of the essence provisions. See also *Spirent*

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[2] Found at www.albertacourts.ab.ca/courtofqueensbench/commercialpractice/tabid/324/default.aspx
[3] *Royal Bank v. Nysted Construction* [1985] A.W.L.D. 927 at para. 38

Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc., 2008 ONCA 92 (CanLII), leave to the SCC denied 2008 CanLII 36473.

Lien claimants can also not be overlooked. Their claims for liens and trusts are secured claims against property of the debtor which in this case would be the owner of the development (see *Re Blue Range Resource Corp.* [1999] A.J. No. 1337; and *Kerr Interior Systems Ltd.*, 2009 ABCA 240).

Lien claimants can create particular difficulties where debtor in possession financing is sought.[4] In Alberta, certainly debtor in possession financing has been allowed in the face of lien claims (*Re Sulphur Corp. of Canada Ltd.*, 2002 ABQB 682). However, in Ontario, Justice Farley was not inclined to grant DIP financing priority over registered builders' liens in *Re Royal Oak Mines Inc.* (1999) 7 C.B.R. (4th) 293.

The reader is reminded that certain jurisdictions, notably Alberta, Saskatchewan, Manitoba, Ontario, and Newfoundland, have provisions in their builders' lien/construction lien/ mechanic lien legislation enabling the Court to grant priority to certain monies advanced to the Trustee.[5] For example, section 54(3) of Alberta's *Builders' Lien Act* provides that "money advanced to the Trustee as the result of <u>any of the powers</u> confirmed on the Trustee under this section takes priority over all liens existing at the date of the appointment of the Trustee (emphasis added)." Presumably, the Court could appoint either the Monitor (if it was appropriate to do so) or the debtor itself as the Trustee utilizing these provisions where similar legislation exists in that jurisdiction.

Finally, given the lien holders' enhanced status under legislation, they are clearly secured creditors under the provisions of the CCAA and must be treated as such in any proposed plan of arrangement.

[4] Query whether they may also be adversely affected by any administration charge ordered by the Court in any Initial Order.

[5] Compare section 53(3) of Alberta *Builders' Lien Act* with section 84(4) of Saskatchewan's *Builders' Lien Act*; section 69(2) of Manitoba's *Builders' Liens Act*, section 32(2) of Newfoundland's *Mechanics' Lien Act*; and section 68(3) of Ontario's *Construction Lien Act*.

VII. CONCLUSIONS

While real estate developments do present unique challenges in a restructuring, and may well not lend themselves to a “going concern” restructuring in terms of salvaging the existing corporate entity in which they reside, there are other options available to proceeding with a real estate development. This paper has offered merely some suggestions to address the situation in these economic times. Ultimately, it is clear that the restructuring does require some breaks from traditional restructuring thoughts and processes.