

The State of the Commercial Real Estate Market

Real Estate Group Seminar
Wednesday, April 28, 2010



Mark S. Brennan
Partner
416 865 5129
mbrennan@fasken.com



Craig R. Carter
Partner
416 865 4359
ccarter@fasken.com



Andrea L. Centa
Partner
416 868 3348
acent@fasken.com



Neil M. Smiley
Partner
416 865 5122
nsmiley@fasken.com

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Mark S. Brennan, Craig R. Carter, Andrea L. Centa and Neil M. Smiley



Good Faith, Discretion and Best Efforts

Mark S. Brennan



Is There A Duty To Act In Good Faith In A Negotiation?

- The courts have been clear, there is no duty to act in good faith in a negotiation.
- The very goal of a commercial negotiation is to realize a financial gain at the expense of the other party. Many negotiations result in a winner and a loser. Parties can come to the negotiating table with a stronger bargaining position, by reason of wealth, market power or information. To impose an obligation of good faith on a negotiation would likely punish those in a stronger negotiating position, and send a chill through the business community. Imposing an obligation of good faith could result in an insurance – like remedy for unsuccessful negotiations.
- The Supreme Court of Canada in a 2000 decision held that no duty of good faith would be imposed upon a landlord/tenant lease renewal negotiation, notwithstanding that the landlord and tenant had already then enjoyed a 10 year lease term together and notwithstanding that the tenant was an arm of the federal government.

A Lender's Obligation To Advance

- Most commitment letters or mortgages contain a "discretionary advance" clause. A common example might read as follows:
 - "Neither the execution nor the registration of this mortgage shall bind the mortgagee to advance monies hereunder, but the advance of moneys shall be in the mortgagee's sole, absolute and unfettered discretion."
- Despite the fact that this clause is clear and easily understood, the Canadian courts, in an effort to avoid unfairness, have interpreted the words creatively.
- The most important and often-referred to case is a 1969 Ontario Court of Appeal decision. In that case a third-party supplier to a borrower's construction site got telephone assurances from the lender's lawyer that he would be paid from mortgage advances. He wasn't paid and then sued the lender, because the borrower had no remaining assets. The court, in an effort to cause the third-party supplier to be treated fairly, held that a contract existed between the supplier and the lender because of the telephone calls.

A Lender's Obligation To Advance

- A second important case is a 1977 decision of the British Columbia Court of Appeal in which the lender's loan officer attended at the borrower's construction site and assured the borrower that sufficient progress had then been made for the next mortgage advance. The court held that the lender contractually bound itself to advance.
- A third case relevant to this issue is a 1985 Supreme Court of Canada decision in which a third-party supplier was supplying goods and services to a project financed by the lender. The supplier asked for and received assurances from the lender that sufficient advances would be made to cover the supplier's invoices. Part way through the construction process it became clear that advances would not cover the supplier's invoices. The supplier was never told. The court found that the lender negligently misrepresented the circumstances of the construction to the supplier and accordingly was liable.
- The final case I will refer to in this area is a 1999 Ontario Court of Appeal decision. The lender submitted a title requisition letter with 52 requisitions. The court held that the lender was not contractually entitled to submit these requisitions and accordingly not entitled to rely on them as justification for refusing to advance.

A Lender's Obligation To Advance

- In conclusion a lender should be cautious in relying on a plain wording interpretation of its discretionary advance clause. The clause can likely be relied on if a borrower experienced substantial financial difficulty, or if the real property was materially contaminated or if substantial title defects were uncovered. It is not so clear for reasons such as a deteriorating economy, rising interest rates, an amended internal lending policy or an arbitrary decision reversal.

A Purchaser's Ability To Terminate Using The Due Diligence Condition

- The most important issue for a purchaser reviewing and signing a purchase agreement is the ability to terminate pursuant to a due diligence condition. A common due diligence condition might read as follows:
 - “The purchaser may, by written notice to the vendor, at any time before 5:00 p.m. on April 28, 2010, terminate this agreement and the transaction contemplated hereunder because it does not approve, in its sole, absolute and unfettered discretion, of title to the real property, the physical condition of all improvements constructed and/or installed thereon, the environmental condition of the real property and/or such improvements and/or any other matter relating thereto.”
- Despite the fact that the clause is clear and easily understood, the Canadian courts, in an effort to avoid unfairness, have interpreted the words creatively.
- Termination On the Basis of Deficiency
- The courts have held that a party exercising its right to terminate on the basis of a property deficiency must do so in good faith.

A Purchaser's Ability To Terminate Using The Due Diligence Condition

- Other decisions have indicated that the test is not about good faith, but of materiality, and good faith is merely one of the factors which enables a court to gauge materiality.
- Termination By Reason Of A Time Of Essence Clause
- The courts have held that a party exercising its right to terminate on the basis of the other party's failure to comply with a time of essence obligation, must do so in good faith.
- Termination By Reason Of Failure To Fulfill A Condition
- The courts have held that a termination condition cannot be used by the benefiting party unless it took all reasonable steps or used its best efforts to fulfill the condition.

