

FOCUS

ON REAL PROPERTY



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Divisional Court slams ruling trimming bank tower assessments

In reversing the Ontario Assessment Review Board's decision to reduce the taxable assessed value of Toronto's bank towers, Justices Carnwath, Jennings and Pardu of the Ontario Divisional Court concluded that the original ARB holding could be described as follows: "undermines the purpose of the *Assessment Act*... wrong in law... unacceptable... unreasonable... unjust... makes no sense... [and] approaching the absurd."

As one veteran respected observer remarked in direct response to the Divisional Court's harsh wording (and with tongue planted firmly in cheek), "Why don't they tell us how they *really* feel... I hate it when they waffle like that!"

History

After what has been reputed to be the longest hearing in its history, the Assessment Review Board (ARB) sided in 2008 with the owners of Toronto's downtown bank towers, a dozen of the most valuable office towers in Canada (including such prestige addresses as BCE Place, Royal Bank Plaza, Toronto-Dominion Centre, Commerce Court, First Canadian Place



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and Scotia Plaza). In so doing, the ARB, in one fell swoop, trimmed almost \$1.5 billion dollars of otherwise taxable assessed value from the City of Toronto's tax rolls, with a domino effect predicted throughout the province when other property owners pursue assessment appeals following the new "current value" paradigm ushered in by the ARB ruling in the bank towers decision. Not surprisingly, the ARB decision was immediately appealed to the Divisional Court, and the Divisional Court released its decision just last week (*Municipal Property Assessment Corp. v. BCE Place Ltd.*, [2009] O.J. No. 3338 (*Bank Towers*)).

Issues in dispute

The issues in dispute in the original ARB consideration of *Bank Towers* were fairly detailed and quite complicated. In addition to a 0.75 percent

increase in the deemed capitalization rate, the owners of the bank towers advocated the exclusion of the value of the space leases for the buildings and the exclusion of the leasehold improvements installed and paid for by the tenants under such space leases.

The owners of the bank towers argued, firstly, that the *Assessment Act* contemplated the value of the "fee simple, if unencumbered" and that this phrase, introduced in the 1997 amendments to the *Assessment Act*, implied that the bank towers had to be assessed as if they were totally vacant. According to the owners, leases, by definition, were "encumbrances" against the fee simple and, according to the strict reading of the *Assessment Act*, the value that any of these space leases otherwise brought to the bank towers had to be excluded from the bank towers' assessed value for realty tax purposes.

The owners of the bank towers also argued that the value of leasehold improvements constructed and paid for by the tenants under such space leases as part of their so-called "tenants' works"

See **Towers** Page 15

Tips on mixed-use property purchases



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Your client is purchasing a property with both commercial and residential uses. She has visions of a reliable stream of rental income and may be starting her own business. She has arranged mortgage financing for the purchase. The client looks to you to ensure it all comes together. This can be a daunting experience and one that will require a mix of both real property and business-related considerations.

As a starting point, canvass your client's planned use of the property. She probably expects both rental and business income. Clarify her expectations about your retainer, as she may handle some of the due diligence. If you are not providing business advice, limit your retainer accordingly. Consider obtaining a written acknowledgement from the client that you have not been retained, and she is not relying on you, to provide advice regarding the property's environmental condition.

Where residential tenants are being assumed, you may be asked to give an opinion on the legality of rents. If the client learns post-closing that illegal rents were being charged and rents are rolled back, the results can be disastrous.

Consider enforceable warranties that survive closing or other forms of security, such as holdbacks, in situations where the rental income is in jeopardy post-closing. Discuss with the client the strength and reliability of any warranties given, particularly if the warranty will be unsecured after closing. Ensure that the client is familiar with any residential tenancy legislation and rent control provisions.

Review and summarize each lease or tenancy agreement being assumed. This review may reveal rights of first refusal, options to

See **Mixed** Page 16

FOCUS ON REAL PROPERTY

If property use doesn't comply with zoning, make sure it's legal non-conforming

Mixed

Continued From Page 13

purchase or discrepancies from the terms in the agreement of purchase and sale. If you are opining on the enforceability of the leases, obtain tenant estoppel certificates from all residential and commercial tenants being assumed. Inform the client of the terms of the leases and tenancy agreements.

If you also act for a mortgage lender, you may be instructed to prepare and register on title an assignment of rents and leases as collateral security for the mortgage. If the lender is taking security in chattels on the property, it may also require a general security agreement, which should be registered under the applicable personal property security legislation.

To preserve the income stream, there must be no work orders or open permits. Make inquiries with the municipal building department. Inquire also about fire department and electrical work orders and compliance. The work required to remedy deficiencies can be costly and pose a risk to the income stream.

If the existing uses of the property do not comply with present zoning, confirm that they are legal non-conforming. The onus is on the vendor to prove that the uses were lawful as of the date that the zoning by-law prohibiting them was passed, and have continued to the present day. Review the zoning as of the date the by-law was passed, including permitted uses, density, setbacks, lot size, parking, etc. If the legal non-conforming use is to continue, the vendor's solicitor should provide you with affidavits from prior owners as to the nature of the prior use and its continuity, so that you will be able to respond to anyone who challenges the client's rights to continue using the property for purposes that are now prohibited.

Title insurance can assist with the real estate-related aspects of the transaction, including zoning. If you are being asked to advise on a post-closing change in use, consider requesting future use coverage, since title insurance policies usually do not cover legality of future use.

Older buildings may have an underground oil tank that is no longer being used. It may have to be removed. In some cases, the soil may have to be remediated.

Where chattels are included in the purchase price or security is being taken on any chattels, do a search for security interests on personal property.

If the vendor is a corporation, confirm it has existed throughout its period of ownership of the property, and still exists; otherwise, the property may belong to

the Crown. If the vendor is an undischarged bankrupt, only his or her trustee can convey the property. Conduct a search under the *Bankruptcy Act*.

Where you are retained to provide business advice, address any special concerns related to the business/income aspects of the purchase, such as income tax issues relating to the allocation of the purchase price between land, building and chattels. If this is not dealt with in the agreement of purchase and sale, the client and

vendor must agree on the allocation of the purchase price, which has a variety of tax consequences. There will also be GST implications, and the purchaser must be a registrant for GST purposes with the Canada Revenue Agency. The client's accountant may be able to assist with these aspects of the transaction.

If your client is buying a business as a going concern, what permits are required to carry on the business? Look to any applicable retail sales legislation as well as

provincial and municipal requirements. If the business carries an environmental or health risk, a federal licence and/or registration may also be necessary.

If your client is acquiring the assets of a business, he or she will need to comply with any applicable bulk sales legislation. This is intended to prevent a business debtor from selling its stock in bulk without taking into account the claims of its creditors. Non-compliance could result in the purchaser being liable for the claims

of the vendor's creditors up to the value of the property purchased.

Scrupulous attention to these real property and business-related matters will go a long way to ensuring that your client's investment dreams become a reality on the day of closing and are preserved for years to come. ■

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