tion in supervisory functions, would greatly ease the application and implementation of the *Act*, particularly for entities operating from outside Quebec that are subject to the *Federal Act*.

Similarly, further clarification of the manner in which requirements under the *Act* will apply to money-services businesses that operate from outside the province, whether online, through agents in Quebec or otherwise, would be welcome in the regulations, including clarification of the type of access that must be given to an appointed Quebec-based respondent.

The Act itself is set to enter into force on a date or dates to be set by the Quebec government and money-services businesses will be required to file an application with the AMF for a licence of the appropriate class within six months after the requirement to be licensed under the *Act* comes into force.

Draft regulations under the *Act* are to be published by the AMF in its weekly Bulletin. Following ministerial or governmental approval, with or without amendment, after a delay of at least 30 days, regulations will then come into force on the date of their publication in the Gazette officielle du Québec or at any later date specified in the regulations.

Money-services businesses will therefore want to monitor for the development of any implementing regulations, which may implement specific requirements under the *Act*, as well as for any announcements with respect to the *Act*'s entry into force.

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• THE BROADER THE CLAUSE, THE BETTER THE PROTECTION

ONTARIO COURT OF APPEAL DECISION UNDERSCORES THE POWER OF BROADLY DRAFTED INDEMNIFICATION PROVISIONS IN LOAN AGREEMENTS •

Lisa Brost and Tamara Ramusovic, McMillan LLP

The recent decision by Ontario's highest court in *Med-Chem Health Care Limited v. Misir*[1] highlights the protection that a broadly drafted indemnification clause in a loan agreement can provide to a lender. An indemnification clause was held to entitle a lender to indemnification from a borrower in respect of expenses and legal fees incurred in defending litigation brought by the borrower. Notably, the losses in respect of which indemnification was sought were incurred long after the loan in question had been repaid. The decision suggests that lenders should take steps to ensure that the indemnification provisions of their loan agreements provide as much coverage as possible and, in particular, do not terminate upon repayment of loan facilities.

THE DECISION

CCFL Subordinated Debt Fund and Company, Limited Partnership (the "Lender") provided loan facilities to Med-Chem Health Care Limited (the "Borrower") pursuant to the terms of a loan agreement (the "Loan Agreement"). The Borrower's financial situation subsequently deteriorated and the Borrower was adjudged bankrupt. The Lender, who had taken security in respect of the loan facilities, was paid in full through the bankruptcy proceedings.

After the Borrower was discharged from bankruptcy, it brought an action against its former directors and the Lender, alleging that the defendants, including the Lender, were responsible for its bankruptcy. It argued that one of its former directors, who was also a president of the general partner of the Lender, preferred the financial interests of the Lender to those of the Borrower during his tenure as a director of the Borrower. The claims against the Lender were for breach of fiduciary duty and conspiracy to breach fiduciary duties.

In the course of the litigation, the Lender brought a motion for an order requiring the Borrower to make advances to fund the legal expenses incurred by the Lender in defending the Borrower's suit. The Lender's claim for reimbursement of such expenses rested on indemnity obligations set out in the Loan Agreement. The term relied upon (the "Indemnification Clause") stated, in part:

> ... The Borrower agrees to pay upon demand all of the Lender's and its agents' reasonable costs relating to the implementation and/or completion of the transaction herein contemplated, and to all other matters for which such costs may be incurred for <u>so long as this Agreement shall be contemplated or in effect between the Lender and the Borrower</u>. Without limiting the generality of the foregoing, the Borrower agrees to pay upon demand ... (b) the reasonable legal fees and disbursements of any counsel retained in connection with advising the Lender generally on the subject matter of the transaction contemplated herein and the actions of the Lender hereunder and in connection with <u>the protection and/or enforcement of any rights or remedies of the Lender hereunder</u> ... Until paid all such amounts shall be deemed to be Advances under the Credit. [Emphasis added]

The Lender argued that the Indemnification Clause was triggered as the Borrower's action put at issue "the actions of the Lender ... in connection with the protection and enforcement of any rights or remedies of the Lender" under the Loan Agreement. The legal fees incurred by the Lender in defending the action were thus caught by the Indemnification Clause.

The Borrower contended that the Lender was not entitled to indemnification because the amounts advanced under the Loan Agreement were fully repaid before the commencement of the Borrower's action. In this regard, the Borrower relied on the provisions of the Indemnification Clause that stipulated that the Borrower was to pay the Lender's reasonable costs related to the implementation or completion of the transaction "so long as this Agreement shall be contemplated or in effect between the Lender and the Borrower". The Borrower maintained that once the loan was repaid, the Loan Agreement was no longer "in effect". The Lender, conversely, took the position that the repayment of the loan did not affect its right to continuing indemnity.

