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Recent Cases

PRODUCT SPOTLIGHT

For information on rent control in relation to residential tenancies see ¶47,000.

MPAC WORKING PAPERS - SHOULD THEY BE USED OR NOT?

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This posting is an excerpt from "Recent Developments in Property Leasing" previously published in the 2014 Canadian Legal Lexpert Directory.

In 1998, Ontario revamped its property tax assessment system and legislation eliminated the requirement to create separate tenant assessments on the assessment roll. Although the Municipal Property Assessment Corporation (MPAC) no longer prepares separate tax bills or assessments for each tenant of a commercial building, multi-tenant properties are valued by assessors using the Capitalization of Income approach. An assessor prepares a valuation summary that lists the tenancies at the property and then each tenancy is ascribed a market rent (not actual rent) that is capitalized. These valuation records are often referred to as the "assessor's records" or "working papers".

There have been many attempts by landlords and tenants to rely on the assessor's records as a basis for allocating taxes. In *Orlando Corporation v. Zellers Inc.*, the Ontario Court of Appeal held that the assessor's records do not constitute separate assessments. In *Sophisticated Investments Ltd. v. Trouncy Inc.*, the court held that the assessor's records do not constitute assessed values. In *658425 Ontario Inc. v. Loeb Inc.*, which affirmed *Orlando Corporation v. Zellers Inc.*, the Court ruled that assessor's records do not constitute a separate value of the Tenant's premises for property tax purposes.

At issue in *Indigo Books & Music Inc. v. Manufacturers Life Insurance Co.*, was the reliability of using MPAC working papers as a basis to determine a tenant's contribution to property taxes. The Court in *Indigo Books* noted that (i) the calculations in the working papers are informal and discretionary, (ii) they are not governed by legislation, and (iii) working papers are not intended to apply to individual premises; rather they demonstrate a value for the entire property. The Ontario Court of Appeal concluded that working papers could not be considered accurate or reliable on an individual basis. Based on the precise wording in that Lease (which provided that if the Landlord was unable to obtain "other information deemed sufficient by the Landlord to make the calculations of Additional Rent," then the Tenant's contribution would be determined on a proportionate share basis) and concluded that it was within the Landlord's

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discretion to deem the information in the working papers insufficient to complete the calculation of additional rent and allocate the Tenant's realty taxes on a proportionate share basis.

Given the recent trend of cases, a few recent decisions come as a surprise. In *Terrace Manor Ltd. v. Sobeys Capital Inc.*, the Tenant (Sobeys) leased space to operate a grocery store. The Lease required Sobeys to pay its share of realty taxes according to the separate assessments issued by the taxing authority. Where no such assessments were available, the Lease required the parties to make reasonable efforts to obtain "sufficient official information" to determine what such an assessment would have been. If no such information was available, the Landlord was required to allocate taxes to Sobeys having regard to "the generally accepted method of assessment utilized by the assessment authority".

The Tenant argued that the working papers produced by MPAC provided sufficient information to determine what a separate assessment would have been for its store. As such, the Tenant argued that the Landlord was obligated to bill the Tenant's share of realty taxes based on the working papers. The Landlord's position was that the working papers were not "official information" as required by the Lease and maintained that the proper method of allocation was a proportionate share calculation.

The Court agreed with Sobeys and held that the working papers qualified as "sufficient official information", noting that municipalities are required by law to use MPAC's assessment data in levying taxes. Further, the Court found that the documents provided sufficient information on how to calculate the current value of each property and had, in fact, been used by the Landlord between 2004 and 2009 to determine the Tenant's share of realty taxes. In light of this, the Landlord could not then take the position that the MPAC records could not be used to determine the Tenant's share of taxes. The Court dismissed the Landlord's application and concluded that "MPAC's assessment for the plaza was created from assessment data, on a unit by unit basis, as shown on the evaluation records [and that] the information they contained was sufficient to determine what the taxes to the Tenant would have been if a separate assessment had been made." The Ontario Court of Appeal upheld the trial Court's decision and dismissed the Landlord's appeal. Oddly enough, the Indigo Books case was not specifically mentioned in the decision, but the Landlord's counsel did argue that working papers produced by MPAC were "not sufficiently reliable or created for the purpose of apportioning the tenant's share of property taxes".

