GOVERNMENT OF ALBERTA GRAZING LEASES

Mae Chow

A provincial grazing lease is a common interest in land with specific rules for transfer/assignment. Often Crown lands are declared to be available to the public and leases are granted. Once issued, however, they become very valuable assets and can be willed to heirs on death. When sold or assigned they can be worth tens of thousands of dollars. There is a standard form of assignment of grazing lease approved by the Minister for both individuals and corporations. The approval time of a grazing lease assignment can take upwards of 12-16 months. Normally the real estate practitioner will seek to separate any transfer closing dates on fee simple lands from the grazing lease assignment, thereby allowing some of the funds to flow to the seller, while the grazing lease consideration continues to be held in trust until the process is concluded. The purchase of the grazing lease can also be financed/used as collateral for refinancing.

The Alberta Department of Environment and Parks forms for which approval of the financing must be obtained are found along with the assignment documents at www.aep.alberta.ca.

Currently, the following Department is your contact point for assignment purposes.

- Agriculture Unit
- Approvals and Disposition Section
- Provincial Programs Branch
- Operations Division
- Alberta Environment and Parks

> "ONCE ISSUED, PROVINCIAL GRAZING LEASES BECOME VERY VALUABLE ASSETS AND CAN BE WILLED TO HEIRS ON DEATH. WHEN SOLD THEY CAN BE WORTH TENS OF THOUSANDS OF DOLLARS."

A couple of practise points to be wary of:

1. The assignment fee to the Alberta Government can be large and is often not contemplated in the standard Agricultural Real Estate Purchase Contract. A recent file with an assignment fee of $16,000.00 required the Buyer and the Seller to re-negotiate whose responsibility it was to pay this.
2. Copies of the grazing lease, denoted by the "GRL" prefix, can be obtained for a fee from the Government of Alberta.
3. The Assignor must have held at least 2/3 of the leased lands for three years to be able to transfer/assign the same to an arm's length third party (Public Lands Administration Regulation, Alta Reg 187/2011 s.156.).
4. Surface Leases from oil companies may also be payable on a grazing lease. This lease revenue should also be assigned and adjusted to the Buyer.

For more information on Alberta Grazing Leases, please contact us.

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CONNECTING YOUR BUSINESS AND PERSONAL LEGAL NEEDS

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MANAGING FINANCIAL ISSUES BEFORE THE BANK COMES CALLING

PROACTIVE STEPS TO MANAGE YOUR BUSINESS CREDIT

Darren Bieganek, QC

It is no secret that the economic downturn is affecting business across the province. Revenues and asset values are down and investment and lending practices have tightened up considerably. In times like this, it may be tempting to ignore financial issues and hope for better economic news. However, it is far better to be proactive in managing the financial aspects of your business, maintain open communication with your lender, and seek professional assistance early—even if it is just to identify potential problems.

Creditors' Rights 101

Most credit facilities are reviewable annually and, if they are with a bank, payable on demand. Contrary to what you might think, the right to demand can be, and often is, triggered by something other than failure to make a payment. In addition to repayment terms, your credit agreement will usually include positive and negative covenants; the things a business must maintain, do, or not do. These include:

- Financial covenants that must be maintained: debt service ratio, tangible net worth ratio, and debt to equity ratio.
- Reporting requirements—monthly operating figures and annual financial statements.
- Restrictions on capital expenditures and payments to shareholders and related entities.

So, first and foremost, maintain good communication with your lender; report on time and provide consistent information. It is a good idea to test your covenants before you submit the reports. If necessary, engage your accountant to assist you in the calculations.

Be Proactive and Put A Plan In Place

If issues arise, do not bury your head in the sand. Work with your professional advisors to develop a plan and provide it to your banker both verbally and in writing. Remember, the person you deal with at the bank is often not the ultimate decision maker. They usually have internal reporting obligations to someone else who will be the ultimate decision maker.

