LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

Commercial Real Estate TRANSACTIONS 2016

CHAIR

Chris Huband
Blake, Cassels & Graydon LLP

September 13, 2016

cpd Continuing Professional Development

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The Law Society of Upper Canada | Barreau du Haut-Canada

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COMMERCIAL REAL ESTATE TRANSACTIONS 2016

Chair: **Chris Huband, *Blake, Cassels & Graydon LLP***

September 13, 2016
9:00 a.m. to 12:00 p.m.
Total CPD Hours = 2 h 30 m Substantive + 30 m Professionalism (P)

Donald Lamont Learning Centre
The Law Society of Upper Canada
130 Queen Street West
Toronto, ON

SKU CLE16-00903

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Agenda

9:00 a.m. – 9:05 a.m. **Welcome and Opening Remarks**

Chris Huband, *Blake, Cassels & Graydon LLP*

9:05 a.m. – 9:30 a.m. **Getting the Parties Right (10 minutes Professionalism (P))**

Brennan Carroll, *Borden Ladner Gervais LLP*

9:30 a.m. – 9:45 a.m. **Requisitions: Including the Vendor's Obligation to Convey Good Title**

Simon Crawford, *Bennett Jones LLP*

9:45 a.m. – 10:00 a.m.	**Representations and Warranties** Rodney Davidge, *Osler, Hoskin & Harcourt LLP*
10:00 a.m. – 10:20 a.m.	**Conditions and the Responsibility for Satisfying and Waiving Conditions (5 minutes Professionalism (P))** Tannis Waugh, *Tannis A. Waugh Professional Corporation*
10:20 a.m. – 10:35 a.m.	**Assumption of Mortgages** William McCullough, *McCarthy Tétrault LLP*
10:35 a.m. – 10:45 a.m.	**Go Ahead and Ask Us (Question and Answer Period)**
10:45 a.m. – 11:00 a.m.	**Coffee and Networking Break**
11:00 a.m. – 11:15 a.m.	**File Management for a Commercial Real Estate Transaction: Best Practices and Critical Steps (15 minutes Professionalism (P))** Michael Lieberman, *Norton Rose Fulbright Canada LLP*
11:15 a.m. – 11:35 a.m.	**Tax Issues: HST, Land Transfer Tax, Withholding Tax** Simon Thang, *Thorsteinssons LLP*
11:35 a.m. – 11:55 a.m.	**Closing Issues and Closing Documentation** Neil Shapiro, *Stikeman Elliott LLP*
11:55 a.m. – 12:00 p.m.	**Go Ahead and Ask Us (Question and Answer Period)**
12:00 p.m.	**Program Ends**

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Commercial Real Estate Transactions 2016

Getting the Parties Right

Brennan Carroll, *Borden Ladner Gervais LLP*

September 13, 2016

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Commercial Real Estate Transactions 2016:

Getting the Parties Right

(9:05 am – 9:30 am)

Brennan Carroll, Borden Ladner Gervais LLP

September 13, 2016

Borden Ladner Gervais

Overview

I. Know Your Client
II. What Type of Entity May One See as Counterparty
III. Potential Parties
IV. Issues in Real Estate Transactions: HST
V. Issues in Real Estate Transactions: Pre-Incorporation Contracts
VI. Issues in Real Estate Transactions: Conflicts of Interest
VII. Issues in Real Estate Transactions: Assignment

Borden Ladner Gervais

I. Know Your Client

"It is not the practice in Ontario to presume that a person is who they say they are"

By-Law 7.1 (*Law Society Act*, ss. 21–23)

- Purpose – to fight money laundering and other illegal activity
- Lawyers are required to **identify** and **verify** the identify of the client and any third party directing, instructing or who has to authority to direct or instruct the client
- Lawyers are also required to retain a record of the information obtained
- Some exceptions apply, see By-Law 7.1 for complete list of exceptions

Borden Ladner Gervais

I. Know Your Client

- **Individual**
  - Full name
  - Home address and telephone number
  - Occupation
  - Business address and business telephone number, if applicable
- **Company or Public Body**
  - Full name
  - Business address and business number
  - In addition, except for when client is a financial institution (bank), a public body (government), or a reporting issuer (public company), you must also obtain:
    - Incorporation or business identification number and where it was issued, if applicable
    - general nature of its business
    - must record the name, position and contact information of the person or persons giving you instructions in the matter
  - Where receiving, paying or transferring funds is involved, must also use reasonable efforts to collect:
    - Name and occupation of each director of the organization
    - Name, address and occupation of each person who owns ≥25% of the organization

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I. Know Your Client: Practical Implications

- ***Baskaran v. Doshi*, 2015 ONSC 3683**

Plaintiffs' Claim	Defendant Lawyer's Claim
➢ Lawyer discharged their mortgages without authorization ➢ Plaintiffs did not meet with lawyer, did not know lawyer, did not sign written discharge authorization ➢ Lawyer was negligent in failing to take reasonable steps to ensure he was actually dealing with plaintiffs	➢ Lawyer acted on instructions from plaintiffs ➢ Plaintiffs met with the lawyer in his office and signed written authorization to discharge mortgages ➢ Lawyer obtained two forms of identification, compared photographs to the plaintiffs and kept photocopies

Who wins?

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II. What Type of Entity May One See as Counterparty

A lawyer must consider who they are sitting across the table from

Financial Institution
Estate
Individual
Not-for-profit/Charity Corporation
Corporation
Municipality
General Partnership
Religious Organization
Limited Partnership
Trust
Limited Liability Partnership
School Board
Agent

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III. Potential Parties: Individuals

Individuals

- Need to have "capacity" to enter into a contract (Purchase Agreement)
  - Be 18 years old
  - Not be incapable
  - Not be an undischarged bankrupt
- Where two or more individuals wish to own property together:
  - **Joint Tenancy** – Characterized by 4 unities: Title, Interest, Possession, Time
    - Includes a right of survivorship
    - Presumed unless otherwise indicated
  - **Tenants in Common** – Only requires unity of Possession
    - No right of survivorship
    - Percentage of title passes estate of co-owner upon death

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III. Potential Parties: Corporations

Corporations

- "A corporation has the capacity and … the rights, powers and privileges of a natural person"
- A corporation can hold title to real estate
- If not disposed of prior to dissolution, property vests in the Crown
- Sale of land must be authorized by resolution of directors
- Authorized officers of corporation sign on behalf of the corporation , however, innocent parties should not have to worry about whether the person signing is authorized

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III. Potential Parties: Corporations – Practical Applications

Indoor Management Rule: "Innocent parties should not have to worry about whether a corporation's internal housekeeping is in order when entering into an agreement"

ABC Corp.

BUT … are all Corporations created equally?

XYZ Condo Corp.

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III. Potential Parties: Agents

- **Agents may enter into real estate transactions on behalf of their principal, but authority must be "clear, express and unequivocal" (*Gilmour v. Simon, 37 SCR 422*)**
  - Terms of agreement must also be explicitly as authorized – In *Levitt v. Webster,* action for specific performance was denied because vendor wanted partial take-back mortgage and agent negotiated all cash deal
- **Power of Attorney implemented to avoid common law agency rule where agency terminates upon mental incapability of donor**
  - Powers of Attorney may do anything in respect of property that a grantor could do other than make a will
- **Powers of Attorney and Agency agreements can present risk of fraud**
  - Best practice is:
    - verify grantor signature and witness signatures for power of attorney
    - Verify authority and personal liability of agent for agency agreements

Borden Ladner Gervais

III. Potential Parties: Partnerships

- **A partnership is a relationship between persons carrying on business in common with a view to profit**
  - No statutory entitlement to rights of a natural person, so partnerships are not capable of holding title to property
  - Only one partner required to execute a binding contract in the normal course of business
  - Outside the normal course of business, all partners required for a binding contract, but often not practical to have all partners sign

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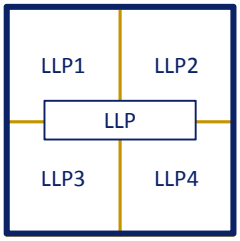
III. Potential Parties: Limited Liability Partnerships

- **A limited liability partnership is just like a general partnership with the exception of the limitation on liability of its partners**
  - A partner in a LLP is not liable, by means of indemnification, contribution or otherwise, for the obligations arising from the negligence or wrongful acts of other partners
  - "The LLP may be liable to the extent of its assets, but the personal assets of the partners, apart from their interest in the partnership, are protected" (*Allen v. Aspen Group Resources Corporation*)



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III. Potential Parties: Limited Partnerships

- **A limited partnership is a special form of partnership in that it has general and limited partners**
  - Only general partners are involved in operation of the partnership
  - Limited partners lose limited status if they participate in the business
  - "The limited partner, as a passive investor, is restricted from taking part in the control of management of the business"
  - A limited partnership can only hold title to real property through its general partner

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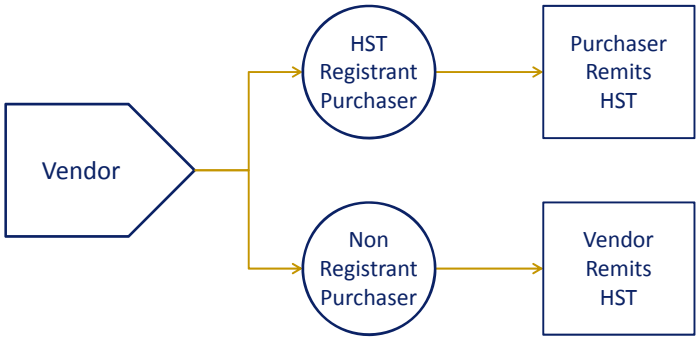
II. Potential Parties: Nominee Parties

- **Bare trusts are exceptions to the rule that trustees are not agents of their beneficiaries**
- **Bare Trustees have no independent power or discretion and are obligated to carry out the instructions of the beneficiaries of the trust**
- **Nominee corporations are often bare trustees of REITs (Real Estate Investment Trusts)**
  - REITs are not legal entities and cannot be party to a contract; primary liability under an APS involving a REIT falls on the individual trustee who signed the agreement (*Canada Deposit Insurance Corp v. Canadian Commercial Bank*, [1987] AWLD 1694)

Borden Ladner Gervais

IV. Issues in Commercial Real Estate Transactions: HST

As a general rule, commercial real estate transactions are taxable … But who remits?



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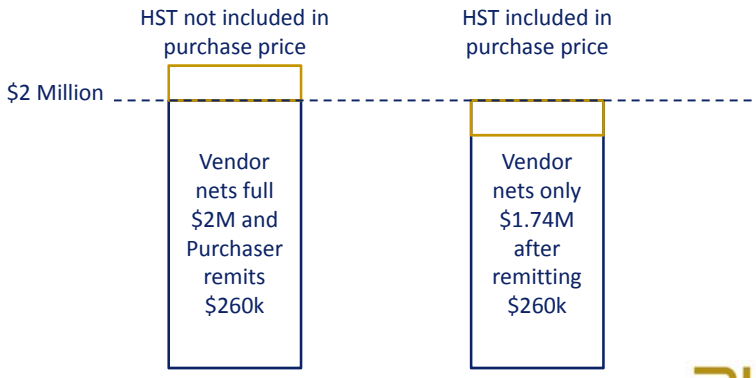
IV. Issues in Commercial Real Estate Transactions: HST – Practical Implications

The tax language in the APS is critical, especially to the vendor



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V. Issues in Real Estate Transactions: Pre-Incorporation Contracts

- **Section 21 of the OBCA was a legislative response to the common law rule from Kelner v. Baxter**
  - A contract made by promoters prior to the incorporation of a company binds only the promoters, and that the company cannot ratify such a contract after incorporation
- **"A corporation may, within a reasonable time after it comes into existence … adopt an oral or written contract made before it came into existence in its name or on its behalf"**
  - Corporation becomes bound by contract and entitled to its benefits
  - If expressly provided in the contract, person acting on behalf of corporation to be incorporated is not bound by the agreement

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V. Issues in Real Estate Transactions: Pre-Incorporation Contracts – Practical Implications

- **1394918 Ontario Ltd. V. 1310210 Ontario Inc. et al. involved an agreement to sell land to "Raymond Stern in trust for a company to be incorporated and not in his personal capacity"**
  - "It is an agreement that fits squarely into s. 21(4)"
  - Agreements under s. 21(4) involve "an entity called a 'contract' under the statute, but no one is entitled to sue for its breach … [it is termed] a nascent contract, its enforceability being suspended"
- **Having a party to a contract that is without liability is risky, and should generally be avoided by vendor's counsel**
  - "Where the contract expressly provides that the individual is not liable in the meantime, there is no contract" – Simon P. Crawford, "Ghost Offers in Real Estate Transactions"

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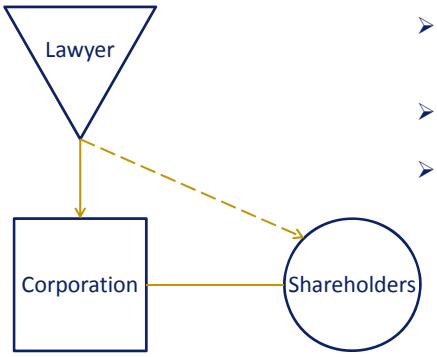
VI. Issues in Real Estate Transactions: Conflicts of Interest

- **Rule 3.4-1 of the *Law Society Rules of Professional Conduct* prevents a lawyer from acting where there is a conflict of interest.**
  - A conflict of interests exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially or adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or third person.
- **Rules 3.4-16.7 – 3.4-16.9 specifically address joint retainers in real estate transactions:**
  - A lawyer may not act for both transferor and transferee of title to real property unless:
    - Permitted by the Land Registration Reform Act;
    - The parties are "related persons" under s. 251 of the ITA; or
    - The lawyer practices in a remote location, and requiring another lawyer would unduly inconvenience the clients
  - Two lawyers in the same firm may represent a transferor and transferee of title

Borden Ladner Gervais

VI. Issues in Real Estate Transactions: Conflicts of Interest – Practical Implications

A lawyer owes a fiduciary duty to his or her client, but it can be hard to tell who is a client



- 8 of 11 shareholders in a closely held family company enter into an agreement to redeem their shares
- All board seats were held by family members who also owned shares
- A lawyer had acted as corporate counsel and corporate secretary at board meetings for 2+ years…

who is/are the client(s)?

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VII. Issues in Real Estate Transactions: Assignment

The general rule where assignment is silent depends on whether the transaction is a sale or lease

Lease of Real Estate

- **"Absent a covenant to the contrary, a tenant may assign or underlet without a landlord's consent"**

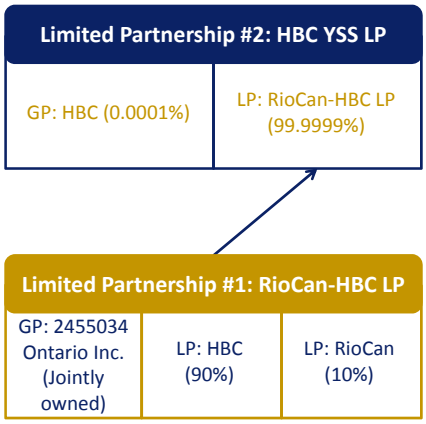
Sale of Real Estate

- **If an APS is silent on the right to assign, benefits can be assigned without consent but not obligations**
- **Direction of title does not require consent, but original purchaser is not relieved of duties under the APS**

Borden Ladner Gervais

VII. Issues in Real Estate Transactions: Assignment – Practical Implications

***Hudson's Bay Co. v. OMERS Realty Corp.*, 2016 ONCA 113**



- Leases would be assigned to HBC in its capacity as GP of HBC YSS LP and then sublet to HBC
- Oxford Properties Group was concerned about HBC assigning a lease to itself as general partner of a limited partnership in which its competitor RioCan exercised control
- Leases originally held by HBC allowed for assignment to an affiliate without consent
- OCA agreed with ONSC that there was no need to look past the GP of a limited partnership and assignment was allowed without consent
- Oxford said that this ignored practical commercial realities … Does it?

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Discussion

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TAB 2

Commercial Real Estate Transactions 2016

Good Title

Simon Crawford, *Bennett Jones LLP*
Katherine Rusk, Student at Law, *Bennett Jones LLP*

September 13, 2016

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Good Title

Simon Crawford, Partner, Bennett Jones LLP

Katherine Rusk, Student at Law, Bennett Jones LLP

When it comes to title matters, commercial real estate purchase agreements generally fall into two categories: (a) those that afford the buyer a period of time to investigate title and in which to make valid requisitions (in which case the seller is afforded an opportunity to respond, subject to an underlying obligation to deliver so-called good title);[1]and (b) those that afford the buyer with a due diligence period for all manner of investigation, including title, in which period the buyer investigates title, raises its concerns, and ultimately, subject to interim negotiation, either "takes it or leaves it" on the due diligence date.

This discussion is focused on the requisition structure, in large part, because there tends to be confusion and debate over what constitutes a valid requisition, and more particularly, what constitutes a valid title requisition. And while there are principles of common law and statute that certainly influence that answer, we must, as in all commercial transactions, start with the contract. For illustrative purposes we will use the 2016 title and requisition language from Ontario Real Estate Association ("**OREA**") form for the purposes of this discussion.

The Mechanics of A Valid Requisition

Before we enter that space however, this discussion would benefit from a brief refresher on certain elemental real estate concepts that practitioners tend to forget.

Firstly, in order to be valid, a title requisition must identify a specific problem or deficiency with respect to title, and should set out a solution or action that, if implemented by the seller, would correct that problem or deficiency.[2] The Court in *Doross Construction Co. v. Kaiser* informed us

[1] For the sake of clarity, "buyer" and "seller" are used in this paper, except when directly quoting from others that use "purchaser" or "vendor".

[2] *Stykolt v, Maynard,* [1942] O.R. 250 [*Stykolt*]. Here, the court held that a letter containing multiple requisitions did not contain any valid objection to title because it had been written without any reference to the particular contract or title.

that a buyer "must be specific as to requisitions and is required to make searches and cannot in a general way require assurances."[3] The number of the instrument, its date, its description, what it purports to do, a description of the particular deficiency, and a request for a specific solution, are all required for a valid requisition, and should the requisition be disputed, would be required to support an application under the *Vendors and Purchasers Act.*[4]

Secondly, the purchase agreement must set out a time period for such requisition to be made in order to be valid, failing which, the buyer must accept such deficiency, unless it goes to *the root of title*. If the purchase agreement does not set out a time period, Section 4 of the *Vendors and Purchasers Act* injects into the contract a thirty day period from the date of the contract. Requisitions must be delivered within the specified time, not just mailed by then.[5]

Title Requisitions and Contractual Requisitions

The OREA form provides for two types of requisitions: title requisitions and other contractual requisitions, which is to say, requisitions as to matters that are not title, but are specifically included in the contract and stated to be the subject matter of a valid requisition. Section 8 of the OREA form agreement sets out the investigation and requisition regime as follows:

> **8. TITLE SEARCH:** Buyer shall be allowed until 6:00 p.m. on the ..... day of....., 20....., (Requisition Date) to examine the title to the property at his own expense and until the earlier of: (i) thirty days from the later of the Requisition Date or the date on which the conditions in this Agreement are fulfilled or otherwise waived or; (ii) five days prior

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[3] 1981 CarswellOnt 3227, 11 A.C.W.S. (2d) 114 at 9. In this case, the newly constructed building was .1 of a foot too close to the property line as set out in the municipal zoning bylaws. The buyer's solicitor sent a "boilerplate" letter requesting assurances that all bylaws and statutes were complied with on the day of closing. The court held that the buyer could not rely on the vague language of the requisitions.

[4] Donahue, Quinn and Grandilli, *Real Estate Practice in Ontario*, 8th ed (Toronto: LexisNexis, 2016) at 253.

[5] *Stykolt, supra* at note 2.

to completion, to satisfy himself that there are no outstanding work orders or deficiency notices affecting the property, that its present use (.....) may be lawfully continued and that the principal building may be insured against risk of fire. Seller hereby consents to the municipality or other governmental agencies releasing to Buyer details of all outstanding work orders and deficiency notices affecting the property, and Seller agrees to execute and deliver such further authorizations in this regard as Buyer may reasonably require.

