

Certifying a Commercial Mortgage

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The difference is a great relationship.

AKA...

How to identify and complete
a commercial mortgage
transaction

Agenda

1. Signs you're working on a commercial mortgage
2. Due Diligence
3. Document preparation (or review)
4. Opinions
5. Practice Tips

How do I know when I'm working on a commercial mortgage?

- Check the credit agreement
- Is other counsel involved?
- Consider the nature and use of the property
- Ask your client

Due Diligence

1. Title and Judgments
2. Zoning
3. Property Taxes
4. Environmental
5. Companies Act
6. Bankruptcy / CCAA
7. Litigation
8. WCB & Labour Standards
9. Residency
10. Bylaw violations

Title and Judgments Searches

- Land Registration Act
- Judgments
- Survey or location certificate
- Beware of overriding interests
- Review plans of survey

- Property can be subject to unpaid judgments
- Search judgment role in grantor/grantee index (GGI)

Zoning

- Confirm permitted uses match intended uses
- HRM – consider ExploreHRM

<http://www.halifax.ca/giss/index.html>

Property Taxes

- Section 133 of MGA: unpaid taxes = 1st lien (no registration requirement)
- Protects purchaser from inheriting an unpaid tax bill / lien on parcel
- Requirement to pay if due within [30] days of closing

Environmental

- What does the Credit Agreement say?
- Options:
 1. Phase I and phase II Assessments
 2. Existing environmental reports
 3. Environmental registry

Companies Act

- *Corporations Miscellaneous Provisions Act* (Part VII) - property of a dissolved company escheats to the Crown
- Registry of Joint Stock Companies database / Certificate of Status / Opinion

Bankruptcy / CCAA

- *Bankruptcy and Insolvency Act* (Section 16(3)) - property of a bankrupt vests in trustee
- *Companies Creditors Arrangement Act* (Part II) – company may be under court protection

Litigation

- When is it required?
- Issues with completing
- Alternatives

WCB & Labour Standards

- *Workers Compensation Act* (Sections 147(1) & 148):
 - assessment is a first lien against property of the employer (regardless of whether employer owns the property)
 - 1st charge on sale proceeds
 - recall s. 73, LRA – no requirement to register

- *Labour Standards Code (Section 88):*
 - any order issued under the Code constitutes a 1st priority lien
 - **BUT** must be recorded in the judgment role to have effect against the real property (but not personal property)

Residency

- Non-resident mortgagors raise issues relating to s.116 withholding on realization, foreign withholding tax and potential exposure to foreign bankruptcy/insolvency proceedings.

Document Preparation and Review

- Develop a closing agenda
- Determine responsibility
- Review terms and covenants

Closing Agenda

- Categories
- Deliverables
- Responsibility
- Signatories
- Delivery Requirements and Escrow Release

Terms and Covenants

- Terms are the business terms governing the deal
- Covenants describe promises by the borrower to do or not do something.

Opinions

- The basics
 - Title & Priority (to real property)
 - Creation of a Security Interest
 - Perfection
 - Searches

Title and Priority

- The Borrower has good and marketable title in fee simple to the Property, and the mortgage is recorded as a [first] fixed and specific mortgage of the Property. The Mortgage was recorded on * as document no. * in the Nova Scotia Land Registration Office for the registration district of * (the “**Registry**”).

Creation of a Security Interest

Each of the Security Documents creates a valid security interest in favour of the Lender in the collateral described by the Security Documents that is personal property to which the *Personal Property Security Act* (Nova Scotia) (the "PPSA") applies and in which the Borrower has rights, and is sufficient to create a valid security interest in favour of the Lender in any such assets in which the Borrower hereafter acquires rights when those rights are acquired by the Borrower to secure the payment and performance of its obligations under the Credit Agreement.

Perfection

Registration has been made in all public offices provided for under the laws of Province of Nova Scotia or the federal laws of Canada where such registration is necessary, (a) to perfect the security interests created by each Security Document to which the Borrower is a party, in favour of the Lender in the personal property or assets of the Borrower, described therein; and (b) to protect or perfect the charge and interest created by the Security Documents in the property referred to in the Credit Agreement.

Searches

The searches described in Schedule “*” to this opinion constitute all searches which are customarily conducted under the laws of Nova Scotia and the federal laws of Canada applicable therein for security and other interests in personal property of a kind similar to the Collateral as of the applicable dates identified in Schedule “*”. Such searches were conducted in respect of the current name of the Borrower. Such searches revealed, as of their respective currency dates, that there were no security interests, encumbrances or notices thereof registered against the Borrower other than as disclosed by Schedule “*”.

Other Opinions

- Liens
- Ownership

Practice Tips

- Due Diligence Early
- Prepare Your Opinions Early
- Be Organized!

Questions?