Lenders are willing to look at options that reduce or eliminate their risk. Banks, as a rule, do not like defaults, so approach the bank early and attempt to engage them in a discussion about covenant adjustments that will help your business avoid a default.

Consider other potential solutions. Have your hard assets valued. Are they bankable? How well secured is the lender? Take a look at the cash burn for the business. Is it sustainable in the short, near, or long term? What can be done to address it? Is downsizing an option? Can surplus assets be sold or re-tasked?

Special Debts or Asset Management

These are groups within the lending organization that are tasked with fixing credit issues from the lender's perspective. If you are advised that your loan is being transferred to this group, it generally means that the lender has deemed your risk significant enough that it must be managed more closely with a view to having it eliminated. If you have not already, now is the time to seek professional advice. It is usually this group that issues a demand for repayment. This group will still work with you, but the reporting and communication requirements will be more onerous.

The message to take away is this: be proactive in managing the financial aspects of your business. Maintain open and frank communication with your lender. And seek qualified professional advice early. Do not wait for issues to overwhelm you; put a plan in place now to protect your business for the future.

WHO GETS WHAT?

DIVORCE AND THE DIVISION OF MARITAL PROPERTY

Carolyn Seitz

When couples separate and divorce, one of the issues that must be settled is the distribution of joint property. In Alberta The *Matrimonial Property Act* creates a regime which governs the division of property between parties on divorce. It directs that property accumulated during the course of the marriage is to be divided equally between the parties except in rare and exceptional circumstances. The Act directs the division of the value of property as opposed to the property itself. In general, the value of property is determined at the date of trial or settlement, not at the date of separation and is based on fair market value. Liabilities incurred during the marriage are generally also shareable equally. Liabilities incurred post-separation may not be.

Under the *Act*, matrimonial property includes, among other things, the following:

1. The family home and any other real and personal property;
2. Vehicles and equipment;
3. Bank accounts;
4. Jewellery;
5. Art;
6. RRSP's: Pursuant to the Separation Agreement these can be rolled over from one spouse to another without tax implications at the time of separation or settlement, to equalize registered investments between the parties. In the event they are to be set off against other assets, there has to be a tax discount to reflect the fact that these assets are not tax free. Typically, the discount is 20 to 25 percent.
7. Whole life insurance policies: The value of these is the cash surrender value of the insurance policy. Term life insurance policies have no value.
8. Private pension plans: There are different types of plans including defined contribution and defined benefit pension plans. A defined contribution plan is very similar to an RRSP. The value the employee receives from a defined contribution plan is defined by the amount of money in the employee's pension account at the time of retirement. A defined benefit plan is a plan generally more often available from employers such as government or international corporate entities. In such a pension plan the benefit the employee is to receive on retirement is defined as a percentage of their best or last number of years' employment income, without reference to the contributions made by the employee to the plan. A pension is generally divided on a formula calculated as 50 percent of the value of the pension multiplied by the number of years the parties were married and the employee contributed to the plan over the total number of years the employee contributed to the plan, as only the portion of the pension earned during the marriage is considered to be divisible.
9. Canada Pension Plan: Similar to a private pension plan, only the portion of pension credits accumulated during the marriage is considered divisible.

> **"THE MATRIMONIAL PROPERTY ACT DIRECTS THAT PROPERTY ACCUMULATED DURING THE COURSE OF THE MARRIAGE IS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES EXCEPT IN RARE AND EXCEPTIONAL CIRCUMSTANCES."**

Higher valued items such as art or jewelry may need to be appraised by a qualified valuator if the parties cannot agree on values. Other options include valuations from a dealership (for vehicles, machinery and recreational vehicles) or a survey of sale prices from websites such as Ebay, Craig's List or Kijiji. These items can also be divided up between parties for convenience of use, if one can reach a relative understanding of the value of them.