The first thing that you will notice is that two types of examinations are contemplated by the contract, and two time frames in which to conduct them. Title examinations are allowed to be made until the set requisition date. Examinations as to outstanding work orders, deficiency notices, the insurability of the property, and as to whether its present use may be lawfully continued, may be made for a period after that, and in any event not later than five days prior to the completion date. The additional time period is considered reasonable given that some of these so-called "off-title" investigations require third party governmental authorities to process written requests for information and to disclose the contents of their file on the property to the buyer.

The purpose of Section 8 of the Agreement is primarily to set out the dates for the various periods of investigation. Section 10 of the Agreement then sets out how these dates trigger contractual rights and obligations of the parties:

10. TITLE: Provided that the title to the property is good and free from all registered restrictions, charges, liens, and encumbrances except as otherwise specifically provided in this Agreement and save and except for (a) any registered restrictions or covenants that run with the land providing that such are complied with; (b) any registered municipal agreements and registered agreements with publicly regulated utilities providing such have been complied with, or security has been posted to ensure compliance and completion, as evidenced by a letter from the relevant municipality or regulated utility; (c) any minor easements for the

supply of domestic utility or telephone services to the property or adjacent properties; and (d) any easements for drainage, storm or sanitary sewers, public utility lines, telephone lines, cable television lines or other services which do not materially affect the use of the property. If within the specified times referred to in paragraph 8 any valid objection to title or to any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued, or that the principal building may not be insured against risk of fire is made in writing to Seller and which Seller is unable or unwilling to remove, remedy or satisfy or obtain insurance save and except against risk of fire (Title Insurance) in favour of the Buyer and any mortgagee, (with all related costs at the expense of the Seller), and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction and Seller, Listing Brokerage and Co-operating Brokerage shall not be liable for any costs or damages. Save as to any valid objection so made by such day and except for any objection going to the root of the title, Buyer shall be conclusively deemed to have accepted Seller's title to the property.

Good Title is a Condition of Closing

In order to understand Section 10, we first need to parse its grammar. It is, by modern standards, horribly drafted. The sentence begins like something from the *Short Form of Leases Act*, with the words "provided that", which we commonly think of being synonymous with "if and only if", which suggests that there is a consequence - a "then" or a "that". Which is to say, that "if and only if title to the property is good and agree from all registered restrictions, etcetera, ***then***…".

Except there is no "then" and there is no express consequence to the proviso in Section 10. So what does it mean?

To understand the grammar of the sentence, we have to acknowledge that, historically, the use of "provided that" in legislative drafting into the nineteenth century has been a truncation of the

term of enacted *it is provided that;* from a more modern perspective, *provided that* is also a conjunction meaning *on condition that*.[6] The Ontario Superior Court of Justice held that "provided that" can convey "the creation of a condition precedent that is to attach to an earlier provision, an exception to such a provision, a qualification of it, and clarification by excluding a specific inference that might possibly be drawn from its terms."[7]

The ***then***, typically, creates a condition of the completion of the agreement where unless the title to the property is "good and free …", the buyer will not be forced to take the title.[8]

So, if we accept then, that Section 10's opening proviso constitutes a condition of closing in favour of the buyer,[9] then we might paraphrase it as stating "*the obligation of the Purchaser to complete the transaction is conditional upon title to the property being good and free…*".

The words "provided that the title to the property is good" are a reiteration of what exists at common law despite this provision, as the common law has long held that any sale of land is conditional upon the seller's good title, even if it is not explicitly stated in the contract. Which is to say, the condition of good title is always implied by the common law.[10]

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[6] Kenneth Adams, *A Manual of Style for Contract Drafting,* 2d ed (Chicago, Illinois, ABA Publishing, 2008) at 283.

[7] John Gardner & Karen Gardner, 5th ed, *Sanagan's Encyclopedia of Words and Phrases Legal Maxims*, (Toronto: Thompson Reuters, 2016), *sub verbo* "provided that", citing *Midas Realty Corp. of Canada Inc. v. Galvic Investments Ltd*. (2008), 2008 CarswellOnt 3087 (Ont. S.C.J.).

[8] *Zender v. Ball,* [1974] O.J. No. 2123, 5 O.R. (2d) 747 at 18 [*Zender*]. In *Zender,* no objections were made to the title within the requisition period. Obtaining an affidavit of execution on a mortgage discharge was held to be a matter of conveyance which required the attention of the sellers before they could make available a good, marketable title.

[9] Blacks Law Dictionary - The word used in introducing a proviso (which see.) Ordinarily it signifies or expresses a condition; but this is not invariable, for, according to the context, it may import a covenant, or **a limitation** or **qualification,** or a restraint, **modification**, or exception to something which precedes. See *Stanley v. Colt* 5 Wall. 166. 18 L. Ed. 502; *Stoel v. Flanders*, 68 Wis. 256, 32 N. W. 114; *Robertson v. Caw*, 3 Barb. (N. Y.) 418; *Pasehall v. Passmore*, 15 Pa. 308; Carroll v. State, 58 Ala. 396; *Colt v. Hubbard*, 33 Conn. 281; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

[10] *McNiven v. Pigott,* [1914] O.J. No. 8, 22 D.L.R. 141 at 14 and 16 (H.C.Div.). The court cited from *Flureau v. Thornhill* (1776), 2 W. Bl. 1078 to hold that "the principle is laid down that a contract for sale of land is merely upon condition, frequently expressed, always implied, that the seller has a good title. If the seller has no title or a defective title, and is acting without collusion, the prospective buyer is entitled

The balance of that sentence then states that title must be two things. Firstly, title must be good, and secondly it must be free from all restrictions and encumbrances except for the four categories of permitted encumbrances described in subparagraphs (a) through (d). So it is a two part test. The second part of the test is more concrete within the four corners of the agreement, as it says that title shall be subject to no encumbrances other than a list of so-called permitted encumbrances. However, the first part of the test, requiring that title also be **good**, means that we must look at the common law. The court in *Joydan Developments Ltd. v. Hilite Holdings Ltd*. tells us that the failure to deliver good title occurs when "the purchaser could not have that which he contracted for and, as such, could not be compelled to take that which he did not mean to have." [11] Clear as mud.

One point that should be noted however, is that, while the obligation to deliver good title is in the contract and is implied by common law, it can be contracted out of. Which is to say, that the buyer can contract for something less than good title, and inherit the risk as it were, as a matter of bargain. The court in *Zender* held that "where the evidence supplied by a vendor falls short of showing good title, he cannot insist on completion, as a court will not force upon the purchaser anything less than a marketable title unless the purchaser has specifically contacted otherwise."[12]

Ultimately, the buyer is entitled to what the it has bargained for. Good title is the default position but if the buyer has agreed to accept something less, that is the bargain that the courts will uphold.

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to no satisfaction for the loss of his bargain." This was supported by *Bain v. Fothergill* (1874), L.E. 7 H.L. 158, where "it was laid down that the rule in the earlier case must be taken to be without exception, unless the plaintiff could shew sufficient to entitle him to recover damages in an action for deceit."

[11] [1972] O.J. No 2008 [1973] 1 O.R. 482 (H.J.C.) at 16.

[12] *Zender*, *supra*, note 8 at 15.

What is Good Title?

If you recall, I have taken the position that while the obligation of the vendor to deliver "good title" is set out in the contract of purchase and sale, it is also an implied condition of the sale of real estate at common law. Consequently, although it can be a matter of contract, the right to make a requisition as to title exists at common law, and failing an express provision of the purchase agreement, is to be made within 30 days of the agreement date, as set out above. Accordingly, title requisitions, and the right to make them, can be distinguished from other types of requisitions on the simple basis that they are inherent in every contract for the purchase and sale of real estate. Therefore, it becomes particularly important that we are able to distinguish a title requisition from a non-title requisition.

When determining what constitutes good title, the courts look primarily into whether title can actually be transferred as promised. As with most tests, it is dependent upon the facts of each particular case; however, the common thread is determining whether the seller is actually able to grant that for which the purchaser bargained. A defect in title relates to the quality of the seller's ownership and not the quality of the actual land.[13] Good title is title that can be forced upon an unwilling future buyer of the property,[14] does not have palpable defects, grave doubts, clouds, or the reasonable threat of litigation or hazard to mar peaceful possession. [15]

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[13] *Armitage v Liptay,* [1976] O.J. No. 2144, 12 O.R. (2d) 543 (Ont. H.C.J.) at 15, aff'd *Armitage v Liptay,* [1977] O.J. No. 2278, 16 O.R. (2d) 223 (Ont. C.A.). The court cites and adopts the unreported decision in *Frank Street Holdings Ltd. v. Caravatta et al* to hold that "A vendor must show a good title. This means a merchantable or a marketable title: one which at all times and under all circumstances can be forced upon an unwilling buyer who is not compelled to take a title which would expose him to litigation or hazard: one which is free from litigation, palpable defects and grave doubts and couples a certainty of peaceful possession with a certainty that no flaw will appear to disturb its market value."

[14] *Zender supra,* at note 8 at 17;.

[15] *Armitage, supra* note 13. Similarly, Paul Perell, *Real Estate Transactions,* 2d ed (Toronto, Ontario: Thomson Reuters Canada Ltd., 2014) at pg. 78 [*Real Estate Transactions*] mentions the following cases: *Pyrke v. Waddingham* (1852), 68 E.R. 813 (Ch.); *663865 Ontario Ltd. V. Docherty,* [1995] O.J. No. 956 (Ont. Gen. Div.); *Holmes v. Graham* (1978), 90 D.L.R. (3d) 474 (Ont. C.A.); and *Caruana v. Duca Community Credit Union Ltd*. (1994), 20 O.R. (3d) 563 (Ont. C.A.).

Pennel J. in *Zender* put it this way:

> "The vendor must show a good title, that being a marketable title. A marketable title is one which can at all times and under all circumstances be forced upon an unwilling purchaser who is not compelled to take a title which would expose him to litigation or hazard".[16]

As we discuss under the context of the analysis of the *Macdonald v. Chicago Title* case later in this article, there has to be a bright line drawn between title and non-title issues when reading this marketability test. With respect to Pennel J., I would almost want to further clarify the test as follows (emphasized words mine):

> "The vendor must show a good title, that being a marketable title***, which for clarity, is to be distinguished from a marketable property***. A marketable title is ~~one~~ ***a title to a property*** which can at all times and under all circumstances be forced upon an unwilling purchaser who is not compelled to take a title which would expose him to litigation ***that relates to the validity of such title or peaceful possession*** or hazard ***that relates to the validity of such title or peaceful possession***".

There are many reasons why a property can be rendered unmarketable, including physical defects, non-compliance with zoning setbacks or safety requirements, faulty construction, ongoing litigation with tenants or neighbours, or other deficiencies. However, these are not title matters, with the possible exception of litigation which goes specifically to title.

Negotiating the Requisition Provision

Let us return to the OREA form then. As you will recall, we discussed in the context of Section 8, that there were two categories of investigations that the Buyer is permitted to make and two

[16] *Zender supra,* at note 8.

different timelines in which the Buyer is permitted to make them, with the exception of "root of title" matters, which can be raised up to the date of closing.

Section 10 sets out what the rights of the buyer and the seller are in this requisition process:

> If within the specified times referred to in paragraph 8 any valid objection to title or to any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued, … is made in writing to Seller and which Seller is unable or unwilling to remove, remedy or satisfy or obtain insurance save and except against risk of fire (Title Insurance) in favour of the Buyer and any mortgagee, (with all related costs at the expense of the Seller), and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction and Seller… shall not be liable for any costs or damages.

Here is a recap of this provision:

1. Contractually, the buyer is allowed to make a valid objection to title (which means that title is either not "good title" or is subject to an encumbrance that was not permitted) or to the four other specified issues: outstanding work orders, deficiency notices, (un)insurability of the property, or to the fact that the present use may not be continued;

2. The objection must be in writing; **and**

3. The seller must be unable or unwilling to remove, remedy or satisfy it or to obtain title insurance to address it; **and**

4. The Buyer shall not have waived its objection; **then**

5. The agreement is terminated, the deposit is returned to the buyer, and the buyer has no further liability for costs and damages.

Now that we understand the mechanics of the OREA form of agreement respecting requisitions, it is important to be aware that the provision is, in its standard form, inherently seller friendly, and we will pause here to identify a couple of things that buyer's counsel must be mindful of each time this provision is tabled.

Firstly, the right to terminate the agreement only arises if a valid requisition has been made. One might make the argument that if a seller has made the business decision to sell a commercial property, then that seller should be prepared to address, at its cost, all valid requisitions. If the seller wanted the Buyer to accept any encumbrance that did not fit neatly into the (a) through (d) categories of permitted encumbrances, then it had opportunity to otherwise specifically set out those additional encumbrances in a schedule and rely on the preambular language of Section 10 that says "except as otherwise provided in this agreement." So in going to market with such title, and having had the opportunity to add to the general permitted encumbrances of Section 10, it stands to reason that the seller should not be able to avoid the cost of rectifying a requisition because it is "***unwilling***" to remedy or satisfy the situation. Buyer's counsel is well advised to consider removing "unwilling" on this basis, so as to reinforce the positive obligation on the seller to deliver what it has bargained for, at its cost. The notion of it being able to skewer the transaction because it is "unable" to remedy the situation is likely reasonable, although a buyer may want to qualify "unable" as not including "unable" due to any requirement to pay or expend monies to do so.

Secondly, the manner of rectification in Section 10 has been broadened in recent years to allow the seller to remedy or rectify the issue by buying title insurance for the buyer and its mortgagee. Again, buyer's counsel would do well to consider striking this out. While title insurance often facilitates closing, it is not always the right fix, and the effect of the "fix" depends not only on the facts of the deficiency, but on the intentions of the buyer for the property. This provision also encourages a seller to do a cost analysis to determine whether fixing the deficiency or insuring over it is the cheaper response: again, not necessarily what is in the buyer's best interest.

Lastly, and I have alluded to this above, seller's counsel in signing off on this form of purchase and sale agreement, must recognize that this is its opportunity to ensure that all encumbrances

on title to the property, or otherwise that the seller is aware of, are (if not covered squarely in Section 10(a) through (d)), set out in a schedule, so as to be captured by the list of permitted encumbrances. Of course, buyer's counsel has a reciprocal duty in this regard. A buyer may well argue that a standard form OREA purchase agreement should contain no specific list of encumbrances, because that forces the purchaser to conduct its title and encumbrance due diligence before executing the purchase agreement.

Good Faith

This is a good place to interject and remind ourselves of that there is a duty of good faith that informs the obligations of the parties. The purchaser has a duty of good faith when sending requisition letters;[17] and the seller has a duty of good faith when responding. In the seminal case *Mason v. Freedman,* a seller who sought to repudiate his contract because his wife had not provided a bar of dower was not able to rely on the rescission clause because he had made no efforts to ask her to do so. The court said that a "vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner."[18] Therefore, notwithstanding the language "unwilling" in the contract, a buyer who has made a valid requisition still has stable footing to argue that the seller must act in good faith in its determination that it is unwilling to rectify a matter set out in a valid requisition. As Middleton J. in *Hurley* v. *Roy* so eloquently put it:

> "this provision was not intended to make the contract one which the vendor can repudiate at his sweet will. The policy of the Court ought to be in favour of the enforcement of honest bargains…".[19]

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[17] Halsbury's Laws of Canada, "Real Property", (Markham, ON: Lexis Nexis Canada, 2012) at para HRP-199, "(b) Requisitions".

[18] *Mason v. Freedman,* [1958] S.C.R. 483, 14 D.L.R. (2d) 529 (S.C.C.) at para 6, as cited in *Bhasin v. Hrynew* 2014 SCC 71 at 51 when the court considered the duty of good faith arising where a contractual power is used to evade a contractual duty.

[19] 50 O.L.R. 281, 64 D.L.R. 375.

The test for whether the seller has satisfied its obligation to perform its obligations in respect of valid requisitions was explored in *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.*,[20] and was distilled in to two main concepts. The seller may only rescind the contract for failing to satisfy a valid requisition if (1) the seller's conduct doesn't evidence recklessness in entering into the contact (i.e. knowingly bargaining for something it could not satisfy) and (2) if the seller made bona fide efforts to remedy the validly requisitioned issue. This reminds us of our discussion above. Sellers should not knowingly bargain to deliver "good title" subject only to certain encumbrances if they are aware that they will be unable to satisfy certain valid requisitions, should they be made. A court may subsequently disentitle them from repudiating the contract no matter whether they are "unwilling or unable" to remediate the issue, on the basis of this overriding common law duty to act in good faith.

Contractual Requisitions vs. Title Requisitions

Section 10 permits requisitions on only two subject matters: **title** (to the extent that it is not "good"), and a specific list of **non-title matters**, such as work orders and deficiency notices; which is to say, that the contract has "*elevated*" these specifically listed items to the level of importance of title matters, for the purposes of allowing the buyer to requisition their rectification, failing which, the right of termination is triggered. We generally include these other, contractually permitted, non-title requisitions, under the banner "matters of contractual requisitions".

Section 10 of the OREA form contains only four matters of contractual requisition: "any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued, or that the principal building may not be insured against risk of fire". That's it. That's all. And so where a requisition is neither one of title nor goes to one of the four issues, it is not a valid requisition under the terms of the contract.

[20] [1997] O.J. No. 5003, 36 O.R. (3d) 328 (Gen Div).

As a consequence, there has been more than a little judicial confusion over the years as to what constitutes a valid title requisition. The underlying problem, generally speaking, is that there are things that can affect the value or usefulness of a property for a buyer, and which are not title matters, and where they are not specifically listed in the contract as being a matter of contractual requisition, the buyer is not able to requisition their rectification or removal.

And so, as a general matter, what the courts have said is that there is title, and then there is the list of off title (contractual requisition) matters that are set out in the purchase agreement, and if you haven't added them to the list, they do not constitute valid requisitions. So, if you are buyer's counsel, consider that the list:

1. does not include open building permits;[21]

2. does not include a lack of building permits if no deficiency notice has been issued;[22]

3. does not include zoning matters, unless the facts are that the said present use may not lawfully be continued. Which means that if the buyer has different intentions for the property, or the zoning matters do not go to the issue of the lawfulness of the current use, they may not be validly requisitioned.

4. does not include restrictions under conservation authorities restricting further development on the land.[23]

These matters are neither title matters, nor are they matters that, by virtue of the contract, have been elevated to the level of title matters.

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[21] *Thomas v. Carreno* 2013 ONSC 1495 [*Carreno*], discussed in further detail below.

[22] *MacDonald v. Chicago Title* 2015 ONCA 842 [*MacDonald*], discussed in further detail below.

[23] *Palen v. Millson* (1987) 63 O.R. (2d) 89 (Ont. Dist. Ct.); *665284 Ontario Ltd. v. Ricci* (1992) 23 R.P.R. (2d) 221 (Ont. Gen. Div.). In both of these cases, the courts held that restrictions placing the land under the power of a conservation authority were not valid grounds to refuse to complete the purchase because they did not go to the root of title if they are not explicitly mentioned in the contract.

For example, the court in *Brar v. Smith* found that the fact that the seller was using the property for business when it was not appropriately zoned for that was not an issue that went to title because the buyers should have done their own due diligence, checked what the land was zoned for, and not assumed that because a commercial-looking sign was on the property that the zoning would be adequate for their purposes without asking anyone.[24] On its face, this decision is correct, which is why the modern form of OREA agreement specifically provides for the contractual requisition "or to the fact the said present use may not lawfully be continued", so that a purchaser has the ability to conduct its due diligence on permitted uses and to requisition the vendor should the existing use not be permitted by existing zoning. In *Kolan* v. *Solicitor*, the Court stated that:

> "in the case of zoning by-laws or planning controls, and in my opinion also in the case of failure to conform with housing by-laws, to affect the marketability of the title they must be expressly mentioned in the contract of sale as grounds for avoidance".[25]

And so, the general position of the courts is that zoning matters are not title matters and may only be requisitioned if expressly mentioned in the agreement, or as some courts put it, if elevated by the contract to the level of importance as title matters. [26]

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[24] [2014] OJ No 4959.

[25] *Kolan v. Solicitor*, [1970] 1 OR 41; aff'd by the Court of Appeal, [1970] 2 OR 686 [*Kolan*].