In finding in favour of the Lender, the motion judge noted that the Loan Agreement did not contain any express provision that effectively terminated the parties' obligations upon repayment of the loan.[2] She also found that the wording of the Indemnification Clause itself did not entail such limits on the Borrower's obligations. It was sufficient that the Lender's legal expenses were incurred in relation to an action that attacked the Lender's conduct during the course of the loan transaction.

In March of this year, the Ontario Court of Appeal upheld the motion judge's ruling. In its decision, the Court noted that the action concerned the Lender's conduct during the life of the Loan Agreement and that nothing within the Loan Agreement provided that the Borrower's obligations to the Lender would come to an end upon the loan's repayment.

IMPLICATIONS FOR LENDERS

This decision shows the considerable protection that a broadly-worded indemnification clause can afford lenders. In effect, the Borrower was compelled to fund the defence of the party that it was suing, a circumstance that likely was not in the contemplation of the Borrower either when it entered into the Loan Agreement or when it commenced its action. Accordingly, lenders should ensure that the language of their loan agreements does not restrict a borrower's obligations to the period that the loan obligation remains outstanding and ensure that indemnification terms are as broad in scope as possible.

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[1] *Med-Chem Health Care Ltd v. Misir*, [2010] O.J. No. 4535, 2010 ONCA 380.

[2] *Med-Chem Health Care Ltd v. Misir*, 2009 CarswellOnt 9101 (Sup Ct), additional reasons at 2009 CarswellOnt 9102 (Sup Ct).

• INCREASED REGULATORY ENFORCEMENT OF COMPLIANCE OBLIGATIONS OF MORTGAGE BROKERS AND ADMINISTRATORS •

Kelly Morris, Blaney McMurtry LLP

Over the last year, the Financial Services Commission of Ontario ("FSCO") has been aggressively monitoring the compliance by mortgage brokers with the provisions of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 [the *Act*]. FSCO's enforcement activities have focused primarily on whether mortgage brokers have implemented the policies and procedures required under the *Act*.

The Superintendent of Financial Institutions has the power to impose administrative monetary penalties for contraventions of the *Act* by mortgage brokerages or administrators (or entities that should be licensed as mortgage brokerages or administrators) of up to $25,000, and may impose administrative monetary penalties of up to $10,000 for contraventions of the *Act* by individuals who are, or should be, licensed as a mortgage broker or agent.

In 2009, FSCO imposed over 100 administrative monetary penalties totalling almost $100,000 against mortgage brokers. These include numerous penalties of $1,000 to mortgage brokerages that failed to file an annual information return and numerous penalties of up to $1,000 to mortgage brokerages that failed to hold proper errors and omissions insurance.

In addition, the *Act* prescribes more serious offences for which the penalties are fines of up to $100,000 and imprisonment for one year for individuals. Corporations found guilty of such offences are subject to fines of up to $200,000, and every director who has acquiesced or participated in such an offence, or failed to use reasonable care to prevent the offence, is also guilty of an offence. These offences include carrying on business as a mortgage broker, lender or administrator without a proper licence; failing to comply with an applicable standard of practice; and providing false or deceptive information while carrying on the business of a mortgage broker, lender, or administrator.

MORTGAGE BROKERAGES

REQUIRED POLICIES

Under the *Mortgage Brokers: Standards of Practice Regulation,* mortgage brokerages, which are entities that solicit the sale of mortgages, are required to establish and implement policies to ensure that the brokerage and its authorized brokers and agents comply with the requirements under the *Act*. Mortgage brokerages should adopt written policies and procedures with respect to:

- Disclosing which party (or both) the brokerage represents;
- Verifying the identity of borrowers, lenders and investors;
- Determining suitability of a mortgage or mortgage investment for borrowers, lenders and investors;
- Identifying and disclosing the material risks of a mortgage or mortgage investment;
- Identifying and disclosing potential conflicts of interest of the mortgage broker;
- Receiving incentives, other than money, by agents or brokers (other than from the brokerage) for dealing in mortgages;
- Paying incentives, other than money, to agents or brokers of other mortgage brokerages;
- Ensuring that brokerages, brokers and agents comply with their responsibilities under the *Act*;
- Ensuring that brokers and agents are adequately supervised;