Sobeys was also successful in a more recent case. In *Sobeys Capital Inc., (c.o.b. Price Chopper) v. Bayview Summit Development Ltd.*, Sobeys leased space from the Landlord to operate a grocery store. The property tax clause of the Lease provides:

> "The parties shall use their best efforts to obtain all necessary information from the municipality or other taxing authority, based on the assessor's working papers, notes and/or calculations to determine the manner in which such authority would have allocated the assessment for Taxes in respect of the Shopping Centre to the Leased Premises had an assessment...been prepared by such authority. The Landlord agrees to provide the Tenant on request, a letter of authorization to the appropriate assessing authority allowing the Tenant access to the assessor's working papers, notes and/or calculations...If such information is not available, the Tenant agrees to pay the Tenant's Proportionate Share of Taxes. If such information becomes available in the future, the Tenant's Proportionate Share of Taxes shall thenceforth be based upon such allocation, and shall not be adjusted retroactively . . ."

The Landlord calculated the Tenant's contribution to Taxes on a Proportionate Share basis and the Tenant brought an application to determine the proper method for calculating its share of Taxes. Not surprisingly, Sobeys argued that the Landlord ought to have calculated its share based on MPAC's working papers. Relying on the strict wording of the realty tax clause in the Lease, the Landlord maintained that MPAC was neither a "municipality" nor a "taxing authority". Relying on *Indigo Books*, the Landlord argued that the MPAC working papers cannot be considered accurate or reliable in individual circumstances.

The Court allowed Sobeys' application, noting that although assessing property value and levying property tax are two separate steps, "they are part and parcel of the overall process". The Court also noted that the parties had specifically referenced the "working papers" in the Lease (which both sides acknowledged refers to the MPAC valuation reports), and by taking the position that the MPAC is not a "taxing authority", the Landlord was "splitting hairs".

In *Bayview Summit*, the Court confirmed it is perfectly reasonable for parties to choose to rely on working papers produced by MPAC in allocating taxes among units of a building. In other words, it was immaterial whether the working papers were reliable since the Landlord and Tenant had both agreed in the Lease to base the allocation of realty taxes on those documents. The Court concluded that the working paper method was the parties' preferred method of allocating taxes and that the Proportionate Share method was an alternative to be used only in the event that such information was not available. How does one reconcile the decisions in *Indigo Books* with these recent *Sobeys* cases? It appears that the precise wording in the lease is key — if the realty tax clause contemplates using the working papers in certain circumstances, this may imply an acceptance by the landlord of that methodology, which in turn could prevent the landlord from relying on *Indigo Books* to support its position that working papers are not reliable.

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RECENT CASES

Applicant Not A Tenant - Summary Judgment Motion Against Mortgagee Dismissed

Ontario Superior Court of Justice, May 30, 2014

The applicant was the father of the owners of a residential property purchased in 2009. The respondent provided the mortgage financing. The applicant resided at the property. In May 2011, the children defaulted on the mortgage and the respondent issued a notice of sale under charge and a statement of claim. In August 2011, the respondent did an occupancy check and was advised the applicant and his children lived at the property and the applicant paid them rent. The applicant was subsequently served with a notice demanding possession. In November 2011, on a summary judgment motion, the Court granted the respondent possession of the property and leave to issue a writ of possession. The respondent obtained the writ in February 2012 and an eviction was scheduled for April 18, 2012. On April 17, the applicant and his children unsuccessfully moved for an order permitting the applicant to remain at the property. On April 24, the applicant brought a motion that to assert his rights as a tenant to remain in the property and also alleged that some of his possessions were stolen during the eviction. The applicant stated that his children did not reside at the property and thus the *Residential Tenancies Act, 2006* applied to him as a tenant, making his eviction improper. The motion was adjourned, but in the meantime, the property was sold. The applicant amended his motion and presented it as a motion for judgment, seeking orders to set aside the previous court decisions as well as compensation for having bought out the remaining portion of the lease, for making an investment of $27,000 in the property, for mental strain and anguish, and for compensation for property that was allegedly stolen while in the respondent's possession.

