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ONTARIO HARMONIZED SALES TAX Implications for Commercial Landlords

On March 26, 2009, the Ontario government announced its 2009 Budget, which was dominated by the introduction of the Harmonized Sales Tax. The new tax is a harmonization of the Ontario Retail Sales Tax (RST) with the federal Goods and Services Tax (GST) to create a federally administered single value-added sales tax, effective July 1, 2010. Accordingly, rather than Ontario consumers paying two separate taxes, they will be paying a combined tax of 13% (with the provincial portion being equal to 8% and the federal portion being equal to 5%). The rules relating to the single sales tax will be largely consistent with those governing the GST.

A "value-added" tax applies to all commercial activities related to the sale of goods and services. Tax is paid on the supply of goods and services throughout the supply chain, but the tax paid by business is generally reimbursed through input tax credits. Specifically, businesses that sell taxable or zero-rated goods and services will be able to claim input tax credits on purchases (similar to the rules under the federal GST).

In order to help transition to this single sales tax, the federal government will give Ontario \$4.3 billion in cash transfer payments so as to better promote economic growth (\$3 billion is payable on July 1, 2010 – to coincide with the implementation date of the single tax – and the balance will be paid one year later).

Although the transitional rules specific to Ontario have not yet been announced, one might assume that the easiest and most logical step for the Ontario government would be to adopt the existing transitional rules from harmonization in the Maritimes back in 1996-97, especially since the rules are already in place. However, no announcement on this had been made to date.

Ontario Sales Tax Transition Benefit for Small Businesses

Transitional support will also be available to small businesses, especially in light of the fact that, effective March 31, 2010, the vendor's compensation currently paid under the RST will be eliminated and also that the new tax system will result in administrative costs to businesses in accounting and point of sale systems. Accordingly, a one-time credit will be provided to most businesses (with the exception of financial institutions) as follows:

- Businesses with taxable sales of \$15,000 or less will receive a \$300 credit;
- Businesses with taxable sales between \$15,000 and \$50,000 will receive a credit of 2% of taxable sales; and
- Businesses with taxable sales between \$50,000 and \$500,000 will receive a credit of \$1,000.

Small Supplier Threshold

Small suppliers with total taxable revenues of \$30,000 or less (\$50,000 or less for public service bodies) would not be required to register and collect the single sales tax.

New Housing Rebate

Purchases of newly constructed homes from developers are currently subject to RST, but this embedded tax will be removed with the introduction of the single value-added tax. However, under the new system, new homes will be subject to the single sales tax (thereby including the federal portion of the tax). In the original Budget release, the government proposed to ensure that new homes priced under \$400,000 would be eligible for a rebate equal to 75% of the provincial component of the single sales tax (i.e. 6%). This rebate was to be phased out for homes priced between \$400,000 and \$500,000. However, on June 18, 2009, Ontario announced an expansion of the new home rebate and eliminated the \$500,000 threshold. Essentially, Ontario will now give a rebate of 75 percent of the provincial portion of the HST on new or substantially renovated homes, on the first \$400,000 of the purchase price, regardless of the total price. The rebate will also apply to new and substantially renovated residential rental properties.

Note: resale homes will not be subject to the single sales tax.

Generally, builders of new single homes or residential condominiums who rent out the new homes or condos are required to self-assess GST when they rent out the homes. With the new HST, these builders will now be required to pay the provincial portion of the HST on the self-supply if they rent out the new homes or condos after June 2010.

The provincial portion of the HST will apply to builders' taxable sales of new rental homes where both ownership and possession of the home are transferred after June 2010. Grandfathering will be provided for certain contracts.

If under a written agreement of purchase and sale, ownership or possession of the home is transferred before July 2010, the

provincial portion of the HST will not apply to builders' GST-taxable sales of new homes.

HST and Leaseholds

With the implementation of the new HST on July 1, 2010, landlords will need to be aware of the tax implications to their current leases as they will now be subject to the HST. Whether or not the legislation is instructive, it will be important for landlords and tenants to review their lease forms to make sure that the lease provides certainty on the payment of HST. For example, a lease with a broad definition of "sales tax" payable by a tenant will likely provide certainty that HST is payable by the tenant, but, leases which refer specifically to GST (which many do) will not be as certain.

It is anticipated that the legislation will include a number of transitional provisions related specifically to commercial leases. One can imagine the confusion which may arise in cases where: (i) a tenant completes the construction of its leasehold improvements and pays for them prior to July 1, 2010 but is not entitled to payment of a leasehold improvement allowance until some time after July 1, 2010; or (ii) costs are incurred by and paid for by a landlord prior to July 1, 2010 in respect of the maintenance, repair and replacement of a property but not billed to the tenants of the same property until some time after July 1, 2010; or (iii) a landlord and tenant have entered into a "gross lease" which states that the "gross" amounts payable by the tenant under such lease are "inclusive of GST", just to name a few.

