EQUITABLE MORTGAGE OFFERS CREDITOR SECURITY

In today's pinched economy, suppliers to construction projects cannot lightly let their lien rights go by. In a construction insolvency situation a supplier's chances of getting paid any money are drastically reduced if he is not a registered lien claimant Canada Customs and Revenue Agency, the bank and those who did me a lien get it all.

A non-lien claimant, who is a mere unsecured creditor in the situation, is usually completely left out.

But a construction lien has to be filed within 45 days of the supplier's last supply of labour or materials. Often this is too early for a creditor to know if his account is at risk or not. And even if he does file a construction lien, the situation often turns out badly for him..

If the lien were med out of an abundance of caution, merely to preserve his rights, he might suddenly face an angry and insulted owner or contractor who threatens a permanent loss of future business unless the lien is removed.

Even if the lien were filed in a situation where the account was definitely at risk, the supplier soon learns that, because he is often only liening a 10 per cent holdback fund, the Construction Lien Act does not help him as much as he thought it would.

More often than not after months of legal proceedings and a large legal bill, he ends up with only a few cents on the dollar on what he is owed.

There is one solution to this situation that I do not see used very often, but I think it is very good if it can be arranged. This is the equitable mortgage.

An equitable mortgage is an acknowledgement by a debtor of his debt to his creditor together with his promise to pay the debt, usually on demand, coupled with further promise to indicate the debtor's intention to bind or charge a particular parcel of land he owns with payment of the debt.

If the creditor can get such a written Acknowledgement of Debt and Promise to Pay from his debtor, then he can register this document against the title to the land referred to whenever he wants.

The creditor is a full-fledged mortgagee of the land from the moment he receives the document from his debtor. He is a registered mortgage holder on the land from the date he registers it, which he can even do after the debtor's bankruptcy.

As the holder of a regular (although peculiar in form and not well understood) mortgage against his debtor's land, the creditor/equitable mortgagee is in a much better position in an insolvency situation than had he merely filed a construction lien or sued for payment of his debt in ordinary civil court.

Getting an equitable mortgage from a debtor can be difficult. The creditor has to have some leverage in a good relationship with the debtor. The debtor has to be willing to sign the Acknowledgement and Promise to Pay.

And if the property being bound is the debtor's matrimonial home, his spouse will have to consent in writing.