The motion was dismissed. The Court found that the matter of whether there was a tenancy that would prohibit the writ of possession from being issued, the claim for the respondent to buy out the rest of the lease, as well as the claim for mental anguish were all previously put before the courts by the applicant and his children. Accordingly, the Court declared these claims *res judicata* and the applicant was not permitted to re-litigate them.

In the event the issues were not already decided by the Court, they were considered under the summary judgment analysis. With regard to tenancy, the affidavit evidence of the applicant and the children simply stated that the children did not reside at the subject property without providing any supporting evidence or giving information as to their alleged true residence. The children had made a statutory declaration stating that the property was owner-occupied and not tenanted, that they had referred to the property as their residence in previous court documents, and that the property was their only registered address aside from a post office box.

The lease at issue in the proceedings was not a legitimate arms-length transaction. The standard rights of the landlord that were normally found on a standard form lease had been crossed out, and the rent was stated to be $1,000 per month for the entire house. There was no evidence that $1,000 was a reasonable rent for a four-bedroom home and instead suggested that the applicant shared the residence with his children. The Court found, on a balance of probabilities, that the children resided at the subject property and it was therefore a shared occupation to which the *Residential Tenancies Act, 2006* did not apply. Further, the Court found no legal or factual basis upon which the applicant could require that the respondent, as mortgagee, buy out a boarder's lease. There was no evidence upon which to make the finding that the applicant invested $27,000 into the property. There was also no proper evidence that personal effects had been stolen, or that there was a break and enter at the property. The Court found that the respondent dealt with the property as would a prudent owner and was not negligent. Accordingly, all of the applicant's claims were dismissed.

Ramnarace v. Home Trust Co. et al., 2014 OREG ¶59,054

Condominium's Bylaw Dealing With Disqualification of Directors Was Valid

Ontario Court of Appeal, July 21, 2014

In November 2011, the board of directors of the respondent, York Region Condominium Corporation No. 818, disqualified the appellant as a director for violating the Directors' Code of Ethics, pursuant to the condominium's Bylaw No. 9. In August 2013, an application judge set aside the board's decision and ordered that the board conduct a fresh ethics review. The judge found that Bylaw No. 9 was valid but the board had violated principles of natural justice and procedural fairness by, among other things, not giving reasonable notice of the ethical review to the appellant. The board conducted a fresh review at which the appellant was once again disqualified. The appellant appealed the August 2013 order, arguing that Bylaw No. 9 was invalid or inconsistent with the democratic principles of the *Condominium Act, 1998* (the "Act") and that the application judge erred in not reinstating him as director.

The appeal was dismissed. The Court found that it was not unreasonable for the board of directors, rather than an independent third party, to make the determination of whether a director had violated the Directors' Code of Ethics, as provided for in Bylaw No. 9. The bylaw did not violate the Act's democratic principles. Section 56(1) of the Act specifically contemplated the enactment of bylaws dealing with qualification, resignation, and removal of directors. The Court noted that Bylaw No. 9 was passed and the directors were elected by the unit owners, including the appellant. Although the application judge could have ordered "such other relief as is fair and equitable in the circumstances" and reinstated the appellant, pursuant to section 134(3) of the Act, the judge had observed that the vacancy left by the appellant had already been filled. Reinstatement of the appellant would have required an order against the new director, who was not before the Court. The order made left open the possibility that the appellant could be reinstated in the future. The Court concluded that the application judge's order was fair and equitable.