[26] *Kolan, ibid; Jackson v. Nicholson,* [1979] O.J. No. 4321 [*Jackson*]; *Innes v. Van de Weerdhof,* [1970] O.J. No. 1453 [*Innes*]. In *Jackson,* the deal to purchase a house fell through when it turned out that an earlier owner had added a sunroom without municipal permission. The request for specific performance was upheld by the court because "the authorities are clear that a requisition for non-compliance with a zoning is not a matter of title, let alone a matter going to the "root of title" (…) At best, a zoning by-law is a "matter affecting the land." In *Innes,* the solicitors acting for the buyers of a house and a 48.5 acre Christmas-tree farm in Collingwood found out from the municipality that there was a zoning by-law in effect on the property. This took the form of a 400 foot frontage buffer zone requirement on each boundary road. Because of discussions around this by-law, the buyers refused to close. The court rejected the proposition that a by-law issue goes to title and the buyers could not rescind the contract on that basis. However, see *Ridgely* v. *Nielson* [2007]

Then in 2013 there was a judicial hiccup (or two).

The Superior Court of Justice in 2013 heard the case *1854822 v. Estate of Manuel Martins*[27] which involved the urgent request from the buyer of the real estate for an order of the Court that the seller had "not shown good title in the premises" on closing because there was an active building permit regarding work proposed to be done to the garage. During the requisition period, the buyer had requisitioned that the open building permit be closed, and the seller had responded that that request was not a valid requisition. The seller took the position that, having regard to the language in the standard form of OREA purchase agreement, an open building permit is neither a work order nor a deficiency notice, inasmuch as a building permit constitutes permission to do work, not a requirement to do that work. The seller also stressed that not only was a permit purely permissive in nature, but that no work had actually been commenced by the seller in furtherance of the open building permit.

The Court found that a building permit, even if not acted upon (or even if only acted on to a small extent), not only affects title but goes to the "root of title". Its rationale was that "the existence of an open building permit which enables the city to inspect premises and make work orders does make a difference to the buyer" ... and "clearly an inspector has the authority under *the Building Code Act* to make an order that certain work be undertaken immediately to bring the garage into compliance with the code". The implications of this finding are significant, because it not only stands for the proposition that open building permits can be validly requisitioned as title matters, but that they are not merely clouds on title or minor defects — they go to the "root of title".

O.J. No. 1699, 53 R.P.R. (4th) 1 (SCJ) in which case the court took into consideration the buyer's future intended use of the property in determining whether a valid title requisition had been made.

[27] 2013 ONSC 4310 [*Estate of Manuel Martins*].

With deference, the author vehemently disagrees with this decision. An active building permit can only be validly requisitioned under the contract if the parties have added it to the list of matters that can be validly requisitioned.

Another 2013 case from the Ontario Superior Court considered a situation in which, in accordance with a customary requisition process, the buyer requisitioned, in a timely fashion, evidence that an open building permit had been closed.[28] The seller made efforts to close the permit in time but was unable to prior to closing. The standard OREA form purchase agreement would have allowed the buyer to terminate the agreement had there existed "valid objections to title, or to any outstanding work order or deficiency notice" made by the buyer within the requisition period (or any requisition after such period that went to the root of title) that the "Seller is unwilling or unable to remove, remedy or satisfy or obtain [title] insurance" for. At closing, the seller denied that the buyer could refuse to close because of the open building permit on the basis that an open building permit is not a "valid objection to title, or to any outstanding work order or deficiency notice", but in any event (despite such denial) the seller obtained a commitment from a title insurer (for the benefit of the buyer) to insure over the issue. The seller obtained this policy by agreeing with the title insurer to set aside in escrow $100,000 to attend to the problem.

The Court found in favour of the seller (and the buyer lost their deposit) on the basis that title insurance was made available, and that the requisition provision in the agreement did not permit termination where the valid requisition was insurable by title insurance. What the Court appeared to do in this case, was to accept that an open building was a valid requisition (presumably, either as a title matter or as a "precursor to a work order"). Interestingly, on appeal, the Ontario Court of Appeal dismissed the buyer's appeal for the return of its deposit, and found that the lower Court had concluded correctly that "the requisition in relation to the open building permit could be satisfactorily answered by a commitment to provide title insurance as

[28] *Carreno, supra* note 21.

contemplated by the Agreement of Purchase and Sale", which is to say, that the Court of Appeal also tacitly acknowledged the validity of the underlying requisition.

So what happened in 2013? Results-based legal decisions. These decisions are a direct result of courts struggling to find a way in which to shoehorn building permits into the "title" category. Bad law. And being as we are on the topic of bad law, our discussion of title and building permits would not be complete without a rant on the 2014 case of *MacDonald*[29] which was based on the following undisputed facts:

(a) the MacDonalds acquired a home without knowledge that the seller had removed load bearing walls in the home without a building permit;

(b) the MacDonalds had purchased an owner's policy from Chicago Title;

(c) some years later, the City of Toronto determined that the home was unsafe as a consequence of such wall being removed, and issued an order to the MacDonalds to remedy the problem by installing shoring to "temporarily support the floor structure"; and

(d) Chicago Title refused coverage.

The Court considered coverage under Section 11 of the policy which provided coverage where: "[y]our title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease, or to make a mortgage loan." The Ontario Superior Court found that the Title Marketability Coverage did not cover the MacDonalds for their loss, but this was reversed at the Court of Appeal which held that the lower court had adopted an "an unduly restrictive interpretation of the coverage provisions in the Title Policy".

[29] *MacDonald, supra* note 22.

The Court stated that marketable meant, under the terms of Section 11, that "a potential buyer can refuse to close an agreement of purchase and sale on learning of the defect". The Court found that Chicago Title had not disputed that the condition of the property would allow a potential buyer to refuse to close a purchase transaction, implying that the insurer had effectively conceded that the test was met. And in addition, the Court denied Chicago Title's position that the cause of the problem was the faulty construction (a "latent defect in construction") and instead found that the "unmarketability" of title was the direct result of the failure of the prior owner to obtain a building permit.

The court's approach in *MacDonald* has effectively blended the two concepts of unmarketability of title and unmarketability of property. The latter is more often associated with ancillary building or land defects (work orders, zoning compliance, deficiency notices and the like). Returning to basics, title to real property is different from the real property itself. Putting aside historical semantics of property law for a moment, there remains a difference between what constitutes one's title to land, and the land and building itself. And the marketability of title and the marketability of land and building are two very different things.

Curiously, in this case, even though it was a matter of the interpretation of an insurance contract, the same thing happened as has been happening in the canon of title requisition law cases – the court labelled a non-title issue (in this case building permits, or lack thereof) as a title issue because it could not find a place where it had been separately addressed in the contract.

Root of Title

Much of this discussion has been focused on the distinction between title and contractual requisitions. But there is a subcategory of "title matters" that we cannot ignore. Returning once more to the OREA form, we note that matters that go "to the root of title" may be requisitioned up to closing and, if not remedied, can give right to contractual rescission. What then is the difference between a title issue and a root of title issue?

If you recall, the *Estate of Manuel Martins* (in which the court determined that the lack of building permit constitutes a "root of title" issue) provided us with an example of how the courts have

confused matters of title generally. In *Jakmar Developments Ltd. v. Smith,* the court analyzed a line of cases determining requisitions and held that:

> "[i]n all the cases ... where an objection to title is made after the date for requisitions was permitted it was a case where the seller could give no title at all and the defect could not be discovered as a result of the usual search of title".[30]

Which is to say, that a failure in the root of title is a fundamental failure of the seller to be able to convey title. Think of such fundamental problems as: the seller does not exist, does not have the authority to sell the property, does not own and cannot compel the sale of the property, or is prevented by law from selling the property. It amounts to a lack of consideration, which is why it is a matter that can ultimately frustrate the contract up to closing.

Requisitions that are a Matter of Conveyancing

This is a subject that most real estate practitioners have either forgotten or never knew existed, although (for good measure) in preparing this discussion I went back and looked at my 2001 LSUC materials from when I taught the bar admission course, and this subject merited its own paragraph in those materials. So if you don't know this, sadly you have no excuse.

There is a seldom-invoked common law line of cases that have described a category of valid requisitions that are a matter of conveyancing. These are extra-contractual requisitions that can be made as a matter of common law. They are requisitions that do not arise from the requisition provisions of the contract, and are therefore not constrained by the periods set out therein or in the *Vendor and Purchaser's Act*, for valid requisitions. They can be made up to closing.

What we know about these requisitions is:

1. they are not title requisitions;

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[30] *Jakmar Developments Ltd. v. Smith*, [1973] 1 O.R.(2d) 87 at 43.

2. they do not go to the root of title;

3. they are not requisitions that could have been made as matters of contractual requisition; and

4. they are requisitions "which the vendor alone or with other persons whose concurrence he can require is in a position to convey the title to the property. They assume that the vendor has a right to make title or to cause it to be made and are concerned with the satisfaction of the right."[31]

Which is to say, that (for example) if there is an offending instrument registered against title to the property that is within the unilateral authority of the seller to delete from the title, the matter need not be raised by the requisition date.

Paul Perell in *Real Estate Transactions,* has determined that following have been held to be matters of conveyance: [32]

- Obtaining the discharge of an open mortgage. In *Toth v. Ho*, where the court distinguished an open mortgage from a closed one because the latter "is by its very nature not one which the mortgagor can compel a discharge be granted," unlike an open mortgage.[33]

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[31] Law Society's Special Lectures by William Howland, as quoted in *Majak Properties Ltd. v. Bloomburg,* (1976) 13 O.R. (2d) 447 (*Majak*). In *Majak*, the court looked at three main requisitions (1) a right of way over the property; (2) a consent of all mortgagees to registration of a plan of subdivision; and (3) a bar of dower of the wives. The court held that contractual limitation of time for delivery of objections to title do not apply to matters of conveyance nor to objections going to the root of title, but that those three main requisitions did not fall into either category.

[32] *Real Estate Transactions*, *supra,* note 15 at 104.

[33] (1998), 26 R.R.R. (3d) 76 (Ont. Gen. Div) at 7. In this case, the agreement of purchase and sale had an annulment clause for cases where the seller could not make title as well as a separate schedule providing that the sellers would discharge all mortgages on title. There was a closed mortgage on title; the question was whether the sellers could therefore invoke their annulment clause – *i.e.* whether the existence of a closed mortgage constituted a requisition on title or a requisition on conveyance.

- Obtaining an affidavit of execution on a mortgage discharge.[34]
- Lifting a writ of execution against the seller.[35]
- Obtaining an estate tax release, or an estate or succession duty release.[36]
- Producing a mortgage statement where the seller has undertaken to produce it.[37]
- Obtaining a survey.[38]
- Obtaining a discharge of a construction lien.[39]

Conclusion

There is no value in my reiterating the main points of this discussion into concluding paragraphs; but there is value in reminding ourselves of these few things:

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[34] *Zender, supra,* note 8.

[35] *Farantos Development Ltd. v. Canadian Permanent Trust Co.* (1975), 7 O.R. (2d) 721 (Ont. H.C.) at 60. Here, the court stated that "[i]n my view the obtaining of succession duty and estate tax releases or consents, and the discharging or lifting of the two executions, are matters of conveyance only and are not matters of title. They relate to encumbrances which the estate had the right to pay off and discharge before the closing date."

[36] *Ibid.*

[37] *272393 Ontario Ltd. v. 225596 Holdings Ltd.* (1976), 1 R.P.R. 101 (Ont. H.C.) at 31, aff'd (1977), 2 R.P.R. 245 (Ont. C.A.), leave to appeal refused (1978), 20 N.R. 449 (note) (S.C.C.). In this case, the buyer was held to be entitled to rely on the seller's solicitor's undertaking to produce the mortgage statements. Since he had not done so, the buyer was entitled to refuse to close.

[38] *McCauley v. McVey,* [1980] 1 S.C.R. 165 (S.C.C.) at 5. Here, McVey unintentionally did not give the surveyor enough time to produce a survey by the closing date, but the court held that the survey obligation was "more a matter of conveyancing than of title, and it is clear that a seller cannot justify a refusal to complete by relying on a matter of conveyancing that is within his power to correct."

[39] *Grant v. Tiercel Digital Ltd.* (1993), 32 R.P.R. (2d) 51 (Ont. Gen. Div) aff'd 1994 CarswellOnt 4539 (Ont. C.A.). There were several construction liens registered against the property, the buyer was aware of them and the closing was postponed several times as the seller attempted to settle the liens. The seller eventually cancelled the agreement on the basis that the liens had not been settled on time and the court held that construction liens were a matter of conveyance and not a matter of title.

1. Standard form purchase and sale agreements are the start of the discussion on title and off-title matters, not the end, and they must be negotiated up front by the parties, and not blindly relied upon; and

2. A buyer's solicitor must have a fulsome discussion with the buyer to discuss its needs and intentions for the property so that the requisition provision provides sufficient room to address the purchaser's needs prior to the requisition date. When in doubt, make all matters related to the property the subject of due diligence; and

3. Be diligent in meeting the formalities of a valid requisition, and be cognizant of the difference between title requisitions, contractual requisitions (and should you need them), requisitions as to matters of conveyancing.

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TAB 3

Commercial Real Estate Transactions 2016

Representations and Warranties in Real Property Transactions

Rodney Davidge, *Osler, Hoskin & Harcourt LLP*
Sonam Pandya, Articling Student, *Osler, Hoskin & Harcourt LLP*

September 13, 2016

cpd Continuing Professional Development

REPRESENTATIONS AND WARRANTIES IN REAL PROPERTY TRANSACTIONS

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Contractual representations and warranties are an essential part of a real estate lawyer's negotiation toolkit. The quantity and quality of representations and warranties should always be given careful consideration, especially where they have the potential to ease the impact of the *caveat emptor* principle on purchasers. This principle provides that absent fraud, mistake or misrepresentation, the purchaser takes the subject property as it finds it, unless it protects itself through contractual terms.[1] Representations and warranties are thus valuable tools purchasers can rely on to protect themselves and help ensure they are receiving what they bargained for.

Generally, the representations and warranties provided by purchasers (if any) are limited and often only relate to the purchaser's status and authority, residency, and consents and approvals required. As such, this paper will primarily focus on the negotiation of the representations and warranties typically provided by vendors.

Despite purchaser preference for a fully-represented transaction, the vendor will ideally want to sell the property "as is". This can leave the purchaser and vendor at odds, especially if certain representations and warranties are essential to the purchaser. As such, the representations and warranties provided (or not provided) for a given property are often a heavily negotiated component of an purchase agreement.

While it is true that a representation generally precedes and induces the contract, whereas a warranty is usually given contemporaneously with, and is embodied in it,[2] in practice, there is little distinction made between a representation and a warranty. Breach of either generally leads to damages rather than a right to terminate the agreement, unless, of course, they are coupled with the condition that they are true and accurate as of the closing date.

Purpose of Representations and Warranties

[1] John D. McCamus, *Caveat Emptor: The Position at Common Law* (Toronto, ON: Irwin Law, 2003) at 99.
[2] Fraser-Reid v. Droumtsekas (1980), 1 S.C.R. 720, 103 D.L.R.(3d) 385.

The quantity and quality of the representations and warranties negotiated in a transaction will vary depending on the nature of the particular transaction. For example, the representations and warranties provided in connection with the purchase of a commercial property will be more fulsome and of a different character than those provided in connection with the purchase of bare land.

Generally speaking, representations and warranties will serve one or more of the following purposes:

1. To provide certainty to the parties by confirming certain facts that are assumed to be true by both parties.
2. To relieve the purchaser of the obligation of determining the truthfulness of certain facts in situations where it may not be able to satisfy itself through due diligence.
3. To negotiate the allocation of risk between the parties.
4. To expose potential problems or risks. For example, if a vendor refuses to give certain representations or warranties, this can reveal facts that may not have otherwise been disclosed, thus allowing the purchaser to assess the risks and make an informed decision.

In order to determine what purposes the representations and warranties will serve in a given transaction, purchaser's counsel should ensure that they have a full understanding of the purchaser's objectives, as well as what facts both parties assume to be true, what facts the client is unable to uncover through due diligence investigations, and what terms the client deems essential to include in connection with the transaction. It is integral for the purchaser's counsel to have a complete understanding of what the client wants before attempting to draft and negotiate the representations and warranties.

Categories of Representations and Warranties

Whether or not certain representations and warranties are sought will depend on the circumstances surrounding the transaction, such as the respective bargaining power of the parties, the type of property being purchased, the extent of the information the purchaser gathered through due diligence, the vendor's knowledge of the property and its history, the client's risk tolerance, the client's end goals, and industry standards. After considering these

factors, the purchaser's counsel will determine which representations and warranties are most important to seek and the vendor's counsel will determine which representations and warranties should not be given, as well as which ones must be qualified.

Generally, there are three distinct types of representations and warranties[3] covering the areas of:

1. Status and authority of the vendor.
2. Status of the real property.
3. The operation and maintenance of the property.

Each type of representation and warranty is discussed below.

1. Status and Authority of the Vendor

These representations and warranties are given by the vendor to assure the purchaser that the vendor is in existence and good standing, that the vendor has the right, power, and authority to perform its obligations under the purchase agreement, that the purchase agreement is enforceable against the vendor, that the vendor is not required to obtain any consents, and that the vendor is not a foreign person.[4] While these representations and warranties are generally standard and non-controversial, the purchaser should still verify correctness, to the extent possible. It may also be prudent to include as a condition to closing that the vendor will provide an officer's certificate and/or a legal opinion of its counsel that confirms the accuracy of the representations made regarding the status and authority of the vendor.

2. Status of the Real Property

These representations and warranties allow the purchaser to assess the risks associated with the property itself and make an informed decision based on the facts disclosed by the vendor.

[3] Edward A. Peterson, Winstead Sechrest, and Minick P.C, "The Effective Use of Representations and Warranties in Commercial Real Estate Contracts" (2009) at page 2 < https://c.ymcdn.com/sites/acrel.site-ym.com/resource/collection/8CD585C9-0FD8-42C5-A162-9590402FE64E/a002089.pdf> [*Peterson*].
[4] *Ibid*.

Representations and warranties in this category allow the purchaser to gain valuable insight on a number of important issues including assurances:[5]

(a) as to title to the property;

(b) that there have been no violations of any applicable laws;

(c) that there is no active, pending or threatened litigation that affects or relates to the property;

(d) that there are no encumbrances on title besides those that have been disclosed to the purchaser;

(e) with respect to the rights of any other parties to possess or occupy the property;

(f) that all taxes having been paid; and

(g) with respect to the environmental matters.

The scope of the representations and warranties sought by the purchaser will also depend on the type of property being purchased. For example, more detailed representations and warranties may be warranted in connection with the acquisition of a rural or cottage property as opposed to an urban property. While the purchaser will likely push for all of these representations and warranties to be included in the purchase agreement, many vendors will be reluctant to accept the significant risk associated with warranting some of the above. This holds especially true for representations and warranties relating to environmental matters due to the significant costs potentially payable if the property is later found to be contaminated, as well as the fact that vendors never have complete knowledge of the property's environmental condition. Thus, during the negotiation process, the vendor will often seek to reach a compromise by way of qualifiers, which are discussed later in this paper.

3. **The Operation of the Property**

[5] *Peterson*, supra note 3 at 6-11.

The last category of representations and warranties relate to assurances with respect to the operation and maintenance of the property.[6] A sample of common representations and warranties in this category include assurances[7]:

(a) regarding leases, including statements that the rent roll is accurate and complete and that there have been no defaults under any the leases by either the vendor or the respective tenants;

(b) regarding the status of operating agreements and other contracts which allow the purchaser to make an informed decision on which operating agreements and contracts it may wish to assume; and

(c) regarding the accuracy and completeness of books and records so that the purchaser can understand the true value of the property and insulate itself from negligently prepared financial information.

It should be noted that the representations and warranties relating to tenant leases, if such are applicable, can be among the most important for purchasers of real property, as the status of the leases can have a significant impact on the economics of the property. As such, in addition to the representations and warranties, it will often be a condition of closing that the vendor obtain and provide tenant estoppel certificates from the tenants of, or a certain portion of the tenants of, the property.

The proper scope of representations and warranties in respect of operations at a property depends in large part upon the nature of the operations at the property. Where the acquisition involves the acquisition of an operating business in addition to the purchase of real property, such as retirement residence or a hotel, it is common for there to be more extensive representations and warranties dealing with the business operations.

Qualifications

[6] *Peterson*, supra note 3 at 11-12.
[7] *Ibid*.