As a result, it is important for landlords and tenants to start thinking about how the HST will effect cash flow and cost recovery models under their leases so that they are able to put systems in place to deal with these HST issues effective July 1, 2010.

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NEW RULES OF CIVIL PROCEDURE: NEW WAY TO LITIGATE

On January 1, 2010, significant changes to the Rules of Civil Procedure will take effect. This article provides a summary of the most significant amendments that will change the way claims are litigated. These are:

- I. Summary Judgment
- II. Mandatory Mediation
- III. Discovery Reform
- IV. Expert Evidence

I. Summary Judgment - Rule 20

The most significant of all the new changes is to summary judgment. The changes are sweeping and fall into three categories: (a) the court's powers on a motion for summary judgment will allow a judge to direct a "mini-trial" as a judge is now directed to weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence; (b) the court's powers where trial is necessary will now permit the court to give directions and impose terms, such as timelines and security for costs; and (c) the court's powers on costs will now allow the court to impose substantial indemnity costs where it is of the opinion that any party has acted reasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay.

II. Mandatory Mediation - Rule 24.1

The major changes to the mandatory mediation rule

relate to: (a) application – mediation will now apply to all Toronto actions; and (b) timing – mediation will take place 180 days after the first defence has been filed.

III. Discovery - Rules 29.1, 29.2, 30 and 31

There are four main changes to the discovery rules: (a) redefinition of the concept of relevance – the phrase "relating to any matter in issue in the action" is replaced with "relevant to any matter in issue in the action" in all rules relating to discovery; (b) time limits on examination for discovery – there will now be a "one day" rule limiting the length of examinations; (c) discovery plan – an entirely new rule, requiring parties to agree on the scope, how documents will be produced and when examinations for discovery will take place; and (d) proportionality in discovery – an entirely new rule, requiring time and expense to reflect what is at stake in the proceeding.

IV. Expert Evidence - Rule 53

To reinforce that expert witnesses are intended to assist the court with a neutral evaluation of the issues, they will now be required to certify in writing their duty to the court to be fair, objective and non-partisan. Other changes to reduce delay require expert reports to be served earlier and to contain certain specific details such as the instructions provided to the expert in relation to the proceeding, and a description of the research conducted by the expert.

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Professional Notes

Kenneth L. Kallish and **Catherine Francis** made a presentation to Royal Bank of Canada on the topic "Strategies For Effective Account Management" on September 1, 2009. Topics of discussion included file maintenance, client communications, privilege and early warning signals of concern to lenders.

The Commercial Leasing Group participated in the RealLeasing Conference held on September 17, 2009 in Toronto. **Stephen J. Messinger** acted as Moderator for a session "Mastering Lease Negotiation in Today's Tricky Market: How to Develop Solutions, Resolve Key Issues and Close the Deal."

On September 17, 2009 **Stephen Posen** moderated a panel for RealLeasing on working with weaker tenants or landlords: covenants, security, financing, rights, bankruptcy and insolvency.

The Commercial Leasing Group participated in the ICSC Canadian Conference to be held September 21-23, 2009 in Toronto. **Stephen J. Messinger** acted as Moderator of the Economic Keynote session at the conference.

Aaron S. Grubner's article "Addressing the Four Ds in Family Shareholder Agreements" was quoted in an article which appeared in the September 28th edition of *LawTimes*

Joan E. Jung co-chaired a seminar "Disclosure of Information-Trust and Corporate Information" for STEP Canada (Toronto branch) held on October 7, 2009. **Howard S. Black** was a speaker at this seminar.

Stephen J. Messinger will act as a Presenter/Facilitator of a seminar at the ICSC US Law Conference in Phoenix, AZ October 21-24, 2009.

Samantha A. Prasad was quoted in "Planning for Tuition Costs," an article in the 2009/2010 edition of *Canada's Private School Guide*.

Firm News

Reuben M. Rosenblatt, Q.C., and **Jules N. Berman Q.C.**, received a Life Membership to the Law Society of Upper Canada for providing 50 years of legal service.

Martin Maierovits was re-elected to serve a second term as Chairman of the Board of Kashruth Council of Canada, the premier kashruth supervising and certifying agency in Canada. Kashruth Council of Canada supervises and certifies over 700 industrial food production plants producing thousands of "COR" certified kosher food products in Canada and the U.S. In addition, Kashruth Council supervises and certifies over 50 retail food establishments in the GTA and beyond.

Minden Gross is pleased to announce that "Nathan's Company Meetings including Rules of Order 8th edition", edited by **Hartley R. Nathan, Q.C.** will be published by CCH Canadian Limited in November, 2009. A webinar respecting the publication will be held in December and **Hartley R. Nathan Q.C.** and **Phillip G. Bevans** will participate in same.

Minden Gross is pleased to announce that "Tax & Family Business Succession Planning, 3rd ed." by **David Louis, Samantha A. Prasad** and **Michael A. Goldberg** will be published by CCH Canadian Limited this Fall.