Market value for used furniture is garage sale value or auction value. Due to the fact that there is such depreciation from the retail price, the value of house contents and furnishings is usually not worth incurring legal fees over. We generally encourage parties to try to reach a reasonable arrangement themselves as to the distribution of such items. Dividing up house contents so that each party will have an equivalent burden of replacement is usually the recommended result and an alternating pick by each of the parties is the recommended process.

THE HIGH COSTS OF HIGH RATIO MORTGAGES

Douglas P. Gahn, QC, David C. Romaniuk, QC and Andrea Willey

The low interest era that Canadians have enjoyed for the past few years has made homeownership accessible and affordable for many people. It has also resulted in a substantial number of home buyers entering the market without paying a large deposit on their dream home.

Any home buyer with a deposit of less than 20% of the purchase price of their home is taking out a high ratio mortgage. In Alberta, these high ratio mortgages come with significant costs for the buyer and increased power for the financial institution. Before taking out a high ratio mortgage, home buyers should make themselves aware of the drawbacks of these mortgages and be comfortable with the potential scenarios that could come into play should they wish to, or be forced to, sell the property before the mortgage is repaid.

What are the Differences Between a Conventional and a High Ratio Mortgage?

The first significant difference between a conventional and high ratio mortgage is default insurance. Homeowners purchasing a property with a deposit of less than 20% and obtaining a mortgage from a regulated lender are required by law to take out insurance against their potential default on the mortgage. The cost of this insurance is typically 2-3.5% of the loan amount. It is included as a one-off payment at the time of the mortgage advance and the cost is added to the total mortgage loan obtained from the financial institution.

While the idea of taking out insurance may sound comforting to a home buyer, the insurance coverage provided is only for the benefit of the financial institution; the home buyer simply pays for it on the financial institution's behalf. The insurance policy does not provide any protection for the home buyer. Should a home buyer default on the mortgage the financial institution may foreclose and take title to the property. If the financial institution is unable to recoup its full loan amount when it resells the property, then the financial institution will obtain judgment against the homeowner for the deficiency and turn to the insurance policy to make up the shortfall.

The second major difference between high ratio and conventional mortgages is the obligation the home buyer has and is required to provide on the loan. With conventional mortgages, only the mortgaged property is used as security. If someone with a conventional mortgage defaults on the mortgage, all their other personal assets are safe. But, with a high ratio mortgage, the buyer may be required to repay the shortfall amount that the insurer pays to the financial institution personally from any assets they have. Should a financial institution turn to an insurer to recoup the full value of the loan, then the insurer may pursue whatever assets the buyer has(for information these are now exempt – a matter of public policy), until they have recouped their payout.

The Potential Risks Involved with a High Ratio Mortgage

One of the great and unexpected dangers buyers face when they take out a high ratio mortgage is stagnant or declining property values. If the buyers find themselves in a position that they must sell the house, and the value of the property is the same or lower than when they took out the mortgage, the buyer may have a shortfall in funds needed to repay the mortgage. This is due not only to a lower selling price, but also to the high costs associated with selling a home. Most mortgages come with early repayment penalties if they are being paid out in full prior to the expiry of the term of the mortgage. Combine that with real estate broker fees and the cost of selling a home can easily mount to $30,000 or more.

Sellers might think that one option for avoiding the early repayment fees is to sell the property and assign the mortgage to the new owner. This may be appealing to a new buyer as interest rates are on an upward trend, making the old mortgage terms a bargain. But beware. The original buyer who obtained the mortgage is still liable for the loan even if it has been transferred to a new owner. Should the new owner default before the mortgage is paid in full, then both parties will be pursued to make up the funds.

The long reach of the financial institution applies to spouses who are legally separated too. A formal separation agreement between spouses, in which one agrees to take over the property and the mortgage, does not remove the liability for the high ratio mortgage from the other spouse. Anyone separating from a spouse should seek a formal release from the lender to avoid being on the hook for the mortgage at a later date.