When providing representations and warranties, the vendor invariably takes on a certain amount of risk. The vendor's counsel can attempt to transfer a portion of that risk to the purchaser by using qualifiers. There are several categories of qualifications that may be helpful for counsel to keep in mind that can help move negotiations along:

1. **Exceptions**

Incorporating language to qualify broad representations and warranties, such as "…except as disclosed on Schedule "A"…" or "…except as provided for in this Agreement" can provide for a more comprehensive agreement. As well, the use of specific exceptions can help to reflect the intentions of the parties in cases where broad, sweeping representations and warranties may otherwise compromise the effectiveness of provisions in other parts of the agreement.

2. **Knowledge**

Representations can be qualified by the "knowledge" of the party who is giving the representation. Thus, by prefacing representations and warranties with a phrase such as, "The vendor represents and warrants to the best of the vendor's knowledge that…", the vendor can qualify its representation or warranty to the extent that it has knowledge of what is being represented or warranted.

It can be important for the parties to flesh out *whose* knowledge the knowledge qualifier is referring to. From a purchaser's perspective, they will want the group of people who are the subject of the knowledge qualifier to be as large as possible, whereas vendors will want to limit the knowledge qualifier to apply to the knowledge of a limited amount of people (for example, only certain specified senior officers of the corporation). The purchaser's counsel should investigate before defining the subject of the knowledge qualifier to determine who is most and least likely to carry certain types of knowledge.

It is also important to determine the specific definition of "knowledge". Does knowledge mean actual knowledge or the knowledge that someone should reasonably be expected to have? Is there an obligation on the subject of the knowledge qualifier to make a due inquiry before claiming that they do not have certain knowledge? In order to best protect the client, the answers

to these questions are important for the purchaser's counsel to determine before defining the scope of "knowledge" in the agreement.

3. **Materiality Threshold**

Vendors can also qualify representations and warranties by negotiating a materiality threshold. This means that the purchaser's right to make a claim will be limited to circumstances where the breach goes to the transaction's substance. Of course, parties don't always agree on the significance of a given breach, so counsel should consider defining the concept of "materiality" so that both parties are better aware of what would constitute a "material" breach. Providing for this definition in the agreement can assist in reflecting the expectations of the parties in the event that a dispute is to arise.

Survival

After negotiating the representations and warranties along with any qualifiers, the next issue to consider is the time limit during which claims may be brought for breach of representations and warranties. This length of time is referred to as the survival period. The survival period is an important component of negotiations as it determines the point at which any risks inherent in the transaction transfer from one party to the other. There are at least four ways to draft a purchase agreement which addresses the life span of the agreement's representation and warranties.

1. The first possibility is an express provision that states that the representations and warranties will merge upon closing. This method of addressing the survival period is a clear way to demonstrate the intention of the parties if they wish to provide for no possibility of a post-closing claim for misrepresentation.
2. The second possibility is silence in the purchase agreement with respect to whether the representations and warranties survive on closing. This scenario is rare given the importance of the survival period and the implications it has for both parties. Nonetheless, if no survival period is specified, post-closing claims for misrepresentation may still be possible if the purchase agreement can be interpreted to allow for them.

3. The third possibility is an express survival period stated in the purchase agreement. This discrete period limits the time during which claims may be brought for breach of representations and warranties. Depending on the length of the period outlined, it may have the effect of contracting out of the *Limitations Act*.[8] In drafting the contractual limitation period provision, counsel should ensure they use clear and explicit language and delineate the scope of the application of the limitation period.[9]
4. The fourth possibility is a provision that provides for indefinite survival. This possibility is subject to applicable limitations laws. However, parties should note that they have the ability to contract out of such laws.[10]

From the purchaser's perspective, they will want any potential claims to survive for as long as possible. The vendor will endeavour to have the representations and warranties merge on closing or as soon as possible thereafter. Generally, there is no "perfect" survival period. The period often varies depending on the subject of the representation or warranty, and of course, the relative bargaining strength of each of the parties. Counsel may consider different survival periods for different types of representations in order to negotiate more effectively.

Other Considerations

1. Impact of Purchaser Knowledge

Absent language otherwise in the purchase agreement, a purchaser may have the right to claim damages for a breach of representation and warranty even if it was aware of such breach either at the time it entered into the purchase agreement or at the time of closing. A vendor will often seek to prevent the purchaser from recovering in those circumstances. Where a purchaser had knowledge of the breach of representation and warranty at the time in entered into the contract, it is hard to argue that it should have the right to claim damages for such breach and if the parties

[8] *Limitations Act*, 2002, S.O. 2002, c. 24.
[9] Boyce v. The Co-Operators General Insurance Company, 2013 ONCA 298 at para 20, 116 O.R. (3rd) 56.
[10] According to section 22(3) of the *Limitations Act*, 2002, S.O. 2002, c. 24, a limitation period under the Act, other than one established by section 15, may be suspended or extended by an agreement made on or after October 19, 2006. For a limitation period established by section 15, this limitation period may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered.

intend that to be the case, in most cases is makes more sense to deal with liability for that particular matter directly in another provision of the purchase agreement.

The vendor and the purchaser may disagree with respect to the appropriate remedies where a breach of representation or warranty is discovered after the purchase agreement is signed. Many vendors will seek to require the purchaser to choose between terminating the contract as a result of the breach and proceeding with closing without any right to sue for the breach. A purchaser will not want to be faced with that choice as it may be forced to accept less than it bargained for because to do so makes more sense than to walk away from the sunk costs already invested in the purchase transaction at the time the breach is discovered.

2. **Quality of the Vendor Covenant**

Negotiating for representations and warranties that survive closing of an purchase agreement is of limited value of the vendor will not have assets post-closing that a purchaser can recover against in connection with post-closing claims. Where the ability to make post-closing claims is of importance, the purchaser should consider obtaining some security for the vendor's obligations. In some cases, a certain portion of the purchase price can be held back or placed in escrow until the survival period expires or the vendor can be required to post a letter of credit as security. However, there is no limit to the type of security that may work on any particular transaction.

3. **Limits on Recovery**

In some cases, in addition to limiting its exposure on representations and warranties by qualifying the representations and warranties in the manners discussed above, a vendor may seek to limit its exposure with respect to representations and warranties by providing express limits on the ability of the purchaser to recover for breaches of representation and warranty. This can take the form of a certain threshold that must be passed before any claim can be made or a cap of some kind on the amount the purchaser can recover. The use of these concepts can sometimes help bridge the gap on a disagreement with respect to the scope of representations given and the manner in which they are qualified, as a vendor may be willing to provide more

comprehensive representations where it has comfort that the purchaser cannot grind the price down post-closing by raising small issues and/or that its overall exposure is limited.

Conclusion

Given the tendency for the allocation of the risk between the purchaser and vendor to shift significantly depending on the existence or absence of certain representations or warranties, purchaser and vendor counsel should ensure they have a full and complete understanding of what their client wants in order to be able to effectively negotiate the representations and warranties of the purchase agreement.

While attempting to protect their client's interests, purchaser and vendor counsel should always keep the efficiency of their negotiations in mind. Namely, for the purchaser's counsel, there is no use in trying to negotiate representations and warranties for information the purchaser already has knowledge of or is able to easily verify. On the other hand, for the vendor's counsel, there is no use in attempting to withhold a representation that can be safely represented to the other side with little to no potential for liability. These practicalities can be an excellent way to overcome an impasse and assist the parties in moving the negotiation process along.

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TAB 4

Commercial Real Estate Transactions 2016

Conditions and the Responsibility for Satisfying and Waiving Conditions

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cpd Continuing Professional Development

Conditions and the Responsibility for Satisfying and Waiving Conditions

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Introduction

Calling a clause a condition in agreement does not make it a condition and the determination of its status and the remedies that flow from it will always be contextual.

One of the most important characteristics of a condition is its difference from a warranty: a condition, whether a condition or a true condition precedent, will be fundamental to the contract whereas a warranty is not. Only an examination of the covenant in the context of the contract will be determinative. Simply calling a covenant a condition does not make it so.[1]

Examples of Warranties

How does one determine if a covenant is a warranty, a condition or a true condition precedent? The cases in this area provide a useful roadmap for analysis.

In an older Ontario Court of Appeal case, the court was tasked with trying to determine whether a covenant was a condition or a warranty. In *Jorian Properties Ltd.* v. *Zellenrath*[2]*,* a purchaser entered into an agreement of purchase and sale

[1] *Jorian Properties Ltd.* v. *Zellenrath et al.* (1984), 46 OR (2d) 775; 10 DLR (4th) 458; 26 BCLR 276; 26 BLR 276; 4 OAC 107; 1984 CanLII 2178 (ON CA).
[2] *Ibid.*

for a property which had been converted to five apartments. The property was zoned for a three-plex. The purchaser maintained that the covenant was a condition and did not close.

At the Court of Appeal, the majority determined that the covenant was a warranty not a condition. Practically speaking, the purchaser should have closed on the transaction and would have had the right to sue for damages only (the effects of a breach of warranty) as opposed to a condition which is deemed to be so fundamental to the contract that a breach results in the aggrieved party not receiving what they bargained for.[3] It is interesting to note that Justice Blair dissented in *Jorian* and deemed the covenant to be a condition: the purchaser bargained for "large Buick" and received a "small Chevrolet."[4]

Conditions Precedent (Simple Conditions) are Contextual

A good example of this lack of clarity follows with the later case of *Champlain Thickson Inc.* v. *365 Bay New Holdings Ltd.*[5] In *Thisckson*, the purchaser and vendor entered into an agreement of purchase and sale for two commercial buildings. As part of the due diligence process, it was discovered that there were repairs required for the elevators of the buildings. The actual cost of these repairs was $6,200.00. The purchase price for the buildings was $24,500,000.00.[6]

[3] *Ibid* at paragraph 15.
[4] *Ibid* at paragraph 19.
[5] *Champlain Thickson Inc.* v. *365 Bay New Holdings Ltd.* (2007), 2007 CanLII 35702 (ON SC).
[6] *Ibid.*

The parties executed an amendment to the agreement which provided for the vendor completing the repairs prior to closing. As closing neared, it became clear that the repairs would not be done prior to closing because the two elevator repair companies engaged were not able to complete the work prior to closing. The purchaser requested an extension of the transaction to allow for the work to be completed before the closing which the vendor rejected.

What is particularly interesting about this case is the greater context of the negotiations between the purchaser and vendor to the amendment. The purchaser saw the issue of the elevator maintenance as a deal-breaker due to its health and safety implications and the amendment was hard sought. This is a key fact in the court's ultimate decision that the covenant was a condition and not a warranty.

The vendor took the position that by entering into the elevator repair contracts, it had substantially complied with the condition; this was the basis for its refusal of an extension of the closing date.[7]

Despite the *diminimus* nature of the value of the repairs in relation to the purchase price, the court ultimately determined that the failure to repair the elevators before closing was a breach of a condition precedent.[8]

[7] *Champlain Thickson Inc.* v. *365 Bay New Holdings Ltd.* (2007), 2007 CanLII 35702 (ON SC).
[8] *Champlain Thickson Inc.* v. *365 Bay New Holdings Ltd.* (2007), 2007 CanLII 35702 (ON SC).

Champlain Thickson Inc. v. 365 *Bay New Holdings Ltd.* illustrates all too well that the greater context of the transaction and subjective intention of the party seeking to rely on the covenant will be of the most utmost importance in determining whether the covenant is a warranty or condition.

What is a True Condition Precedent?

It is essential when analysing conditions and their role in a contract that there are two kinds of conditions. The first, as described above, is the condition precedent or simple condition which is referred to above in *Jorian* and *Champlain Thickson* and which "is a set of facts that must exist, or something that must be satisfied, before one party is bound to proceed with the transaction…where the party in whose favour the condition was included can unilaterally waive it."[9]

A"true condition precedent," however, is completely reliant on an external event. To illustrate its role and definitional existence in a contract, we need to go back to a 1959 Supreme Court of Canada case, *Turney* v. *Zhilka*:

> The obligations under contract, on both sides, depends upon a future uncertain event, the happening of which depends entirely on the will of a third party – the Village council. This is a true condition precedent – an external condition upon which the existence of the obligation depends. Until the event occurs, there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur.[10]

[9] Halsbury's Laws of Canada – Real Property, *Contracts* (LexisNexis Canada 2012), at II. Sale of Land, I. Contract for Sale of Land, (5) Conditions, (a) General.
[10] *Turney* v. *Zhilka,* [1959] S.C.R. 578; 18 DLR (2d) 447; [1959] CarswellOnt 81; [1959] SCJ No 37 (QL); 1959 CanLII 12 (SCC) at 583.

For further clarity, neither party can waive a true condition precedent. How does one get around the uncertainty of the external third-party event? Careful and comprehensive drafting that sets forth the consequences upon failure of the condition and possible contingencies if the true condition precedent being fulfilled is reliant on conditions imposed by the third party.

In *Mull* v. *Dynacare*, the court considered the issue of "material adverse change" conditions and whether it could relate to a strictly external event. While this case relates to material adverse change (MAC) condition in an agreement of purchase and sale for a business, it is still relevant in the real estate context and has implications for income generating properties.

The defendant's position was that a MAC condition could not relate to an external event and the court noted that the specific wording of the agreement was the only thing that could determine the rights of the respective parties.[11]

Boiled down, this means that a MAC can be a true condition precedent. The specific clause reads as follows: "there shall have been no changes to the Business, financial or otherwise, since September 30, 1992 which in the aggregate are materially adverse…"[12]

[11] *Mull v. Dynacare Inc.* (1998), 44 BLR (2d) 211, 1998 CanLII 14814 (ON SC).
[12] *Ibid.*

The drafting was broad enough to be interpreted in favour of the purchaser. As such, the vendor will want to limit the use of external events being caught in the net of condition with the opposite goal for the purchaser. The efficacy of such a clause for either party will come down to the negotiation and the careful drafting of the clause.

In *535045 B.C. Ltd. v. 741662 Alberta Ltd.*,[13] the court dealt with this very issue in a real estate agreement of purchase and sale with a material adverse change clause. The purchaser became aware that one of the tenants of the property was in default of their lease which was determined to be a material adverse change. While the purchaser had concerns about 2 other leasable spaces that were vacant, the court determined the default in the lease was enough to constitute a MAC and that the other reasons for the purchaser defaulting did not delineate from the ability to rely on the MAC condition to end the transaction. [14]

The facts suggest an interesting question surrounding the duty of good faith which was not addressed in the decision.

Waiving Conditions

[13] *535045 B.C. Ltd. v. 741662 Alberta Ltd.* (2002), 323 AR 272, 2002 ABQB 871 (ABQB).
[14] *Ibid.*

It will come as no surprise that there is a good faith component to waiving conditions but it did not originate with the seminal Supreme Court of Canada case, *Bhasin* v. *Hrynew*.[15]

Without getting into a comprehensive analysis of the facts of *Bhasin* v. *Hyrnew*, it stands for the proposition that there two components of good faith in relation to a contract: 1) as an organizational principle that underpins the various situations and relationships of contractual deals; and 2) a duty to act honestly.[16]

While *Bhasin* v. *Hrynew* imparted a general duty of good faith in contracts, this has been a status quo in real estate contracts and only confirmed what is already known to be the case.

There is a breadth of case law that preceded *Bhasin* v. *Hrynew* that addresses good faith in the context of real estate contracts but how does it relate to the waiver of conditions?

In *Dynamic Transport Ltd.* v*. O.K. Detailing Ltd.*,[17] a Supreme Court of Canada case dating back to 1978, there was an agreement of purchase and sale that was conditional on Planning Act approval but the condition was silent as to whose

[15] *Bhasin v. Hyrnew*, [2014] 3 SCR 494; 2014 SCC 71; AZ-51124463; JE 2014-1992; [2014] SCJ No 71 (QL) (SCC).
[16] *Ibid.*
[17] *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 SCR 1072; 1978 CanLII 215; 85 DLR (3d) 19; 6 Alta LR (2d) 156; 9 AR 308; 20 NR 500; [1978] CarswellAlta 62;[1978] SCJ No 52 (QL); [1978] ACS no 52; 4 RPR 208 (SCC).

obligation it was to obtain such consent. The vendor refused to close the transaction on the basis that the description of the land was too vague and that the contract was silent on which party was responsible for obtaining Planning Act consent.

The court found that the description of the land was not sufficiently vague and there was an implied term of the contract that the vendor would seek the Planning Act consent for reasons of business efficacy. In its decision, the Court noted that the vendor had a "duty of good faith and to take all reasonable steps to complete the sale." [18] Reasonable steps included pursuing the appropriate Planning Act application in good faith.

This responsibility to act in good faith in the satisfaction of conditions requires best efforts on the part of the party required to fulfill the condition according to *Barg* v. *Boyd*[19] where the court determined that the obligation of best efforts is still going to be contextual.

The purchasers entered into an agreement to purchase the vendor's property which contained a condition for the sale of the purchasers' property. No offer was forthcoming and a friend of the vendor offered to purchase the purchasers'

[18] *Ibid* at 1084.
[19] *Barg v. Boyd* (1992), 1992 CarswellOnt 604, [1992] O.J. No. 1708, 26 R.P.R. (2d) 157, 35 A.C.W.S. (3d) 135 (OCJ Gen. Div.).

property at fair market value. The purchasers determined that they required a specific purchase price to afford the new property.

In that case, the court looked at the greater context of the purchasers' reasons for not waiving the condition to determine that the purchasers were acting in good faith.[20] It is easy to see how if the facts were adjusted slightly, a different result could ensue.

The duty of good faith does not extend to protect the opposing party from adverse consequences of their refusal to act.[21]

In *2260695 Ontario Inc.* v *Invecom Associates Limited*[22], the parties had entered into a conditional agreement of purchase and sale indicating that if no notice was provided by the purchaser that the condition had been waived, the condition was deemed to be satisfied by the purchaser.

On the day the condition elapsed, the purchaser sought an extension of time. The vendors were silent until the time for notice of the condition had expired. Upon expiration of the conditional period, the deal was firm and if the purchaser breached the agreement, the deposit would be forfeited whereas, if the purchaser had provided notice that the condition could not be satisfied, the deposit would

[20] *Ibid*.
[21] *2260695 Ontario Inc. v. Invecom Associates Limited* , 2016 CanLII 3327 (ON SC).
[22] *Ibid.*

have been returned to the purchaser. The court found that the vendor did not breach its duty of good faith by its failure to respond to the purchaser regarding the request for the extension.[23]

The issue of good faith post-*Bhasin* was also contemplated by the British Columbia Court of Appeal in *Alim Holdings Ltd.* V. *Tom Howe Holdings Ltd.*[24] The appellant offered to purchase two properties from the Respondent which was subject to a condition in favour of the vendor regarding a right of first refusal of the tenants. One of the tenants failed to exercise their right of first refusal and the did but opted to purchase both properties.

The appellant argued that the respondent failed to act in good faith by refusing to take all reasonable steps to satisfy the conditions and complete the sale.
The Court noted that as soon as the tenant opted to exercise its right of first refusal (regardless of the fact that it was for both properties), the condition could not be satisfied and rendered the agreement null and void.[25] The obligation to act in good faith did not extend to trying to convince the tenant not to exercise their right of first refusal.

[23] *Ibid.*
[24] *Alim Holdings Ltd.* V. *Tom Howe Holdings Ltd.* 2016 CanLII 84 (B.C.C.A).
[25] *Ibid*.

Tenant Estoppel

The reality of multi-unit commercial properties for sale is that their ability to generate income directly relates to their purchase price and economic feasibility for a new purchaser. That being the case, a tenant estoppel certificate has the potential to be a deal-breaker for prospective purchaser if it does not confirm the expected income generation.

Due to the far-reaching effect the existing (or not existing tenancies) may have on the viability of the purchase, the tenant estoppel certificate becomes a key component of the purchaser's due diligence and careful drafting of its reliance must be contemplated in an agreement.

A simple confirmation of existing leases in a contract is not going to be enough to make a tenant estoppel certificate enforceable. The Court of Appeal (application for leave to appeal to the SCC dismissed) in *Goodyear Canada Inc.* v. *Burnhamthorpe Square Inc.*[26] was very clear that actual reliance on an estoppel certificate is required. For either a lender of a purchaser seeking to rely on the estoppel certificate, the easy way to do this is create a condition in the agreement to crystalize the reliance.