Gordon v. York Region Condo. Corp. No. 818, 2014 OREG ¶59,055

Certificates of Possession Under *Indian Act* Subject to Seizure

Ontario Court of Appeal, July 30, 2014

The appellant Andrew Clifford Maracle was a member of the Mohawks of the Bay of Quinte First Nation ("MBQ"). In 2000, Maracle purchased lands and a building on the lands from Shawn Brant ("Brant"), another member of MBQ. Brant had negotiated to purchase possession of the lands from MBQ in 1992, but the deal was not concluded and Brant did not actually possess the lands he sold to Maracle. In 2008, MBQ commenced an action against Brant and Maracle to regain complete control over the lands and building, as Maracle occupied the lands without a certificate of possession. At trial, MBQ obtained a mandatory injunction restraining Maracle and others from occupying the land and for $250,000 in general and $50,000 in punitive damages. To satisfy the judgment, MBQ took out a writ of seizure and sale on three other properties to which Maracle held certificates of possession. After several years, MBQ was unable to satisfy any of the awards made in its favour and brought a motion to enforce the transfer of Maracle's certificates of possession to satisfy the awards.

A motion judge of the Superior Court of Justice ordered Maracle to complete any documents required to transfer his certificates of possession and submit them to the Indian Land Registrar; the judge did not have the authority, however, to bind the Minister of Aboriginal Affairs and Northern Development to effect the transfer of possession. Maracle appealed, arguing that (1) the Court did not have jurisdiction to order him to execute the transfers and (2) certificates of possession were not "real or personal property" of an Indian situated on a reserve under section 89(1) of the *Indian Act* (the "Act"), and it could therefore not be seized by a Band. Maracle argued that the certificates of possession were equivalent to "reserve lands" and therefore not subject to seizure under legal process, pursuant to section 29 of the Act.

The appeal was dismissed. The Court held that the motion judge correctly found that Ontario courts have jurisdiction over the matter, following *Batchewana First Nation of Ojibways v. Corbiere*, 2000 16245 (FC). The jurisdiction of the Ontario courts was not ousted by Parliament or the *Indian Act*.

Section 29 of the Act states that "Reserve lands are not subject to seizure under legal process," while section 89(1) provides that there are no constraints between Indians and Bands with regard to seeking a charge, pledge, mortgage, attachment, levy, seizure, or distress relating to an Indian or Band's real and personal property situated on a reserve. Having examined the legislative history relating to Aboriginal land, the Court summarized the intentions of the Act as: (1) reserving certain Crown lands for the use and benefit of a Band; (2) affirming that title continues to be with the Crown; (3) ensuring reserve land is communal and possession may only be allotted to a Band or its members; (4) requiring the Minister to issue certificates of possession to reflect transfers of possession; and (5) ensuring reserve lands are not subject to sale, lease, or conveyance unless they have been surrendered to the Crown.

Under the Act, an Indian's right to possess reserve lands was a separate and distinct interest from ownership of the reserve lands, the Court stated. Title to the land remained with the Crown, while possession could change, as evidenced through the certificates of possession. Seizure of reserve land through legal process, as referred to in section 29 of the Act, could not be conflated with seizure of a right of possession through legal process. Having regard to the Act, the motion judge had correctly found that "real and personal property" was separate from "reserve lands." Accordingly, the Superior Court of Justice was permitted to order the execution of the transfer of possession from Maracle to MBQ.

