

LAW NEWSLETTER

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HST REFORM

A new harmonized sales tax, (“HST”) is proposed in the 2009 Provincial Budget. It will be implemented on July 1, 2010. This HST would replace the current 8% provincial retail sales tax and 5% federal GST. The administration of a single tax instead of two means one set of forms, one payment and one point of contact for audits, appeals and taxpayer services. John Wilkinson, the Minister of Revenue has said:

Now I know my political opponents are trying to spin a myth. They are trying to create the impression that our tax reform comes down to nothing more than increased sales tax for many items. That's a myth.

Free tax information seminars are offered by the Ontario Ministry of Revenue to learn how the PST and GST affect your business and how the proposed HST would work. The HST would not apply to resale homes. Also, buyers of new homes would receive a rebate of up to \$24,000 regardless of the price of the new home. New rental housing

would receive a similar rebate. More information is to come on this in the spring.

GREEN ENERGY ACT

This statute whose full title is Green Energy and Green Economy Act received royal assent on May 14, 2009. An interesting new concept which it creates is mandatory home efficiency disclosure. This is basically a home energy audit in form and substance to be prescribed by pending regulations. A person who offers to sell an interest in real property (ie. - house or building) shall provide information, reports or ratings to the person making the offer before accepting the offer. Similarly, a person making an offer to purchase has the right to receive from the seller, such information, reports or ratings. This section of the Act will come into force on a day to be named. Dates anticipated vary: (i) offers made after January 1st, 2010 for the lease or sale of a new home with a building permit; (ii) on entering an agreement for the purchase or sale of an existing home or building on or after January 1st, 2011; and (iii) on entering a tenancy agreement for a home or building on or after January 1st, 2012.

COMMERCIAL REAL ESTATE AND LEASES

Commercial property purchasers usually rely on tenants’ letters called estoppels to ensure key facts about existing leases in the

buildings being purchased. Two examples are the amount of rent paid by the tenant and the term of the tenant's lease. Obviously, the buyer relies on the tenant's statement as to the amount and duration of rental income. It is an open question as to whether a court will hold a tenant to the statements the tenant makes in an Estoppel Certificate.

In *Vancouver City Savings Credit Union v. New Town Investments Inc.*, New Town stepped into the landlord's shoes, Park Georgia Properties Ltd., and Vancouver City Savings was the tenant. The term of the lease was ten years and it granted three five-year renewal options. When New Town bought the property from Park Georgia, the tenant provided an estoppel certificate indicating that only two renewal periods remained. After New Town bought the property the tenant purported to exercise the second renewal option. As the new landlord, New Town wanted to hold the tenant to its reference to the first renewal option in its estoppel certificate and its subsequent assertion that it was exercising its second option. In actuality, the original lease had been extended rather than renewed and the time remaining on the lease was much longer than the tenant had stated in the estoppel.

In reviewing the facts of the case, the court restated the long-held common law position that a renewal and an extension are two different concepts at law. An extension was an continuation of the same contract for a specified period but a renewal was the re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to an extension. Since the court found that the original lease had been extended rather than renewed, all three renewal options remained to the

dismay of the new landlord. One legal commentator stated that:

"It is a scary proposition for purchasers that they may not be able to rely on the contents of an estoppels, however in this case, a proper inspection and interpretation of the lease documentation by the purchaser should have revealed that in fact the term had been extended by the extension agreement entered into by the parties and therefore all three renewal terms remained (rather than two renewal terms). If the lease documentation available for due diligence had not been clear, the Court may have held the Tenant to the statements made in the estoppels."

In a purchase transaction, the only way to verify the lease terms and current state of the landlord-tenant relationship is not only to review the actual lease documents but to also review the tenant correspondence etc. so the purchaser should insist on reviewing the entire tenant file for due diligence purposes.

GROW OPS DISCLOSURE ACT

Ontario's Bill 18 requires property owners and real estate agents to disclose information to prospective buyers and tenants as to whether the property was used for marijuana grow operations. When this Bill becomes the law affected parties had better comply or face possible fines.

DESCRIBING COLLATERAL IN PUBLIC NOTICE SYSTEM

Lenders who secure their loans with collateral security who want to be assured of the enforceability of their security typically

register a “financing statement” in Ontario’s Personal Property Security system. Ontario is the only province that uses a check box system for a secured party to identify its collateral such as equipment, inventory, accounts (receivable) or the general category “other”. Secured parties usually describe their collateral in order to avoid receiving many requests from other creditors who wish to determine whether or not they will be lending on the same collateral. There is a statutory obligation to reply to all requests.

In the Tiger Leasing case, Bombardier Capital Ltd. registered a financing statement over all of Tiger’s collateral but later amended it by listing specific vehicles by serial number in the general collateral description box. By doing so, the court held that other lenders were misled into thinking that Bombardier had no broader security interest and therefore limited Bombardier to enforcing against the specifically described collateral even though its general security agreement with Tiger included a charge over receivables. Bombardier unwittingly limited its collateral by trying to provide a helpful collateral description to the public in order to avoid the administrative burden of handling other creditors’ enquiries about their collateral.

ENDING A PARTNERSHIP

When business partnerships are created there is a lot of good will involved in the relationship among the partners. This is the best time to have your lawyer draw up a partnership agreement signed by all the partners. A key component of such an agreement is the exit strategy. That is to say, how will the partnership end? Typical events to plan for are the withdrawal of a

partner, death, disability and retirement. How will the partner’s interest be valued? How and when will he or she be paid? These are some of the questions that are pivotal in a well formed partnership arrangement. By skipping over these things, the partners set themselves up for potential problems down the road. In a recent consultation, a two partner situation, this is exactly what happened. The partner wishing to leave the partnership sought my advice which had to be tempered by the obvious fact that everything depended on how the remaining partner would react. To avoid unresolvable conflicts that end up in costly litigation, I cannot over-emphasize enough, the importance of a signed partnership agreement.

CONTACT INFORMATION

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