Delegating Responsibility for the Responsibility of Conditions

[26] *Goodyear Canada Inc.* v. *Burnhamthorpe Square Inc.* [1998] 41. O.R. (3d) 321 O.A.C.

Delegating, regardless of the context, requires careful and precise communication in order for the intended result to be obtained. Delegating the responsibility for satisfying conditions between solicitor and client is no different.

It will come as no surprise since it has been much talked about over the last three years that delegation of responsibility to satisfy conditions refers to *Outaouais Synergest Inc.* v. *Keenan*.[27] The plaintiff was a sophisticated developer who retained the defendant solicitor for the purchase of land. After closing, the purchaser became aware of an unregistered agreement in favour of the municipality with a substantial payment required for access to a reserve.

The defendant took the position that the plaintiff limited its retainer and was responsible for all issues related to the development of the property during the conditional period – the reserve being one of these development issues.

The court found that the solicitor was liable because of his failure to make any inquiries regarding the cost consequences of lifting the reserve and his failure to ensure that the lines of responsibility between the solicitor and client regarding the development aspects were clear (the "bright line" test):

> Legal matters relating to title and to ingress and egress are not normally matters that are delegated to the client, at least not without a clear delineation of responsibilities by the solicitor, and the client's

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[27] *Outaouais Synergest Inc.* v. *Lang Michener LLP*, 2013 CanLII 526 (O.C.A.)

> acceptance of those responsibilities; the solicitor has a duty to consult with the client "on all questions of doubt which do not fall within the express or implied discretion left to him." [28]

Limited retainers are not ideal for the solicitor. They invite a greater possibility of negligence and professional responsibility problems and may end up being more rather than less work to ensure the client is adequately protected. Nonetheless, they are a practical reality in the practice of law today where clients are concerned with minimizing costs.

The issue of responsibility for satisfying conditions may be irrelevant if the purchaser determines that it is sophisticated enough to enter into a conditional agreement and only retain counsel once the waiver of the conditions has occurred; however, this is not likely to be the case in the normal course.

Solicitors must take care and be guided by the bright line test to appropriate limit their responsibility for satisfying such conditions by being mindful of the following guidelines:

- Limited retainers should be clear and concise. In the context of responsibility for vague or broadly worded conditions, this imparts a responsibility on the solicitor to specify exactly what components of the condition he/she will not be investigating;
- Ambiguity will be found in favour of the client;

[28] *Ibid.*

- Best practices are to have the limited retainer in writing although it is possible to find an oral limitation; and
- The solicitor needs to contemplate the relative sophistication of the client(s). Practically speaking, this means that if the client has a low level of sophistication when it comes to commercial real estate transactions, the solicitor will not only have to be clear and concise but will also need to explain the risk associated with the limitation.'

The possible irony of all of these requirements to limit a retainer may end up being too risky and more work than properly investigating the condition in the first place although it will depend on the circumstances of contents of the condition.

Conclusion

The take-away from all of the cases referenced is that the ultimate decision must be read within the greater context of the facts. The subjective impression of both a party asserting that a term is a condition is relevant and good faith will be closely examined.

Some of the cases reviewed above, specifically *Jorian, Thickson* and *Barge*, if boiled down to the ultimate decision, may seem like absurd results but when analysed with regard to the whole context, make more sense in ensuring consistency – consistency that the greater context of the operation of the condition will always be relevant.

This means the outcome of a dispute regarding conditions and/or the interplay of good faith is not a *fait accompli* and a party asserting a position based on a condition may find that that they do not get the result that they want if the matter is adjudicated.

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TAB 5

Commercial Real Estate Transactions 2016

Following Proper Procedures for the Assumption of Mortgages

This paper has been republished with permission from the author. It was originally prepared for the Law Society's Commercial Mortgage Transactions – Complex Issues in Documentation and Due Diligence program that was held on February 25,2008

William McCullough, *McCarthy Tétrault LLP*

September 13, 2016

cpd Continuing Professional Development

Following Proper Procedures for the Assumption of Mortgages

By
William D. McCullough

Lawyers are asked to assist with the documentation of assumption of commercial mortgages usually long after the business deal has been struck amongst the purchaser of the mortgaged property, the vendor (original borrower) and the lender, and very often just before closing of the purchase transaction. It is helpful in such circumstances to have an established routine of due diligence and documentation to turn to, as lender's counsel, and to be able to reasonably anticipate such a routine, as purchaser's or original borrower's counsel. In this paper, I will address some of the key features of documenting the assumption of mortgages in an effort to establish some helpful guidance for all of the counsel involved.

The starting point in any analysis of the required documentation and procedures for assumption of commercial mortgages is a consideration of the mortgage itself, which extends to the provisions of the relevant loan documents, such as the commitment, loan agreement, trust indenture and security package, depending on the nature of the package of loan documents. Specifically, counsel will be looking for the 'due on sale' clause or an equivalent provision stipulating the rights and obligations of the original borrower and the lender under the mortgage documentation when there is a sale, transfer or other disposition of the mortgaged property. The parties involved in the assumption transaction can consensually alter or waive the transfer requirements set out in the loan documents, depending on the exigencies of the business deal, but most often they find themselves having to work within the parameters of such clauses, which commends a good and careful reading at the outset of the assumption.

Historically, it was common in many types of commercial mortgage lending in Canada during the middle part of the last century for loan documents to contain no 'due on sale' clause. In those cases, mortgages were assumable without borrowers or purchasers even approaching the lender for consent or approval, unless an original borrower or guarantor wanted to be released from their promise to pay under the loan documents. In the absence of any assumption agreement, for purposes of establishing a contractual right of action by a lender against a purchaser for obligations under the loan documents, Section 20 of the *Mortgages Act* (Ontario) stipulates that a mortgagee can sue a subsequent owner of the equity of redemption in a mortgaged property where the purchaser has expressly or otherwise become obligated to indemnify the original borrower for amounts due under the mortgage loan (with a presumption confirmed in case law that such indemnity has been given unless there is clearly expressed intention of the parties to the contrary). Under that provision, the lender's right to sue a subsequent owner of the equity of redemption ends as against that subsequent owner when that subsequent owner transfers the property again to a new owner, unless the lender has commenced enforcement actions before the transfer occurs. Section 20 also makes it clear that the lender can only obtain judgment for recovery from the original borrower or the subsequent owner, but not from both.

As commercial lending became ever more sophisticated in the last two decades of the last century and in the opening years of this century, however, conditioned in part by economic recessions affecting real estate, and by real estate lending practices in the United States, which American influence was magnified once conduit lenders began doing business in Canada, lenders became more concerned with regulating the change of ownership of mortgaged property, introducing refined and extensive 'due on sale' clauses and transfer restrictions into loan documents.

The current state of 'due on sale' clauses in commercial mortgage loan documents can contain all sorts of provisions, such as:

- requirements for assumption agreements from approved transferees;
- stipulations that changes in corporate control of a corporate borrower will be treated as deemed dispositions of the mortgaged property, such that consent of the lender is required as to the new entity or persons who are controlling the borrower and assumption agreements can be required from the new, controlling entities;
- negotiated exemptions from assumption agreements in respect of transfers to or changes in corporate control involving non-arm's length entities, transfers of the mortgaged property or of shares or units in the borrower to family members, transfers to affiliates or changes of control of publicly traded shares of borrowers;
- requirements that terms of the transaction of purchase and sale be disclosed to the lender and that the lender be satisfied with such terms, as they may affect the ongoing economic viability of the mortgaged property;
- requirements for disclosure to the lender of financial and reputational information as to the purchaser, for 'know your borrower' purposes and to assist in assessment of the quality of the new covenant (particularly if a release of the promise to pay of any of the original borrower or guarantor is contemplated);
- stipulation of a transfer or administration fee payable to the lender, which sometimes must be paid up front, together with a requirement to pre-pay estimated costs of the lender in considering the request for assumption; and

- for mortgage loans in respect of which commercial mortgage-backed securities ("**cmbs**") have been issued and sold, requirements for rating agency approval of the transfer and assumption, at the cost of the borrower under the loan documents (which cost may be dealt with by the vendor and purchaser in their transaction documents).

A lender may issue a conditional approval letter to an original borrower and purchaser, in advance of closing of a purchase transaction and the signing and delivery of formal assumption documents, which letter will set out the terms upon which the lender will consent to assumption. When properly drafted, such an approval letter will take into account the terms of the 'due on sale' clause in the loan documents and should set out with conciseness and clarity any business items that the loan documents do not address (e.g. release of a party from their promise to pay, quantum of costs, or amendment of loan terms, etc.). Such a letter will become a 'term sheet' for the assumption transaction.

Armed with the loan documents and having actually reviewed the 'due on sale' clause in them, and having digested any conditional approval letter that may exist, we can now consider some of the salient procedures and documents for an assumption transaction.

A. Release of Original Borrower and Guarantors

Unless there is a material amendment to the mortgage loan after a transfer and assumption such that there is novation of the mortgage loan, and such novation of the mortgage loan occurs without agreement from the original borrower, an original borrower remains liable to a lender through privity of contract to pay amounts due under a mortgage and to perform the obligations under it even though the original borrower has transferred the property. If a guarantee from the original loan is broadly enough drafted, and if there are no material amendments to the mortgage

loan and no novation, an original guarantor can remain liable after transfer of the mortgaged property and assumption of the loan, as well. Not surprisingly, with little interest in the mortgaged property after sale of it and little or no ability to control the mortgaged property once it is transferred to a new owner, an original borrower or guarantor is motivated to try and get released from their contractual promise to pay in the loan documents. At the same time, unless the 'due on sale' clause expressly provides for release of an original borrower or guarantor, a lender will not usually be interested in gratuitously releasing these contractual promises unless offered some incentive (e.g. enhancement of security, offering of alternative guarantees, reduction of indebtedness, etc.).

If the loan documents provide for release, or if the lender is persuaded to grant a release of an original borrower or guarantor through incentives or otherwise, the form of release of the contractual promise to pay and perform ought to be a simple and straightforward statement to the effect that the original borrower or guarantor is released from its promises to pay and perform under the loan documents, or guarantee, from and after the effective date of the assumption transaction. Such language can be contained in a letter addressed to the original borrower or guarantor or in a separate document addressed to the recipient of the release. If an original borrower is going to be released, but other original guarantors are going to remain liable under their guarantees after the assumption transaction is completed, then, depending on the language of the guarantee, the lender should ensure that the remaining guarantors confirm their guarantees to the lender at the time of the assumption, as the release of the original borrower can be seen as a novation of the original mortgage loan contract, which might have the effect of releasing the guarantors who are intended to remain liable.

In the absence of litigious or potentially litigious circumstances, the release need not be anything further than the simple and straightforward statement described above. From a lender's perspective, to use full and final release language typically found in forms of releases exchanged at

the end of litigation would be a mistake, because the type of release called for in the assumption setting should not release all historical liabilities as between the lender and the original borrower or guarantor; there are aspects of historical liability that may have arisen under the loan documents (e.g. environmental liabilities, liabilities involving tenants, etc.) and be hidden from view for some time after closing of the assumption transaction, but which the lender would not want to be forever barred from raising.

In the realm of cmbs, lenders are cautioned not to allow for release of the original borrower to be incorporated into 'due on sale' and transfer provisions of the loan documents. A release of the original borrower is generally seen as an indicator that there has been novation of the mortgage loan contract. A novation of a mortgage loan contract included in a pool of mortgages that underlies the flow-through securities issued in a typical public cmbs transaction may be considered as a basis for a deemed disposition of a portion of the securitized asset, which would result in a similar deemed disposition of the flow-through securities issued in respect of such asset. Since there may be potentially negative tax consequences for the holders of such securities arising from any such deemed disposition of the securities, a circumstance or provision that could lead to novation of the underlying mortgage loan contract is unwelcome.

B. Options When Prior Borrowers and Guarantors are not Released

As noted above, an original borrower or guarantor has very little interest in the mortgaged property and little or no ability to control the mortgaged property after closing of the sale transaction and assumption of the mortgage loan by the purchaser. There are a number of ways that borrowers and guarantors who are remaining liable have tried to mitigate the risks associated with the continued liability under the loan documents:

- If there is an unpaid portion of the purchase price secured by a subsequent ranking mortgage of the property, where default under the prior mortgage is default under the subsequent mortgage, the original borrower or guarantor will have an interest in the property and an ability to take control of the property if there is default under the primary obligation to the lender. As well, as a subsequent mortgagee, if the original borrower or guarantor makes payment to the prior lender, then under Section 2 of the *Mortgages Act* (Ontario), as long as the prior lender has not gone into possession of the property, they can require that the prior lender assign the security under the prior loan to them if they have redeemed that mortgage, rather than discharging the security, allowing the original borrower or guarantor a right of subrogation under that prior security.

- It is typical for the original borrower or guarantor to get an indemnity from the new owner of the property, and possibly from a principal or shareholder of the new owner who has substantial assets to back up such indemnity. The indemnity would be an express obligation to save the original borrower or guarantor harmless from any claims that might be made against them under the assumed loan.

- If the indemnity is granted to the original borrower or guarantor, then, even if there is no unpaid purchase price, the indemnity can still be secured through a charge against the property itself or other property that the purchaser may put up as collateral. One of the benefits of taking a charge over the mortgaged property itself to secure the indemnity is that as a subsequent mortgagee of the mortgaged property, the original borrower or guarantor has a better chance of becoming aware of defaults through notices (e.g. liens, tax notices, etc.). As well, the original borrower or guarantor, as

subsequent mortgagee, can get the benefit of Section 2 of the *Mortgages Act* (Ontario), as discussed above.

- In order to manage risk of a change of corporate control of the purchaser, which, if unapproved under the existing mortgage could be a default, and which may result in increased credit risk to both the lender and original borrower or guarantor, the original borrower or guarantor might require a pledge of shares of the purchaser in favour of the original borrower or guarantor in support of the indemnity described above.

- If it is suitable and in the nature of the original borrower's business, the original borrower or guarantor may enter into a property management agreement with the purchaser and stay on as property manager, giving better control over and knowledge about the property.

- In its indemnity and/or mortgage security from the purchaser, the original borrower or guarantor would want the purchaser to agree not to further encumber the property while the indemnity or security is in effect without obtaining consent of the original borrower or guarantor, so that no further or additional financial stress will be placed on the property or the resources of the purchaser.

C. Loan Approvals, Searches and Other Due Diligence for Purchaser

With respect to loan approvals for purchasers, one might intuitively consider that if a loan is non-recourse or if an original borrower (whose credit-worthiness has already passed the lender's tests at loan origination) is remaining liable for the loan, then, the lender may not have a great deal to consider in regard to purchaser approval. In our increasingly regulated and sophisticated

commercial lending environment, however, where 'know your borrower' rules are required to be followed for all loan transactions and now for modifications such as assumptions, institutional lenders will generally require the complete array of financial and reputational information for a proposed purchaser regardless of the terms of the loan or remaining covenants.

As to the legal searches and due diligence required in regard to a purchaser upon an assumption, when it is an assumption only, that is excluding considerations that arise if there were amendments to the loan, lender's counsel will want to perform all of the corporate and governmental searches that are typically available with regard to corporate existence, bankruptcy and insolvency and executions, since those searches go to the ability of the purchaser to enter into the assumption agreement and the purchaser's credit-worthiness or potential credit issues. It should not be necessary to undertake subsearches of title to the real property, unless lender's counsel is made aware of some change that has occurred to title since loan origination (in which case we are not dealing with an assumption only), as an assumption agreement is not registered on title to real property. As well, if original registrations concerning personal property were done properly at loan origination, and if lender's counsel has a copy of the registrations made at that time, it is not necessary to conduct searches of registrations in the personal property registry for either the original borrowing entities or the purchaser.

In most cases, insurance for the property that was maintained by the original borrower will be replaced by new policies placed by the purchaser. It is a routine requirement of most institutional lenders that such new policies be reviewed in advanced by a professional and independent insurance consultant in order to obtain the opinion of such consultant confirming compliance of the purchaser's insurance with the lender's insurance requirements generally and as specifically set out in the loan documents. Counsel for lender and purchaser ought to work together to ensure that the

purchaser's insurance broker is provided with the name and contact details of the lender's insurance consultant so that the process of review and settlement of insurance moves smoothly and does not delay closing of the purchase transaction.

As to any additional documentation that may be required by lender's counsel with regard to an assumption, such requirements will be conditioned by the items stipulated in lender's approval letter, if there is one, by the lender's administrative requirements (e.g. pre-authorized payment documents) and by the terms of the 'due on sale' clause in the loan documents. It will not be unusual, having regard to such letter and the terms of the loan documents, for lender's counsel to require production of certain documents relating to the purchase transaction, including, for example, a copy of the agreement of purchase and sale and amendments to it, a copy of the statement of adjustments upon which the transaction is closed and a copy of the transfer/deed of land by which the purchaser is granted title to the real property.

D. Mortgage Assumption Agreement and other Documentation

For an assumption of a mortgage loan by a purchaser, in circumstances where there is no amendment of the underlying security or terms of the loan, the form of agreement should represent a straightforward effort to capture the promise to pay of the purchaser as if the purchaser was the original borrower. I have attached as an Exhibit to this paper an example of such an assumption agreement. There are some essential considerations for proper drafting of a mortgage assumption agreement by lender's counsel:

- Ensure that you have the correct identity of the purchasing entity.
- Ensure that you have the correct identity of the lender. Lenders often undergo re-organizations and transformations that lead to name changes and even transfers of the

security, particularly in the cmbs world. Therefore, lender's counsel ought to make enquiries to confirm that the lender's name for the assumption agreement is the same or, if changed, the reasons and documentation behind such change.

- If there have been intervening assumptions, modifications or amendments with regard to the loan, it is useful, though not essential, for the future history of the loan file and those using it to tell the full story in the recitals. Since an agreement relating to assumption only will not be registered in the land registry office, counsel who is drafting the assumption agreement is not bound to observe the same discipline in recording such changes.

- It is important to review the loan origination file to appreciate the structure of the promises to pay and security so that the description of the obligations being assumed by the purchaser in the assumption agreement is complete. There are many means of achieving such completeness in the description of the security, and the example set out in the Exhibit is just one way. Another way might be to create an actual list identifying the loan agreement and all of the security and append such list as a Schedule to the assumption agreement, which is a valid approach so long as counsel is confidant that they are aware of all of the security granted for the loan.

Other terms of the assumption agreement will depend upon specific aspects of the deal that may be set out in the lender's approval letter or in the loan documents or arising from the purchase transaction.

Though not produced by lender's counsel, the purchaser will require and the lender will produce an assumption statement, which will indicate the amount of the indebtedness being assumed

by the purchaser as at the date of closing of the purchase transaction. Usually, the purchaser will request a statement from the lender that the loan and security are in good standing, which, statement can be incorporated into the assumption statement prepared by the lender, and is usually qualified by the knowledge of the lender. In some cases, particularly when dealing with large balance loans, purchaser's counsel will ask that the lender's statement of indebtedness and as to good standing be incorporated into the assumption agreement itself.

Finally, if a release of borrower or guarantor is going to be granted, such release needs to be documented in some fashion. As stated above, such a release is not drawn on the litigation form of full and final release (unless there is some litigious history of the mortgage file that needs to be dealt with for finality by the parties). Instead, a letter on lender's letterhead ought to suffice, stating that the original borrower or guarantor, as the case may be, is released from its promises to pay and perform under the loan documents, or guarantee, from and after the effective date of the assumption transaction. With very little difficulty, such a letter could be translated into a short document addressed to the parties being released, if more formality is required in the circumstances.

E. Registrations

Since an assumption agreement, by itself, does not represent an interest in land or amend any interest in land, it is not seen as an instrument that is capable of registration in the land registry system. Therefore, such an assumption agreement, when executed by the lender and purchaser, will reside in the mortgage file and the purchaser's records, once the assumption transaction is complete.

The only registration required in regard to a assumption by a purchaser (with no amendment to the loan terms or the security nor any additional security taken), is for a financing change

statement to be registered in the personal property security registry confirming that there has been a transfer by debtor of the collateral from original borrower to purchaser.

F. Opinions

There are evolving processes in the financial world and our profession for confirming that legal documentation is duly signed by persons who are properly identified. Many institutional lenders are establishing standard procedures for verifying the identity of all those who sign documentation with them, in many cases based upon procedures set out in the regulations made under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada), even if such procedures are not mandated by law for the specific circumstances or transaction. As counsel, we must be prepared to meet these requirements and certify that we have reviewed the required forms of identification of signing persons, as stipulated by lenders.