Tyendinaga Mohawk Council v. Brant, 2014 OREG ¶59,056

Judge Misinterpreted Clause as Price Adjustment Deadline Rather Than Valuation Date

Ontario Court of Appeal, August 6, 2014

In August 2005, the respondent vendor and the appellant purchaser entered into an agreement of purchase and sale for three properties, one of which was the subject property. The price for the property was $12,550,562 (71.7175 acres at $175,000 per acre), calculated on the basis that the entire property was developable. The agreement contained a price adjustment clause pursuant to which the price would be reduced if on March 16, 2011 the proportion of

non-developable land exceeded 20 per cent of the total land. The balance owed by the purchaser of approximately $3.7 million was secured by two vendor take-back mortgages payable over seven years. The purchaser did not seek a price adjustment on or before March 6, 2011. In January 2012, the purchaser provided the vendor with an "area certificate" stating that there were 15.8696 acres of excess non-developable land. The purchaser claimed that the purchase price should be reduced by $2,777,180 (15.8696 acres × $175,000). In June 2012, the vendor's expert determined that only 9.231 hectares were non-developable, which resulted in a reduction of $1,481,935, in the event the price adjustment clause still applied.

The purchaser sought a declaration that it owed no further payments to the vendor, as the price adjustment clause negated the balance owed. The vendor cross-applied for a declaration that the price adjustment clause had expired and the purchaser owed the remaining balance of approximately $1.4 million. An application judge allowed the vendor's cross-application, finding that the price assessment had to be performed by the fifth year, and the time of the essence clause applied. The purchaser appealed.

The appeal was allowed. The Court found that the applications judge had erred in characterizing the five-year provision, which states, "the purchase price shall be reduced at the end of the fifth year of the term," as a "hard deadline" akin to a limitation period by which the adjustment had to be determined. The clause, the Court noted, did not expressly specify a date by which the determination of the non-developable land and the final purchase price had to be finalized. The agreement provided a separate clause with the various steps to be taken to actually determine the value of the non-developable land and it was obvious they would each require some time. This was inconsistent with the finding that there was a hard deadline of five years for fixing the value. Having regard to the agreement's timelines for payments due under the mortgage, it was implicit that the parties intended to have the price adjustment process completed before the second last balloon payment under the mortgage; this "deadline," the Court found, could have been met even with a starting date in January 2012, when the buyer provided the seller with the area certificate.

The Court found that the application judge had effectively implied a term when the conditions for doing so were not present, and a court could only do so where it was obvious the parties intended the contract to include such a term, and it was necessary to give effect to the parties' intentions and to give business efficacy to the agreement (see *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619). The Court concluded that there was no date to which the time of the essence clause attached itself with regard to determination of the non-developable land, and that the judge had erred in interpreting the role of the determination date as a deadline, rather than a valuation date. The buyer was entitled to a price reduction, calculated in accordance with the agreement.

First Elgin Mills Developments Inc. v. Romandale Farms Ltd., 2014 OREG ¶59,057

Board of Directors Found in Contempt of Court

Ontario Court of Appeal, August 6, 2014

The appellants were members of the board of directors of a condominium corporation. The respondents were the condominium unit owners. The condominium development contained 144 units. The exterior of the buildings contained a "podium" which shielded the buildings from the street; it was composed of an inner area, the "courtyard," which contained planters and a traffic circle. In 2010 and 2011, repair work was conducted on the garage below the complex, which required removal of the podium and landscaping. The appellants retained an architectural firm to develop a new landscaping and planting plan for the podium. A group of owners opposed the new plan and argued that it constituted a "substantial change" to common elements that required the approval of two thirds of the owners, pursuant to the *Condominium Act, 1998*. The appellants began implementing the new plan. In June 2011, the owners obtained an order enjoining the appellants from authorizing any work on the new plan. The parties signed minutes of settlement providing that the new design plan would be put to a vote that required approval by 66 2/3 per cent of the owners. The outcome of the vote was that 60.5 per cent of the owners voted in favour of the settlement, which was short of the numbers needed for approval. The appellants challenged the minutes and the owners moved to enforce them. On June 29, the owners obtained an endorsement requiring the appellants to "reinstate the [c]ourtyard as it existed after the repairs to the garage."

The restoration work resulted in a courtyard that differed from the original design. The appellants ignored the owners'

complaints and continued to implement a design plan that contained elements of both the original and the new plan. The owners moved for an order holding the appellants in contempt of the June 29 endorsement and for related relief. The motion was brought before the same judge who issued the endorsement. He found the appellants personally in contempt, ordered that the original design be restored, and that the appellants individually bear the costs of the restoration, at $100,000 each. The appellants appealed.

