Cassels

Solar Power Update: SCC Leave to Appeal Refused

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03/28/2019

In January 2018 the Ontario Superior Court of Justice released a decision, *Solar Power Network Inc. v. ClearFlow Energy*[1], which raised concern for lenders regarding interest payable by borrowers that is not expressed on an annualized basis. This decision was reversed in part by the Ontario Court of Appeal (ONCA).[2] A summary of this decision can be read here.

On March 28, 2019, the Supreme Court of Canada refused the leave to appeal application resulting in far greater certainty for lenders in respect loan agreements and interest payable by borrowers thereunder.

As outlined in our e-LERT published in September 2019, the three takeaways of the ONCA decisions that lenders should be aware of are as follows:

Takeaways:

- Section 4 of the *Interest Act*[3] will be satisfied when an annualizing formula is included in the loan agreement.
- If the agreement is a commercial loan agreement consistent with modern commercial reality it may not need to provide an annualizing formula to comply with Section 4 of the *Interest Act*.
- Always provide an annualized rate when there is no formula. Even though the Court took a commercial reality test into account, it still held that if interest were set out only on a monthly basis, it needed to be annualized. Section 4 of the *Interest Act* will not be satisfied if the agreement, for example, provides for interest at 2% per month calculated monthly but which is payable on the due date of the loan or promissory note. In such a scenario an annualized rate must be provided to comply with Section 4. This is likely one of the most common mistakes made by non-Canadian lenders.

For further information regarding this matter, please contact Jonathan Fleisher, Lauren Grossman or any other member of the Banking, Lending & Specialty Finance Group.

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[1] 2018 ONSC 728
[2] *Solar Power Network Inc. v. ClearFlow Energy*, 2018 ONCA 727.
[3] RSC, 1985, c I-15.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.