As to formal legal opinions, when an entity other than an individual is entering into an assumption agreement, i.e. a corporation, partnership, limited partnership, etc., in a commercial mortgage loan transaction, it is becoming common place to require an opinion of counsel for the purchaser as to existence of the entity, due authorization, power, capacity, execution and delivery of the assumption agreement and enforceability of the assumption agreement (excluding any discussion of enforceability of underlying loan documents).

EXHIBIT

ASSUMPTION AGREEMENT

THIS AGREEMENT made as of this • day of •, 20•.

B E T W E E N:

.

(the "**Purchaser**")

OF THE FIRST PART

- and -

.

(the "**Lender**")

OF THE SECOND PART

WITNESS THAT WHEREAS:

A. Pursuant to a commitment letter (as amended and/or supplemented, the "**Commitment Letter**") dated •, 20•, issued by the Lender to • (the "**Original Borrower**"), the Lender made a loan (the "**Loan**") to the Original Borrower in the original principal amount of $•.

B. As security for the Loan and the Original Borrower's obligations under the Commitment Letter, the Original Borrower granted to the Lender a charge/mortgage of land (the "**Mortgage**") registered in the Land Registry Office for the • Division of • (the "**Registry Office**") on •, 20•, as instrument number •, which charges and mortgages the lands and premises (the "**Mortgaged Property**") described in Schedule A attached hereto.

C. Together with an assignment of rents in favour of the Lender, registered against title to the Mortgaged Property in the Registry Office on • as instrument number •, and a general security agreement granted by the Original Borrower to the Lender, the Mortgage and all other security for the loan granted pursuant to the Commitment Letter, is referred to in this agreement, collectively, as the "**Security**".

D. [Insert recitals re corporate and other changes to the Original Borrower and any changes in regard to the Lender.]

E. Pursuant to an agreement of purchase and sale (the "**Purchase Agreement**") dated •, the Original Borrower sold the Mortgaged Property to the Purchaser, and, as of the date hereof, title to the Mortgaged Property has been transferred to the Purchaser.

F. The Purchaser has agreed to assume all obligations and liabilities of the Original Borrower in regard to the Loan under the Commitment Letter and the Security.

G. The Lender consents to the Transaction, on the basis that the Purchaser has executed and delivered this Agreement.

IN CONSIDERATION of the promises made between the Purchaser and the Lender, as contained in this agreement, the Purchaser and the Lender agree as follows:

1. The Purchaser hereby assumes the obligations of the Original Borrower under the Commitment Letter and the Security in all respects, and covenants and agrees, as principal debtor and not as surety, to pay all monies now owing or to become owing thereunder and to observe and perform and be bound by all obligations, terms, conditions, covenants and agreements contained in the Commitment Letter and the Security, within the times and in the manner therein provided, as if the Purchaser was the original borrower named therein in the place and stead of the Original Borrower.

2. The Lender consents to the Transaction; provided that such consent does not extend to any further or other transfer, assignment or disposition of the Mortgaged Property. The Lender confirms that as of the date hereof, the Loan and the Security are in good standing in all material respects and the Lender is not aware of any event or condition, which, with the lapse of time or the giving of notice, or both, would constitute a default of a material nature under the Commitment Letter or the Security.

3. The Purchaser and the Lender acknowledge that, following the date hereof, the Mortgaged Property will continue to be managed by •, who is approved at the date hereof by the Lender.

4. This agreement is to be read and construed along with and treated as part of the Security, which continues to be in full force, virtue and effect, unamended.

5. This agreement benefits and binds the Purchaser, its successors and permitted assigns, and the Lender and its successors and assigns.

6. This agreement may be executed in several counterparts, each of which when so executed is deemed to be an original and which counterparts together constitute one and the same instrument.

IN WITNESS WHEREOF the Purchaser and the Lender have executed this agreement by properly authorized officers as of the date set out above.

[Insert signature blocks]

SCHEDULE A

MORTGAGED PROPERTY

[Insert legal description of the Mortgaged Property]

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TAB 6

Commercial Real Estate Transactions 2016

File Management for a Commercial Real Estate Transaction: Best Practices and Critical Steps

Sample Closing Agenda

Michael Lieberman, *Norton Rose Fulbright Canada LLP*

September 13, 2016

cpd Continuing Professional Development

FILE MANAGEMENT FOR A COMMERCIAL REAL ESTATE TRANSACTION: BEST PRACTICES AND CRITICAL STEPS Michael H. Lieberman, Norton Rose Fulbright Canada LLP

R.I.S.C. ANALYSIS:

1. **REVIEW** the Contract

- Review the Agreement of Purchase & Sale, Schedules, Amendments, Assignments, etc.; Make sure you have all the documents

- Get involved in the negotiations early so as to help shape the chronology and establish clear and realistic timelines

2. **IDENTIFY** Critical Dates

- Identify the transaction chronology and timing for deliveries, deadline for waiver/satisfaction of conditions, deadline for title and off-title requisitions, election date for any assumed contracts and/or purchase price allocation, the Closing Date, etc.

- Identify any other time-sensitive matters (ie. *Competition Act* and/or *Investment Canada Act* approvals, other third party consents, creation of new purchaser entity, obtaining HST registration particulars for Purchaser, obtaining and delivery of estoppels, mortgage discharge statement, *Personal Property Security Act* (PPSA) comfort letter(s), insurance certificate, title insurance commitment, etc.)

- Identify any necessary off-title searches and consider the response times

- Identify and confirm the client's availability, including for execution of documents

- Prepare a timeline for meeting transaction milestones (working backwards from the Closing Date)

3. **SCHEDULE** Critical Dates

- Follow-up with opposing counsel to confirm the Critical Dates schedule; Communication is key

- Diarize Critical Dates: Paper Calendar, Electronic Calendar (ie. Outlook), Active File List; Find a tickler systems that works for you

- Meet with your team regularly (associates, students, clerks) to ensure that allocation of tasks is clear and that the same are being completed on time; Identify any issues as early as possible

4. **CONFIRM** Responsibility and Completion

- Confirm individual Critical Dates responsibilities with the client and opposing counsel so that it is clear who is taking carriage of which tasks, including allocation of drafting responsibility; Prepare and circulate a Closing Agenda

- Regularly review the transaction timeline and Closing Agenda to ensure that tasks are being completed on time; Get letters, notices and waivers off early

Note: Repeat the forgoing R.I.S.C. Analysis for any related mortgage financing facilities and/or related transactions

CASE STUDY:

Title Condition: The Purchaser shall have until 5:00 p.m. on the Title Date to investigate all aspects of title, registered encumbrances and off-title matters relating to the Property, including, without limitation, building/zoning compliance, outstanding permits and work orders (collectively referred to herein as the "**Title Diligence**"). The Purchaser shall deliver its letter of requisitions to the Vendor at least four (4) Business Days prior to the Title Date and the Vendor shall deliver its reply to same at least two (2) Business Days prior to the Title Date. If the Title Condition (as defined below) is waived by the Purchaser, the Purchaser shall be deemed to have reviewed and accepted all encumbrances registered against the Property or any part thereof prior to the Execution Date, subject to the Vendor's reply to the Purchaser's requisition letter and any matters that go to the root of title to the Property. If the Purchaser does not provide written notice to the Vendor on or before 5:00 p.m. (Toronto time) on the Title Date of its satisfaction, in its sole and absolute and subjective discretion, with the result of its review of the Title Diligence (the "**Title Condition**"), then this Agreement shall terminate and become null and void, the First Deposit, and the Second Deposit, to the extent paid, together with all interest accrued thereon, shall be returned to the Purchaser and the parties hereto shall be released from all liabilities hereunder (save and except in respect of the Purchaser's confidentiality obligations referred to herein).

Time: Time shall be of the essence of this Agreement. If anything herein is to be done on a day which is not a Business Day, the same shall be done on the next succeeding Business Day. Unless otherwise provided hereto, all references to time shall mean Toronto, Ontario time. Where in this Agreement a number of days is prescribed, the number shall be computed by excluding the first day and including the last day.

"**Business Day**" means any day other than a Saturday, Sunday or a statutory holiday in Toronto, Ontario.

"**Execution Date**" means September 13, 2016.

"**Title Date**" means the 30th day after the Execution Date.

- When is the Title Date?
- When is the Purchaser's letter of requisitions due?
- When is the Vendor's reply letter due?

Sample Closing Agenda

This document is for reference only and is not to be relied upon for legal purposes

SAMPLE CLOSING AGENDA
(FOR INFORMATION & DISCUSSION PURPOSES ONLY)

RE: **Vendor** (registered owner)**:**
Beneficial Owner:
Purchaser:
New Beneficial Owner (if different than Purchaser)**:**
Indemnifier(s):

Property:
Vendor's Solicitors:
Purchaser's Solicitors:

NOTE: All capitalized and undefined terms shall be defined in accordance with the definitions therefor in the Agreement and all section/Section references shall be to those in the Agreement.

DOCUMENT/MATTER		RESPONSIBLE PARTY	STATUS
I.	**PRELIMINARY AGREEMENTS**		
1.	Confidentiality Agreement dated ●		
2.	Agreement of Purchase and Sale dated ● (the "**Agreement**")		
II.	**PRE-CLOSING DOCUMENTS/MATTERS**		
3.	First Deposit of $● (Section ●)		
4.	Second Deposit of $● (Section ●)		
5.	Investment of Deposits		
6.	Agreement re allocation of Purchase Price (Section ●)		
7.	Delivery of Property Information (Section ●)		
8.	Tenant Estoppels (Section ●		
9.	Property Access (from and after execution of Agreement of Purchase and Sale) (Section ●)		
10.	Governmental Authority authorization (Section ●)		
11.	Waiver of Title Condition (expires at 5:00 p.m. on ●) (Section ●)		
12.	Requisition Letter (Section ●)		
13.	Response to Requisition Letter		
(a)	Requisition Obligation - to complete the work contemplated by permit nos. ● and ● and to close out such permits prior to Closing		
(b)	Requisition Obligation - to execute and deliver all reasonable documentation necessary to delete expired leases from title		
(c)	Requisition Obligation - confirm that all required work relating to installation no. ● has been completed and provide appropriate documentation to evidence such compliance to Technical Standards and Safety Authority		
(d)	Requisition Obligation – to obtain comfort letter from relevant secured party confirming that PPSA File Nos. ●		

DOCUMENT/MATTER		RESPONSIBLE PARTY	STATUS
	and ● does not attach to the Property		
(e)	Requisition Obligation – to delete Instrument Nos. ● and ● from title		
14.	Draft Statement of Adjustments with supporting documentation (due not later than ● Business Days prior to the Closing Date) (Section ●)		
15.	Purchaser Comments on Statement of Adjustments (due not later than ● Business Days prior to the Closing Date) (Section ●)		
16.	Statement of Rechargeable Sum Estimates collected and Rechargeable Sums expended (due not later than ● Business Days prior to the Closing Date) (Section ●)		
17.	**[Return of Deposit and payment of $● break fee within ● Business Days following termination (Section ●), if applicable]**		
18.	**[Extending of Closing Date, in the aggregate not exceeding ● days (Section ●), if applicable]**		
19.	Provide all Notifications, make all information filings and pay all fees required pursuant to the *Competition Act* (Canada) (Section ●)		
20.	Provide notification of investment under the *Investment Canada Act* (Canada) (Section ●)		
21.	**[Extending of Closing Date, in the aggregate not exceeding ● days (Section ●), if applicable]**		
22.	Reliance letters from ● and ●(Section ●)		
23.	Retention list of employees to be hired by Purchaser (Section ●)		
24.	Final ● realty tax bill, ● estimated vacancy rebate report, pre-authorized tax payment form, ● "Property tax lookup"		
III.	**CLOSING DOCUMENTS/MATTERS**		
25.	Title Insurance Commitment (Section ●)		
26.	Delivery of Competition Act Approval and certification that Purchaser has received no notice under the *Investment Canada Act* (Canada) prohibiting Closing (Section ●)		
27.	First Mortgage lender's delivery of all relevant discharge documentation (Section ●) and all related documentation in accordance with a First Mortgage closing agenda, if applicable		

DOCUMENT/MATTER		RESPONSIBLE PARTY	STATUS
28.	E-Reg and/or Registry Transfer Documents containing Vendor's *Planning Act* (Ontario) statements (Section ●):		
29.	Vendor's acknowledgement and direction in respect of transfer documents described immediately above		
30.	Purchaser's acknowledgement and direction in respect of transfer documents described immediately above		
31.	Beneficial transfer of the Property (Sections ●)		
32.	(a) Assignment and Assumption of Leases (including an assignment and transfer of all non-cash security from Tenants) and any specific assignment and/or assumption agreements which may be required under any of the Assigned Leases (Section 5.2 (c))		
	(b) Second version of Assumption and Assignment of Leases (with beneficial owners)		
33.	(a) Assignment and Assumption of Contracts (excluding Warranties) and any specific assignment and/or assumption agreements which may be required under any of the Assigned Contracts (Section ●)		
	(b) Second version of Assignment and Assumption of Contracts (with beneficial owners)		
34.	(a) Assignment and Assumption of Permitted Encumbrances and any specific assignment and/or assumption agreements which may be required under any of the Permitted Encumbrances (Section ●)		
	(b) Second version of Assignment and Assumption of Permitted Encumbrances (with beneficial owners)		
35.	Assignment of Assigned Trade-marks (Section ●), if applicable		
36.	Assignment of Warranties, if any, to the extent assignable (Section ●)		
37.	Bill of Sale (Section 5.2 (h))		
38.	Vendor's Indemnity with respect to bulk sales (Section ●)		
39.	Corporate Certificate re Vendor (Section 5●)		
40.	Statement of Adjustments (Section ●)		
41.	Certificate re Leases (Section ●), if applicable		

DOCUMENT/MATTER		RESPONSIBLE PARTY	STATUS
42.	Notices to Tenants advising of the sale of the Subject Assets and directing that all Rents payable after Closing be paid to the Purchaser or as the Purchaser directs (Section ●)		
43.	Notices to other parties under the Assigned Contracts of the assignment of such Assigned Contracts to the Purchaser (Section ●)		
44.	Direction as to the payee or payees of the Balance (Section ●)		
45.	Vendor's Undertaking to re-adjust the Adjustments (Section ●)		
46.	Certificate of an officer of the Vendor confirming that the Vendor is not a "non-resident" of Canada within the meaning of the *Income Tax Act* (Canada) and a second certificate of an officer of the Beneficial Owner in respect of the Beneficial Owner (Section ●)		
47.	Statutory Declaration of Possession of an Officer of the Vendor (Section ●)		
48.	All keys and other access devices to the Building (to be left at the Property Operations Office) (Section ●)		
49.	Originals or copies of all Assigned Leases and Assigned Contracts, together with all files and correspondence with respect thereto, to the extent in the possession of the Vendor (to be left at the Property Operations Office) (Section ●)		
50.	If available, originals of all plans and specifications and drawings of the Building which were provided as part of the Property Information (Section ●)		
51.	Mortgage statement discharge of the First Mortgage (Section ●)		
52.	CD-Rom or flash drive containing a digital copy of the entire contents of the Data Room (Section ●)		
53.	Balance of Purchase Price (Section ●)		
54.	Corporate Certificate re Purchaser (Section ●)		
55.	**[Acknowledgement and agreement from the beneficial owner, if the Purchaser or the Designee is not the beneficial owner of the Property on Closing, to be bound by all of the covenants and agreements of the Purchaser made in favour of the Vendor pursuant to the Agreement and all of the Closing Documents, jointly and severally with the**		

DOCUMENT/MATTER		RESPONSIBLE PARTY	STATUS
	Purchaser (Section ●), if applicable]		
56.	Purchaser's Direction re: Title (Section ●)		
57.	Purchaser's Undertaking to re-adjust the Adjustments (Section ●)		
58.	Purchaser's (and New Beneficial Owner's, if applicable) HST Declaration and Indemnity (Section ●)		
59.	Assumption agreements or other agreements, notices, undertakings or other instruments pursuant to any Assigned Contracts, Assigned Leases or Permitted Encumbrances, or as the Vendor may otherwise reasonably require (Section ●)		
60.	Notice and direction to the applicable Governmental Authority directing that payment of all property tax vacancy credits or rebates for the period prior to Closing be made to the Vendor (Section ●)		
61.	Documents and indemnities contemplated in Section ●of the Agreement; signed employment agreement with Retention List employee(s) to be provided not later than ● Business Days prior to Closing		
62.	**[(1) an opinion in respect of (i) the authorization and execution of the indemnities by the Indemnifier entities, and (ii) enforceability of the indemnities under, all under Ontario law]**		
63.	Indemnity Agreement (Section ●)		
64.	DRA (Section ●)		
65.	**[Representation and warranty re identity of beneficial owner (Section ●)]**		
66.	Registration of E-Reg and/or Registry Transfer		
67.	Payment of Title Insurance Premium		
68.	Payment of real estate brokerage commission		
IV.	**POST-CLOSING DOCUMENTS/MATTERS**		
69.	Endorsement of ● rent cheques (and wire transfer of rent payments received electronically) in favour of Purchaser		
70.	**[Estoppel Certificates in respect of Leases for which Estoppel Certificates were not delivered Section ●), if applicable]**		
71.	Adjustment of Post-Closing Adjustments (Section ●)		
72.	Adjustment of Property realty tax assessments (Section ●)		

DOCUMENT/MATTER		RESPONSIBLE PARTY	STATUS
73.	Delivery of Notice to the City of ● re change of ownership		
74.	Delivery of Notices to Tenants		
75.	Delivery of Notices to other parties under the Assigned Contracts		
76.	**[Approval of Press Release (Section ●), if applicable]**		
77.	Payment of Deposit Interest (Section ●)		

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TAB 7

Commercial Real Estate Transactions 2016

Tax Issues: GST/HST, Withholding Tax, Land Transfer Tax

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cpd Continuing Professional Development

Commercial Real Estate Transactions Tax Issues: GST/HST, Withholding Tax, Land Transfer Tax

Simon Thang, Thorsteinssons LLP

As the readers of this paper will appreciate, the value of commercial real property is typically very high. As a result, it is especially important to properly address the myriad of tax issues which can arise with commercial real property transactions. This paper discusses number of these tax issues and is intended to provide background to a presentation on the following topics:

1. GST/HST – Obligation to collect or self-assess tax, exemptions;
2. Withholding Tax – Obligations on dispositions by non-residents, tax withholding, certificates of compliance; and
3. Land Transfer Tax – Value of consideration issues, limited partnerships, multiple transfers.

1. GST/HST[1]

The Goods and Services Tax/Harmonized Sales Tax ("GST/HST")[2] is Canada's federal broad-based consumption tax. It is imposed under the *Excise Tax Act* ("ETA").[3] Supplies of services and property, including real property, made in Canada are taxable unless specifically exempt by virtue of inclusion in Schedule V.[4] The rate is currently 13% for real property located in Ontario and between 5% and 15% for property in the other provinces. In principle, input tax credits ("ITCs") are available where a person pays tax to acquire supplies for consumption, use or supply in the course of "commercial activities," which generally comprises making taxable supplies but excludes exempt supplies.[5] The tax is imposed on the recipient of a taxable supply but the supplier is obligated to collect, subject to important exceptions such as those for real property discussed below.[6]

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1 This section of the paper is based on a paper by the author and by Ron Choudhury of Miller Thomson presented at the 2016 Ontario Bar Association Tax Conference.

2 This section focuses on the GST/HST as, with limited exceptions, there has been no provincial sales tax in Ontario since July 1, 2010.

3 Unless otherwise stated herein, all statutory references in this section are to the ETA. In this section, the defined terms "supplier" and "recipient" are used instead of the more colloquial "seller" and "purchaser."

4 Supplies may also be zero-rated (taxed at 0% and with ITC entitlement). See Sch. VI, Pt. IX, ETA

5 There are various other ITC eligibility requirements such as documentation and being "registrant" which are beyond the scope of this paper.