The appeal was allowed in part. The majority of the Court found the June 29 endorsement was clear and unequivocal. The only reasonable interpretation of "reinstate the [c]ourtyard as it existed after the repairs to the garage" and to "landscaping," was that the appellants were required to restore both the podium hard and soft landscaping, and the entirety of the podium, not just the internal part. The record revealed that the parties at no point distinguished between the "podium" and "courtyard" and the issue had all along been the design of the entire podium. The appellants' conduct up to the time of the motion evidenced that they clearly understood the obligations of the endorsement and wilfully violated them. The Court further rejected the appellants' claim that the endorsement required them to "do the impossible" as they could not replace mature vegetation with new planting materials. The Court stated it was clear that the motion judge only required materials that were "the closest match." The appellants' response, further, should have been to appeal rather than ignore the endorsement, had they found it impossible to perform.

The Court found the appellants' contempt was serious but was not motivated by personal gain or vengeance, other than their belief that they knew what was best for the complex. A mitigating factor was that the appellants had no previous contempt orders, while an aggravating factor was their "unremitting intransigence" as they defied the endorsement. The Court stated that the sentence should not be such that it would deter others from volunteering on boards of condominium corporations. The Court found that the motion judge erred in focusing on the cost of the restoration rather than on deterrence when ordering that the individual appellants bear the costs of the restoration without an assessment of the impact of the penalty. The majority of the Court held that a reasonable penalty of $7,500 per appellant was appropriate, payable to the condominium corporation.

Boily v. Carleton Condo. Corp. 145, 2014 OREG ¶59,058

LEGISLATIVE UPDATE

The *Building Opportunity and Securing Our Future Act (Budget Measures), 2014*, SO c. 7 (originally Bill 14) (the "BOSOFA") amends a number of acts, including the *Land Transfer Tax Act* (the "LTTA"). Pursuant to Schedule 16 of the BOSOFA, new section 12.1, a general anti-avoidance rule, has been added to the LTTA. Schedule 16 comes into force on the day the BOSOFA receives Royal Assent. The BOSOFA received Royal Assent on July 24, 2014.

Section 12.1 provides for a determination of tax consequences that are reasonable in the circumstances to deny a "tax benefit" that would result either directly or indirectly from an avoidance transaction. "Tax benefit" is defined in subsection 12.1(1) as a reduction, avoidance, deferral, or cancellation of tax or other amount payable under the LTTA, or an increase in a refund or rebate of tax or other amount under the LTTA.

However, the tax benefit would not be denied if it could reasonably be considered that the transaction would not result, directly or indirectly, in a misuse of the provisions of the LTTA or its regulations (see subsection 12.1(5)).

Without restricting the generality of subsection 12.1(3), the following are considered examples of tax consequences pursuant to subsection 12.1(6):

(a) any exemption, refund or rebate may be allowed or disallowed, in whole or in part;

(b) any such exemption, refund, rebate or a part thereof may be allocated to any person;

(c) the value of the consideration may be determined and may be apportioned among parts of the land or lands being conveyed;

(d) the proportional share of the acquisition of or increase in an interest of any kind in land of any person may be determined;

(e) any tax payable under section 3 that is deferred or no longer owing may be deemed to be owing as of the 30th day after the date of the disposition of a beneficial interest in land;

(f) the nature of any transaction, payment or other amount may be recharacterized; and

(g) the tax effects that would otherwise result from the application of other provisions of this Act or the regulations may be ignored.

Pursuant to subsection 12.1(7), any person, other than the person to whom a notice of assessment, reassessment or additional assessment has been sent under section 12, may, within 180 days after the day the notice is sent, request that the Minister make an assessment, reassessment or additional assessment by applying subsection 12.1(3) to that transaction.

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