6 See ss. 165 and 221, the main provisions relevant to tax on supplies.

2. Real Property

Real property is one of the most complicated areas in GST/HST. Supplies of "real property" can include sales, leases, and transfers of interest in real property.[7] They are generally taxable unless a specific exemption applies.[8] The most common exemptions are those in respect of residential real property[9] which, generally, is taxed once when newly constructed or substantially renovated, and exempt thereafter. There are other exemptions such as certain sales of farmland and "vacant land" (discussed below) in Part I of Schedule V. Certain sales of real property by charities and public service bodies are exempt.[10]

It is beyond the scope of this paper to canvass all the issues arising with real property and, in particular, the "self-supply" rules for residential real property in section 191.[11] The following highlights some other commonly problematic areas for commercial real property.

(a) Self-Assessment by Recipient

i. Registered Purchaser

As indicated above, suppliers are generally required to collect applicable GST/HST on taxable supplies. However, pursuant to para. 224(2)(b) a supplier is not required to collect tax on the sale[12] of most real property to a GST/HST-registered recipient unless the recipient is an individual.[13] Instead, the recipient is required to self-assess the tax. If the recipient acquires the property primarily for use in commercial activities, it accounts for the tax on its GST return for the relevant period and can claim ITCs on the same return.[14] This can be a significant cash-flow benefit given the high value of real property. Otherwise, a registered purchaser must report and pay the self-assessed tax on a separate form, GST 60.

In order for self-assessment to apply, the recipient must be *actually registered* at closing and not *merely required* to be registered because they make taxable supplies.[15] This puts the onus on the supplier to ensure the recipient's registration status. Accordingly, agreements for purchase and sale commonly require the recipient to certify that it is GST/HST-registered and to indemnify the

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7 See definition of "real property" in ss. 123(1). The "small supplier" rules for persons with sales under taxable sales $30,000 or less in the prior four quarters also do not apply to real property sales. As a result, sales of real property by small suppliers will be taxable if there is no applicable exemption. However, leases are subject to the small supplier rule.

8 Sch. V, Pt. I. As discussed below, rebates may also be available.

9 See, in particular, the definition of "residential complex" in ss. 123(1).

10 S. 1 of Pt. V.1 and s. 25 of Pt. VI, of Sch. V.

11 The self-supply rules are important but have been addressed extensively elsewhere. See, for example, CRA GST Memorandum Series Chapter 19.2.3 *Residential Real Property – Deemed Supplies* (June 1998).

12 Self-assessment only applies supplies by way of sale of "real property." This would include transfers of interest in real property such as assignments or transfers of leases. It would not apply to supplies other than by way of sale, such as a lease itself. The normal vendor-collection rules would apply.

13 Self-assessment under para. 224(2)(a) does not apply if the recipient is an individual and the real property is a residential complex or supplied as a cemetery plot or place of burial, entombment or deposit of human remains or ashes.

14 Ss. 228(4).

15 A person is required to be registered if they make taxable supplies in Canada in the course of commercial activities, unless they are a small supplier or their only commercial activity is the sale of real property otherwise than in the course of a business. A person is essentially a small supplier if the person's (and its associate's) taxable supplies in the prior four quarters does not exceed $30,000 (or $50,000 in the case of a public service body); see s. 148.

supplier for failure to collect tax if this proves untrue. Suppliers can also verify the recipient's registration with the CRA, which can be done online.

Given the importance of the timing of registration to the collection rules, purchasers of real property for use in commercial activities should generally register in advance of the sale. For purchasers who are already registered because of existing commercial activities, this should not be an issue. It is sometimes overlooked, however, for persons such as newly-created entities who do not yet make taxable sales and are not yet registered.

Suppliers should also be careful that they are not relying solely on the GST/HST registration of a purchaser who is a bare trust. The law is somewhat unclear, but it is arguable that the true recipient of the property for GST/HST purposes is actually the beneficial owner and not the bare trust. As a result, it is the beneficial owner who must be registered in order for self-assessment to apply. If a purchaser is merely a bare trust and the beneficial owner is not registered, then the supplier may still be required to collect tax.[16] Accordingly, it is important to identify whether one is dealing with a bare trust and to address this appropriately in the agreement of purchase and sale.[17]

ii. Non-Resident Vendor

Pursuant to paragraph 221(2)(a) a non-resident supplier (or one deemed resident only because it has a Canadian permanent establishment)[18] is not required to collect the tax in respect of any taxable sale of real property to any recipient (whether registered or not). Instead, the recipient is required to self-assess.

The normal common law rules for determining residency generally apply for GST/HST purposes.[19] In addition, section 132 deems a person to be "resident" in Canada in number of situations. Corporations, for example, are deemed resident in Canada if they are incorporated or continued in Canada and not continued elsewhere. Individuals are deemed resident in Canada if any of the deeming rules in paragraphs 250(1)(b) to (f) of the *Income Tax Act* apply. As noted above, persons only deemed to be Canadian-resident because of a Canadian permanent establishment are treated as non-residents for the self-assessment rule in paragraph 221(2)(a).

(b) Exemptions & Misconceptions

Sale to Registered Buyer is Not Exempt – As indicated above, any tax on the supply of real property by way of sale to a GST/HST-registered buyer is to be self-assessed by the purchaser. Purchasers are sometimes under the misapprehension that the sale is "exempt" if they register for GST/HST and, as a result, fail to self-assess. This is especially a problem if the buyer does not acquire the property for use in commercial activities and cannot claim ITCs. It is important to

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16 See *Samuel C. Young Professional Corp. v. R.*, [2007] G.S.T.C. 13 (T.C.C.).

17 Bare trusts raise other important issues for GST/HST purposes which are beyond the scope of this paper. For example, the so-called "vacant land" exemption below requires, among other things, that the seller be an individual or personal trust. The sale by an individual as bare trustee or agent for a corporation or partnership likely would not qualify. There may also be issues where a bare trustee claims ITCs as it will normally not have any commercial activities.

18 Ss. 132(2).

19 For corporations, this is generally based on its place of "central management and control." See *De Beers Consolidated Mines Ltd. v. Howe*, [1906] A.C. 455 (U.K.H.L.).

note that the sale is not exempt simply because the buyer is registered. The sale is taxable if there is no applicable exemption under Schedule V, but it is up to the registered recipient to self-assess the tax. If the buyer is acquiring the property for commercial activities, it can claim ITCs. If it is not acquired for commercial activities, the buyer generally cannot claim ITCs.[20]

Sale of Vacant Land – It is commonly believed that sales of vacant land are GST/HST-exempt. However, this is only the case under certain conditions. Section 9 of Schedule V, Part I of the ETA specifies the conditions pursuant to which a sale of vacant land is exempt, namely:

1. The supply must be by an individual or personal trust;

2. None of the following circumstances apply:

   a) The real property is, immediately before transfer of ownership or possession, capital property used in a business with a reasonable expectation of profit or, if the seller is a registrant, in making taxable supplies by way of lease, licence or similar arrangement;

   b) the real property is supplied in the course of a business or if a specific election is filed, in the course of an adventure or concern in the nature of trade of the supplier;

   c) the real property is part of a parcel of land which has been subdivided or severed into parts unless the subdivision was into two parts or the recipient of the supply is related to the supplier and is acquiring the part for personal use or enjoyment;

   d) the supply is deemed to have been made pursuant to sections 206 or 207 of the ETA, which are change-in-use rules;

   e) the supply is of a residential complex or an interest therein; or

   f) the supply is to a registrant who has made a joint election with the supplier, the transferor or the deceased, if the transferor is an estate, last acquired the property from the recipient, the transferor or the deceased acquired the property from the recipient less than one year from the date the transferor is supplying the property to the recipient, and the recipient's acquisition of the property from the transferor is occurring pursuant to a right or obligation to acquire the property which arose at the time when the transferor or the deceased acquired the property from the recipient.

Given the numerous exclusions from the exemption for vacant land, sellers should be careful in determining whether the exemption applies. If there is doubt, and the purchaser is GST/HST-registered and acquiring the land for commercial activities (and can claim ITCs), the seller should consider requiring the purchaser to self-assess the tax.[21]

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[20] However, see section 193 which may allow a rebate to recover the GST/HST where there is eventually a taxable sale of the property.

[21] If the property turns out to be exempt, the purchaser should not have liability for having claimed ITCs. A rebate for tax paid in error would have been available to the purchaser under section 261. CRA should be required to credit that rebate in assessing the purchaser's net tax for the ITCs under the offset rules in 296(2.1).

It can also be observed that the conditions for exemption are based on information largely within the seller's knowledge. If the purchaser is registered, however, the purchaser is the person obligated to self-assess any applicable tax. As a result, purchasers sometimes ask sellers to provide written certification that the sale is exempt. Pursuant to section 194, a seller providing such a certificate is statutorily liable for tax (on a tax-included basis) if it provides an untrue certificate, unless the purchaser knew or ought to have known that the supply was not exempt.

3. Withholding Tax[22]

Most readers will be familiar with the income tax imposed under the *Income Tax Act* (the "ITA")[23] and perhaps with the concept of withholding tax. This section of the paper discusses the Canadian income tax issues that arise when Canadians purchase property from non-residents, in particular, the withholding tax obligations imposed on purchasers in certain instances.

(b) Overview of Section 116

Non-resident vendors of real property situated in Canada are subject to Canadian income tax on gains realized on disposition. Such property is included in the definition of "taxable Canadian property" ("TCP")[24] and is subject to the regime in section 116 of the ITA. Private corporation shares and partnership or trust units where at any time within the past 60 months most of their value is attributable to Canadian real property is included in the definition of TCP and subject to the regime.[25] Options, interests, or rights in the foregoing are also included.

Section 116 provides that a non-resident must notify the CRA of a disposition of, *inter alia,* TCP within ten days after the date of disposition. Non-resident vendors may also be required to file a Canadian income tax return in the year of the disposition pursuant to section 150, although the reporting procedure under section 116 may relieve them of this filing obligation in certain circumstances.[26] Non-residents include deemed non-residents under an applicable tax treaty.[27]

A purchaser of property subject to the section 116 regime, whether the purchaser is resident or non-resident, may effectively be liable for any Canadian tax that may be owed by the non-resident vendor. This obligation is imposed in order to improve the likelihood of collection and, in order to account for their liability, purchasers are entitled to withhold amounts from the purchase price payable to the non-resident vendor. Section 116 also provides rules on how purchasers may be discharged from this liability.

Subsections 116(5.2) – (5.4) set out similar but separate rules for non-capital and depreciable real property ("116(5.2) Property"). Disposition of such properties may give rise to income

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22 This section of the paper is based on a paper "Taxation Issues When Dealing with Non-Residents" prepared by James W. Murdoch and E. Rebecca Potter of Thorsteinssons LLP for the Law Society of Upper Canada in 2014.

23 RSC 1985, c.1 (5th supp.), as amended. Unless otherwise stated herein, all statutory references in this section are to the *Income Tax Act* (Canada).

24 As defined in subsection 248(1).

25 TCP is defined to include various other forms of property. Only those relevant to real property are discussed here.

26 This is relevant to individuals per paras. 150(1.1)(b) "excluded disposition" and (5).

27 Subsection 250(5).

(including recapture) rather than capital gains. Notably, the withholding tax rate for non-capital and depreciable real property is 50% instead of 25%.

(c) Obligations Imposed on Non-Resident Vendors

Non-resident vendors are required to notify the CRA of the disposition of TCP (other than "excluded property") within ten days after the disposition.[28] This notification, made on Form T2062 (a "116(3) Notification"), involves the vendor providing the CRA with the name and address of the purchaser, a description of the property, the amount of the proceeds of disposition, and the vendor's adjusted cost base in the property. Due to the tight timelines, a 116(3) Notification will rarely result in the issuance of a clearance certificate prior to the remittance deadline.[29]

In order to improve the potential of avoiding remittances, a vendor may choose to make a "116(1) Notification" prior to the disposition of TCP, also on Form T2062. Where a vendor has chosen the 116(1) Notification procedure, a 116(3) Notification is not necessary unless the purchaser of the property, the proceeds of disposition or the adjusted cost base of the property has changed.

In the case of 116(5.2) Property (other than excluded property), a non-resident vendor may similarly give notice to the CRA ("116(5.2) Notification") of a proposed or completed disposition on Form T2062A in order to seek to avoid the remittance obligation.

i. Clearance Certificates

The issuance of a clearance certificate may discharge a purchaser from the obligation to remit a portion of the purchase price under subsection 116(5) and is thereby beneficial to both vendors and purchasers.[30]

To obtain a clearance certificate, a vendor must comply with the vendor notification obligations, provide any further information or supporting documentation that the CRA may require, and provide payment or security for the tax payable. Note, however, that the CRA is not always able to process clearance certificates within the necessary timeline, whether they accompany a 116(1) Notification, 116(3) Notification or 116(5.2) Notification. As such, the CRA has developed the administrative practice of issuing comfort letters which effectively provide a delay for the purchaser's obligation to remit a portion of the purchase price by the normal 30 day deadline below. In these circumstances, the purchaser is nevertheless expected to withhold and retain in escrow the relevant percentage of the purchase price. The amount can then be released to the vendor once CRA completes its review of the notification and issues a clearance certificate. Without this administrative practice, the vendor would need to wait for the CRA to assess its

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[28] For disposition by a partnership with a non-resident partner, CRA has stated that section 116 applies to each of the non-resident partners, but that one notification can be filed on behalf of all the non-resident partners (see Views Doc No 2012-0444081C6). CRA has also stated that the tests in subsection 116(5.01) must be applied to each partner individually (Views Doc No 2009-031737I7).

[29] See below for discussions on remittance obligations and clearance certificates.

[30] As discussed in greater detail below, a purchaser of TCP (other than excluded property, depreciable property or certain treaty-protected property) from a non-resident is required to remit 25 percent of the purchase price (50 percent in the case of 116(5.2) Property) by the 30th day following the end of the month in which the acquisition occurred. This obligation is avoided if a clearance certificate is issued under subsection 116(4).

Canadian tax return for that year to receive a refund of any amounts withheld and remitted in excess the vendor's actual liability.

ii. Excluded Property

A disposition of excluded property does not give rise to a 116(3) notification obligation. The term "excluded property"[31] includes:

(a) property that is TCP solely because a provision of the Act deems it to be TCP;
(b) property that is inventory of a Canadian business (other than real or immovable property situated in Canada, a Canadian resource property or a timber resource property);[32]
(c) an option, interest, or right in property described above; and
(d) "treaty-exempt property".[33]

iii. Penalties

A non-resident vendor who fails to satisfy the notification requirements may be assessed a penalty of $25 per day for each day that the notification is late.[34] This penalty ranges from the minimum of $100 to a maximum of $2,500. Non-resident vendors who fail to satisfy the notification requirement may also be found guilty of an offense[35] and on summary conviction liable to a fine between $1,000 and $25,000 or both a fine and imprisonment for up to 12 months, though this would be extremely unlikely.

(d) Obligations Imposed on Purchasers of Property from Non-Resident Vendors

i. Withholding and Remittance Requirement

As indicated above, the section 116 regime also imposes an obligation on purchasers of TCP and 116(5.2) Property.[36] While it is the non-resident vendor who is subject to tax on gains realized on the disposition of TCP and 116(5.2) Property, since collection from non-resident vendors can be fraught with practical difficulties, the Act imposes a liability on the purchaser on behalf of the non-resident vendor. To satisfy this liability, purchasers of TCP are entitled to withhold and required to remit to the CRA a portion of the purchase price payable to the non-resident vendor.

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31 As defined in subsection 116(6).

32 See Information Circular 72-17R6 — Procedures Concerning the Disposition of Taxable Canadian Property by Non-Residents of Canada — Section 116, para. 36 for a "discretionary exemption policy for certain vendors who operate a business involving inventory of land."

33 Subsection 116(6.1) provides that property is "treaty-exempt property" if the following conditions are satisfied: (a) the property is "treaty-protected property", as that term is defined in subsection 116(5.01); and (b) where the purchaser and non-resident vendor are related, the purchaser provides notice to the Minister of National Revenue under subsection 116(5.02). See below for a discussion of "treaty-protected property". If the property at issue is "treaty-protected property", the parties must determine if they are related. Note that this could be the case from the outset or could occur in the course of the relevant transactions. Careful consideration of this issue is therefore crucial. If it is determined that the parties are related, notice should be provided to the CRA (on behalf of the Minister of National Revenue) within 30 days after the acquisition, using Form T2062C.

34 Pursuant to subsection 162(7).

35 Pursuant to section 238.

36 Pursuant to subsections 116(5) and (5.3).

The portion to be withheld and remitted is 25 percent of the purchase price of the TCP (50 percent in the case of 116(5.2) Property) and the remittance must be made within 30 days after the end of the month in which the purchaser acquired the property.

The amount withheld is, however, not necessarily linked to the final calculation of the vendor's Canadian tax payable. A non-resident vendor of TCP or 116(5.2) Property is, generally, also obligated to file a Canadian tax return in the year of disposition.[37] If the amount remitted is greater than the vendor's Canadian tax payable, the vendor will receive a refund upon the assessment of the vendor's tax return.

ii. Discharging a Purchaser's Liability

The section 116 regime also provides rules on how purchasers may be discharged from their liability. Purchasers of TCP who would otherwise be required to withhold and remit are not required to do so if they have no reason to believe that the non-resident vendor is non-resident, the property is "treaty-protected property"[38], or if a clearance certificate has been issued by the Minister of National Revenue (the "Minister").[39] Similar rules apply with respect to 116(5.2) Property.[40]

The first exception, where the purchaser had no reason to believe that the non-resident vendor is non-resident, provides a due diligence defence for the purchaser. Where the purchaser has made reasonable enquiry, they will generally not be held liable even if the vendor was in fact non-resident. For example, if the vendor represents that it is not a non-resident in the purchase and sale agreement and the purchaser has no reason to question that representation, the purchaser will generally meet the requirements for this exception. In CRA's view, the purchaser must take prudent measures to confirm the vendor's residence status.[41]

The second exception, where the property is "treaty-protected property", discharges the purchaser's liability on the basis that the property is exempt from Canadian tax pursuant to a tax treaty. This is generally of limited application to Canadian real property, but may depend on the particular applicable treaty.

The third exception, where a clearance certificate has been issued, simply provides the consequence for the purchaser where the vendor has obtained a clearance certificate under subsection 116(4).

iii. Penalties

Purchasers of TCP who fail to satisfy the withholding and remittance requirements continue to be liable for the relevant amount plus interest. In addition, purchasers of TCP may be assessed a

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37 Subject to excluded dispositions in ss. 150(5).

38 As defined in subsection 116(5.01).

39 These exceptions are made pursuant to paragraphs (a), (a.1), and (b) of subsection 116(5).

40 Para. 116(5.)(a).

41 Information Circular 72-17R6 — Procedures Concerning the Disposition of Taxable Canadian Property by Non-Residents of Canada — Section 116, para. 58; (released October 2011).

graduated penalty[42] such that if the purchaser makes the payment on time but not in the correct manner or the payment is made up to three days late, the penalty is three percent; if the payment is made four or five days late, the penalty is five percent; if the payment is made six or seven days late, the penalty is seven percent; and if the payment is more than seven days late, the penalty is ten percent. If, however, the purchaser failed to make the necessary payment and the failure was made knowingly or under circumstances amounting to gross negligence, the penalty imposed is not graduated but is instead 20 percent.[43]

4. Land Transfer Tax

Land transfer tax ("LTT") represents yet another form of taxation that should be considered in real property transactions. It is a provincial tax and, in Ontario, is imposed under the *Land Transfer Tax Act* (Ontario), R.S.O. 1990 Ch. L.6 ("LTTA") with various exemptions set out in regulations. For transactions in respect of property located in the City of Toronto, an additional Municipal Land Transfer Tax ("MTT") applies under Chapter 760 of the Toronto Municipal Code. This paper will not specifically address the MTT, as it generally mirrors the application of the LTT but at different rates.

A full discussion of the LTT and issues such as the application of common exemptions is outside the scope of this paper. Instead, the following section[44] highlights issues with: (1) the value of consideration; (2) significant recent changes affecting limited partnerships; and (3) briefly, the special rules for multiple transfers.

(a) Overview

LTT applies to the value of the consideration[45] for real property. LTT originally only applied to **registered conveyances** in land (defined broadly in the LTTA to include land, buildings, fixtures, and certain related interests. For clarity, the term "real property" will be used instead). However, beneficial ownership can be transferred readily without a registered conveyance. Accordingly, the LTTA was amended in 1989 to also tax the **disposition of beneficial interests**.[46] For simplicity, the term "transfer" is used to refer to both registered conveyances and to dispositions of beneficial interest.

The key terms and relevant charging provisions include:

- Subsection 1 definitions of "land," "conveyance," "convey," and "value of the consideration."
- Section 2, which imposes LTT on every person who tenders a conveyance of real property in Ontario for registration to or in trust for a transferee.

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42 Pursuant to subsection 227(9).

43 Pursuant to paragraph 227(9)(b).

44 Note the following looks only at LTT in Ontario. The applicable rules for equivalent land transfer taxes can vary significantly in the other provinces, especially with respect to issues such as taxation of beneficial ownership and partnership transactions.

45 As discussed below, sometimes the value of the consideration is deemed.

46 Ss. 1(6) and para. 3(1)(f) for registered conveyances and unregistered dispositions, respectively. LTT also applies to leases where the remaining term exceeds 50 years, including extensions.

- Section 3, which defines and imposes LTT on the disposition of beneficial interests.

The LTT applies at graduated rates based on the value of the consideration (discussed further below) for the real property. Generally, LTT is payable upon submitting a conveyance for registration or within 30 days of after the disposition of a beneficial interest, as applicable.

The table below shows the applicable rates, along with an illustrative calculation of the total tax payable on the transfer of commercial real property valued at $1M and $10M:

Commercial Real Property Rates & Examples

Value of consideration	**LTT Rate**
Up to and including $55,000	0.5%
Over $55,000 up to and including $250,000	1.0%
Over $250,000	1.5%

Value of consideration	**MTT Rate**
Up to and including $55,000	0.5%
Over $55,000 up to and including $400,000	1.0%
Over $400,000 up to and including $40M	1.5%
Over $40M	1.0%

Examples	**$1M consideration**	**$10M consideration**
LTT only	$13,475	$148,775
LTT and MTT	$26,200	$296,000

Given the graduated rates above for LTT, one may ask whether it is possible to "split up" the transfer of a single property into multiple transfers in order to benefit from an overall lower rate. Section 2.3 of the LTTA anticipates such transactions and deems the LTT to be the amount that would have been payable had there been only one transfer, where the Minister is of the opinion that there was a tax avoidance motive.

(b) Exemptions & Non-Taxable Transfers

There are a number of instances where a transfer is either exempt from LTT or not subject to LTT. Several examples relevant to this discussion of commercial real property include:

- Certain unregistered dispositions of beneficial interest between affiliates (discussed below).

- Certain trust transfers, for instance to or from a bare trustee/nominee corporation (discussed below).

- Transfers of real property that constitute contribution of capital to a corporation made for no consideration of any form.[47]

- Corporate amalgamations, which are not considered taxable transfers for LTT purposes.[48]

- Certain unregistered dispositions of beneficial interest where the transferor receives dividends in the course of a "butterfly" reorganization under the *Income Tax Act*.[49]

- Certain transfers by an individual to a family business corporation provided certain requirements are met.[50] This may occur, for example, upon incorporation of a sole proprietorship.

- Transfers for purposes only of securing a debt or loan, or the return of real property by a creditor used as security, are not subject to LTT. This is not considered a transfer for LTT purposes.[51]

Unregistered Dispositions of Beneficial Interest between Affiliates – A special mechanism exists to effectively exempt certain qualifying dispositions of unregistered beneficial interest between affiliates.[52] LTT on such transfers may be deferred under ss. 3(9) of the LTTA on submitting a filing within 30 days wherein the transferee provides an undertaking that the corporations will remain affiliated for at least 36 consecutive months and provides security equivalent to the LTT.[53] The security may be cancelled if, among other things, the companies satisfy the undertaking or if the property is disposed or conveyed to a third party who pays the LTT. However, LTT applies if the interest is subsequently registered.[54] Note this mechanism does not apply to transfers of real property to shareholders. Generally, such transfers are subject to LTT at FMV.

Transfer of Bare Legal Title – Transfers of bare legal title without beneficial ownership are generally not subject to LTT, even if the transfer is registered.[55] The value of consideration is considered to be nil. As a result, most transfers of title between beneficial owner and bare trustee, and between trustees for the same beneficial owners are generally not subject to LTT. The rules should be reviewed carefully, however, as there are potential pitfalls. For example, a transfer from one nominee corporation to another may at first glance appear to simply be a transfer of bare legal title from one trustee to another. However, if a change in the beneficial owners occurred *prior* to the transfer, the Ministry considers this to trigger LTT.[56]

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47 Such a contribution of capital is considered to be made for no consideration and thus not subject to LTT. See Ontario Tax Bulletin LTT 3-2000.

48 Ontario Tax Bulletin LTT 3-2000.

49 Regulation 70/91, s. 2.

50 See Regulation 697, s. 3 and 70/91 para. 3(1)(c.2) See also *1211825 Ontario Limited v. Minister of Finance*.

51 Definition of "convey" and s. 3(1)

52 Defined in ss. 3(14) and (15).

53 Currently the only forms of security acceptable to the Minister are payment of the tax or letter of credit for the amount of the tax, together with applicable interest for the three year period. See Ontario Tax Bulletin LTT 3-2000.

54 See ss. 2(3), 3(9), (11) and (13.1).

55 See Ontario Tax Bulletin LTT 1-2005

56 See Ministry of Finance Land Transfer Tax Guide (June 2004).

(c) Value of Consideration

Where there is no applicable exemption and LTT potentially applies to a conveyance or disposition, the value of consideration becomes a key issue to understand. Value of consideration is defined to include:[57]

1) the sale price or the amount of any consideration given or to be given by or on behalf of the purchaser;

2) the value of any liability assumed by or on behalf of the purchaser as part the arrangement for the conveyance of land; and

3) the value of any benefit of whatsoever kind conferred directly or indirectly by the purchaser on any person as part of the arrangement.

As a result of this broad definition, the value of consideration is not necessarily simply the purchase price stated in the purchase and sale agreement. The rules can require amounts to be added to the consideration and, in some cases, deem the consideration to be equal to the fair market value of the real property.

The following provide some examples of issues that can arise:[58]

- *Transfer in Exchange for Shares:* Where real property is transferred to a corporation in exchange for shares, the consideration may be deemed to be the FMV of the property.[59]

- *Leasehold Interests:* Leases where the remaining term, including renewals, of 50 years or more may be subject to LTT. The value of the consideration is the FMV of the real property.[60]

- *Construction Contracts:* Transfers of vacant land where the seller or a related party also provides construction services may be subject to the LTT on the total value of the land plus the construction services. The question is the degree to which the land acquisition and the construction services are linked and, in particular, whether they are part of the same arrangement. This is broader and not necessarily the same as whether they are part of a single agreement.

- *Service Contracts:* Similarly, transfers of property where the seller or related party also provides services such as property management may be subject to the LTT on the total value of the land plus the management services.[61] A variation of this issue is transfers where the *purchaser* provides services to the seller or assumes a liability (such as a

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57 Also note that the definition of "land" includes "a structure to be constructed on land as part of an arrangement relating to a conveyance of land…."

58 There are a number of issues which arise with consideration and gifts, inter-family transfers, and estates. However, they are not discussed in this paper, which focuses on commercial real property.

59 Paragraph 1(g) of the definition of "value of the consideration" and Ontario Tax Bulletin LTT 3-2000 "Transfers Involving Corporations."

60 Paragraph 1(c) of the definition of "value of the consideration" and Ontario Tax Bulletin LTT 6-2000 "Leases and the Land Transfer Tax Act."

61 See *Re 472601 Ontario Ltd. and Minister of Revenue* (1987), 59 OR (2d) 25 (HCJ).

mortgage), perhaps in return for a reduction in the consideration. The value of purchaser's services or assumed liability could also be taken into account. Again, the question is the degree to which the land acquisition and the services or assumed liability are linked and, in particular, whether they are part of the same arrangement.

- *GST/HST*: Generally GST/HST is not included in the value of consideration for LTT.[62]

(d) Limited Partnerships

Limited partnerships ("LPs") are common investment vehicles for real property. Until recently, it is has been possible to structure real property acquisitions through multiple layers of LPs and trusts without triggering LTT through the so-called *de miminis* exemption in subsection 1(2) Regulation 70/91, which applied to acquisitions of beneficial interest of not more than 5% in a fiscal year. However, in a significant development, the LTTA was recently amended to specifically exclude certain acquisitions by partnerships and by trusts.

To understand how this issue arose, it is necessary to take a step back. Partnerships are not considered to be separate persons for LTT purposes. As a result, acquisition of real property by a partnership (whether general or limited) is considered by the Ministry to be the *pro rata* acquisition by the partners. For example, an LP holding real property may transfer substantially all the interest in the property to a new partner. If the new partner is also a partnership, one "looks through" the partnership to the interests held *pro rata* by the partnership investors. If there are many investors, each investor's interest may fall below the 5% threshold and, under the old rules, no LTT applies. Another variation of this exemption was being used commonly for real estate investment trusts ("REITs"). Again, real property is held by an LP. This time, a substantial interest is transferred to a REIT. As a trust also is not a person for LTT purposes, one looks through the REIT to the individual investors. As REITs tend to be widely distributed investments, it is unlikely that any single investor would hold more than 5%.

As of February 18, 2016, this exemption is no longer available to trusts or partnerships who acquire an interest in real property. Moreover, the coming-into-force rules for the amendments potentially catch purchasers who have already acquired interest in real property in reliance on the *de minimis* exemption: the amendments are made explicitly retroactive to July 19, 1989, the date the exemption originally became effective. However, purchasers who obtained a ruling letter from the Ministry are grandfathered from the amendments. Those who do not have a ruling potentially have a *retroactive LTT liability* for interests acquired prior to February 18, 2016 (the announcement date of the amendments). The Ministry has published what they call a special voluntary disclosure policy in an effort to encourage purchasers to come forward and pay the tax without interest or penalties.[63] The SVDP applies until December 31, 2016. Transactions subject to the announcement date would be subject to the new rules.

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[62] A special calculation is needed to determine the value of consideration of new residential properties where the purchase price is net of tax and net of any GST/HST housing rebates.

[63] Information Notice "Land Transfer Tax 'De Minimis' Partnership Exemption: Clarifying Amendments for Certain Dispositions" (March 2016).

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TAB 8

Commercial Real Estate Transactions 2016

Draft Form of Closing Agenda

Neil Shapiro, *Stikeman Elliott LLP*

September 13, 2016

cpd Continuing Professional Development

●
(the "Purchaser")
purchase from
● (the "Vendor")
of ● (collectively, the "Properties")

CLOSING AGENDA

Place of Closing:	Toronto, Ontario Electronic registration pursuant to the Document Registration Agreement ("**DRA**")
Date of Closing:	●, 2016
Present:	On behalf of Stikeman Elliott LLP ("**Stikeman**"), counsel to the Vendor: Neil Shapiro (nshapiro@stikeman.com) On behalf of ● ("**Purchaser Counsel**"), counsel to the Purchaser: ●

Defined Terms

All capitalized terms contained in this closing agenda and not otherwise defined herein shall have the respective meanings ascribed to them in the agreement of purchase and sale dated ● between the Vendor and ● (the "**Original Purchaser**"), as amended by a waiver and amending agreement dated ● between the Vendor and the Original Purchaser, and as assigned by the Original Purchaser to the Purchaser by an assignment agreement dated ● (collectively, and as further amended from time to time, the "**Purchase Agreement**").

Standard Delivery

Unless otherwise indicated, all documents shall be delivered by Standard Delivery. The term "Standard Delivery" means delivery of two originally executed copies of each document to each of the parties thereto and, in the case of cheques, receipts, letters of credit or other documents where it is inappropriate to have more than one original, delivery of the original to the party entitled thereto with photocopies to the other parties. Section references used herein refer to sections of the Purchase Agreement.

Delivery of Documents

All closing documents and cheques shall be delivered into escrow on the Closing Date in accordance with the terms of the DRA referred to below. Documents noted as "Not to be Tabled" are the Purchaser's internal documents and will not be delivered to the Vendor.

No.	Description of Document	Prepared by:	Delivered by:	Delivered to:	Status
I. DOCUMENTS DELIVERED PRE-CLOSING					
1.	Purchase Agreement made as of ●	Vendor/ Original Purchaser	Vendor/ Original Purchaser	Standard Delivery	
2.	First Deposit $● (s. 3.1(a))	N/A	Purchaser	Stikeman	
3.	Requisition Letter from Purchaser Counsel dated ●	Purchaser Counsel	Purchaser Counsel	Stikeman	
4.	Response to Requisition Letter dated ●	Stikeman	Stikeman	Purchaser Counsel	
5.	Waiver and Amending Agreement dated ●	Vendor/ Original Purchaser	Vendor/ Original Purchaser	Standard Delivery	
6.	Second Deposit $● (s. 3.1(b))	N/A	Purchaser	Stikeman	
7.	Allocation of Purchase Price (s.3.3)	Purchaser	Purchaser	Vendor / Purchaser	
8.	Draft statement of adjustments with back-up information and calculations	Vendor	Vendor	Purchaser	
9.	Status Report of Vendor's efforts to close open building permits	Vendor	Vendor	Purchaser Counsel / Purchaser	
10.	Delivery of drafts of Estoppel Certificates (s. 6.5)	Vendor	Vendor	Purchaser Counsel / Purchaser	

No.	Description of Document	Prepared by:	Delivered by:	Delivered to:	Status
11.	Purchaser's Approval of drafts of Estoppel Certificates (s. 6.5)	N/A	Purchaser	Vendor	
12.	Reliance Letters and Reports (s. 5.1(d))	N/A	Vendor	Purchaser/ Purchaser Counsel	
13.	Notice of Assignment of Purchase Agreement	Purchaser Counsel	Original Purchaser	Vendor / Stikeman	
14.	Assignment and Assumption of Purchase Agreement by Original Purchaser to Purchaser	Purchaser Counsel	Original Purchaser/ Purchaser	Vendor/ Stikeman	
15.	Competition Act Approval (s. 4.5, 5.2(i))	Purchaser Counsel / Stikeman	Vendor / Original Purchaser	Vendor / Original Purchaser	
16.	DRA (s. 5.4)	Stikeman	Purchaser Counsel / Stikeman	Stikeman/ Purchaser Counsel	
II.	**DOCUMENTS DELIVERED AT CLOSING**				
A.	**ACKNOWLEDGEMENT AND DIRECTION**				
17.	Acknowledgment and Direction from the Vendor to Stikeman re: electronic execution and registration of transfers	Stikeman	Vendor	Stikeman	*internal document*
18.	Acknowledgment and Direction from the Purchaser to Purchaser Counsel re: electronic execution and registration of transfers	Purchaser Counsel	Purchaser	Purchaser Counsel	*internal document*

No.	Description of Document	Prepared by:	Delivered by:	Delivered to:	Status
B.	**TRANSFER OF THE PROPERTIES AND RELATED ASSETS**				
19.	Registrable transfer of the Properties to the Purchaser with customary *Planning Act* statements completed (s. 5.1(a))	Stikeman	Vendor	Standard Delivery	
20.	Direction re Title	Stikeman	Purchaser	Standard Delivery	
21.	Assignment and Assumption of Leases (s. 5.1(b) and 5.2(b))	Stikeman	Vendor/ Purchaser	Standard Delivery	
22.	Assumption of Permitted Encumbrances (s. 5.2(d))	Stikeman	Purchaser	Standard Delivery	
23.	Assignment of Warranties and Permits (s. 5.1(m) and 5.2(f))	Stikeman	Vendor/ Purchaser	Standard Delivery	
24.	Bill of Sale (s. 5.1(e))	Stikeman	Vendor	Standard Delivery	
25.	Notice to Tenants re: sale of property and rent direction after Closing (s. 5.1(f))	Stikeman	Vendor	Standard Delivery	
26.	Delivery of all keys to the Buildings (s. 5.1(i))	Vendor	Vendor	Purchaser	On Closing
27.	Delivery of all original copies of Leases, Tenant correspondence files, plans for the building and other documents listed in s.2.4 to the extent they are in the possession of the Vendor (s. 5.1(c) and (i))	Vendor	Vendor	Purchaser	On Closing

No.	Description of Document	Prepared by:	Delivered by:	Delivered to:	Status
28.	Any postdated cheques related to the leases, endorsed to the Purchaser (s. 5.1(i))	Vendor	Vendor	Purchaser	On Closing
29.	Executed Estoppels Certificates, obtained at least three business days prior to closing, from all of the following Tenants: 1. ● (s. 4.2(b))	Vendor	Vendor	Purchaser/ Purchaser Counsel	
30.	Vendor's Certificate for all unobtained Tenant Estoppels, if required (s. 4.2(b) and 5.1(l))	Stikeman	Stikeman/ Vendor	Standard Delivery	
31.	Purchaser HST Certificate and Indemnity (s. 5.2(e))	Purchaser Counsel	Purchaser	Standard Delivery	
C.	**OTHER CLOSING DELIVERIES AND ITEMS**				
32.	Vendor's bring-down certificate (s. 5.1(k))	Stikeman	Vendor	Standard Delivery	
33.	Purchaser's bring-down certificate (s. 5.2(g))	Purchaser Counsel	Purchaser	Standard Delivery	
34.	Mutual Acknowledgement re realty tax appeals (s. 3.4(b))	Stikeman	Vendor/ Purchaser	Standard Delivery	
35.	Tax Direction re realty tax appeals (s. 3.4(b))	Stikeman	Vendor/ Purchaser	Standard Delivery	
36.	Certificate of the Vendor re section 116 of the *Income Tax Act* (s. 5.1(j))	Stikeman	Vendor	Standard Delivery	
37.	Vendor's undertaking to readjust (s. 5.1(h))	Stikeman	Vendor	Standard Delivery	
38.	Purchaser's undertaking to readjust (s. 5.2(c))	Purchaser Counsel	Purchaser	Standard Delivery	

No.	Description of Document	Prepared by:	Delivered by:	Delivered to:	Status
39.	Beneficial Owner Acknowledgement	Stikeman	Beneficial Owner/ Vendor	Standard Delivery	
40.	Purchaser's replacement letters and/or security deposits to governmental or utility authorities (s. 3.5 and 5.2(h))	Purchaser Counsel/ Purchaser	Purchaser	Evidence to Vendor	
41.	Vendor Certificate and Undertaking re outstanding Vendor Work Orders	Stikeman	Vendor	Standard Delivery	
42.	Owner's Title Insurance Policy from FCT	Purchaser Counsel	FCT	Purchaser / Purchaser Counsel	
D.	**CLOSING DATE SEARCHES**				
43.	Updated subsearch of the Properties on Closing	Purchaser Counsel	N/A	N/A	On Closing
44.	Updated subsearches of adjoining lands on Closing	Purchaser Counsel	N/A	N/A	On Closing
45.	Updated execution search against the Vendor on Closing	Purchaser Counsel	N/A	N/A	On Closing
46.	Confirmation of Purchaser HST number	Stikeman	N/A	N/A	On Closing
E.	**PAYMENT OF THE PURCHASE PRICE**				
47.	Final Statement of Adjustments	Vendor	Vendor	Purchaser	
48.	Direction to Purchaser re: payment of balance of purchase price (s. 5.1(g))	Stikeman	Vendor	Purchaser	

No.	Description of Document	Prepared by:	Delivered by:	Delivered to:	Status
49.	Re-Direction re Funds from Vendor to Stikeman	Stikeman	Vendor	Stikeman	*internal document*
50.	Wire transfer re balance owing, pursuant to Direction to Purchaser in #48 above (s. 3.2(b))	Purchaser Counsel/ Purchaser	Purchaser Counsel / Purchaser	Vendor/ Stikeman	
51.	Payment of First Canadian Title invoice	Purchaser Counsel	Purchaser Counsel	FCT	
52.	Payment of LTT	Purchaser Counsel	Purchaser Counsel	Ministry of Revenue	
F.	**REGISTRATIONS**				
53.	Registration of the transfer of the Properties	N/A	Purchaser Counsel	Standard Delivery	
54.	Registration of the applicable Notices of Leases against the Properties	N/A	Purchaser Counsel	Standard Delivery	
55.	Registration of the new mortgage security against the Properties	N/A	Purchaser Counsel	Standard Delivery	
G.	**POST-CLOSING ITEMS**				
56.	Change of Ownership Letter to City Tax Department	Purchaser Counsel	Purchaser Counsel	City Tax Department	Post- Closing