Best Efforts vs. Reasonable Efforts

- Contracts often include the phrases “best efforts” or “reasonable efforts”. In negotiating agreements over the years I have heard many different definitions of these terms from lawyers. However, the view of the courts is relatively settled. The main principles from the cases concerning “best efforts” are:
- “best efforts” imposes a higher obligation than “reasonable efforts”;
- “best efforts” means taking, in good faith, all reasonable steps to achieve the objective, leaving no stone unturned;
- “best efforts” includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour;
- “best efforts” are not boundless; the contract provisions, parties and purpose must be considered in setting the relevant boundaries;
- a party using best efforts must act honestly and fairly;
- inevitable failure is strong evidence of a party’s failure to use best efforts; and
- evidence that the party failing to use best efforts had the potential to use such efforts and the potential to succeed, constitutes evidence of its failure to do so.

Best Efforts vs. Reasonable Efforts

- Courts have indicated that “best efforts” involve doing all that can reasonably be done in the circumstances and choosing the course of action with the greatest chance of fulfilling the contractual obligation. Such efforts require “first-class, not second-class efforts”, but they do not require a party to sacrifice its own economic interests (which must be distinguished from mere financial disadvantage).
- “Reasonable efforts” are clearly objective in nature, and based upon what other reasonable persons would have done in the circumstances. The courts have been less clear on the differences between “reasonable commercial efforts” and “reasonable efforts”, though the former would have stronger links to established business and industry practices. “Reasonable” has been described as logical, sensible and fair, not requiring the party to go to “absurd, whimsical or unwarranted lengths. “Best efforts” have been described as all reasonable efforts, whereas “reasonable efforts” have been described as only some reasonable efforts. “Reasonable efforts” can be second-best or third-best, and leave some stones unturned.

Best Efforts vs. Reasonable Efforts

- Sometimes courts have implied a promise on the part of each contractual party to use best efforts to do all that is necessary to secure performance of the contract. Other times courts have implied a promise only to use reasonable commercial efforts. The important lesson for the drafting lawyer is to ensure that the obligation imposed is what the parties intend and expect.

Case Law Update

Craig R. Carter

A. POWER OF ATTORNEY AND PRESUMPTION OF GIFT

- Pecore v. Pecore 2007 S.C.C. 17
 - No presumption of gift to adult children
 - Presumption of gift by either parent to under age children

A. POWER OF ATTORNEY AND PRESUMPTION OF GIFT (Cont'd)

- McMullen v. McMullen (2006) 49 R.P.R. (4th) 112
 - cannot benefit from use of power of attorney
 - fiduciary relationship
- Banton v. Banton (1998) 164 D.L.R. (4th) 176
 - use of power of attorney
 - capacity of marry
 - testamentary capacity

B. FRAUD

- St Onge v. Willowbay Investments Inc. (2008) 73 R.P.R. (4th) 294
- Reviczky v. Meleknia (2007) 88 O.R. (3d) 669

C. NON-DISTURBANCE/ATTORNMENT AGREEMENT

- 473807 Ontario Limited v. TDL Group Ltd. (2006) 47 R.P.R. (4th) (ONT. C.A.)

D. DUTY TO DISCLOSE

- Krawchuk v. Scherbak (2009)

E. ADVERSE POSSESSION

- Elliott v. Woodstock Agricultural Society (2008) ONCA 648

F. ORAL AGREEMENTS

- Erie Sand and Grave Limited v. Seres Farms Limited 97 O.R. (3d) 241 (ONT. C.A.)
- Wallace v. Allen (2007) 85 O.R. (3d) 88 (ONT. C.A.)

G. LIMITATION PERIODS: Demand Facilities

- Hare v. Hare (2006) 83 O.R. (3d) 716 (C.A.)
 - Demand Promissory Note
 - Limitation period runs from issuing demand note not demand

G. LIMITATION PERIODS (Cont'd)

- Bank Of Nova Scotia v. Williamson (2008) 54 B.L.R. (4th) 155 (O.S.C.)
 - Guarantee payable on demand

G. LIMITATION PERIODS (Cont'd)

- Mortgage Insurance Co. Of Canada V. Grant (2009) 84 R.P.R. (4th), (C.A.)
 - Indemnity Agreement
- McVan General Contracting Ltd. v. Arthur et al 61 O.R. (3d) 240
 - Mortgage Limitation

G. LIMITATION PERIODS (Cont'd)

- New Amendments to Limitation Period Changes Rule to Date of Demand
 - Bill 114

Land Transfer Tax Grabs and HST Update

Andrea L. Centa

Land Transfer Tax: When is it payable?

- Land Transfer Tax ["LTT"] is payable on every conveyance of land tendered for registration and every unregistered disposition of a beneficial interest in land unless specifically exempt under the Land Transfer Tax Act ["LTTA"] or regulations. It includes:
- Transfers of Land (including buildings, buildings to be constructed, structures, fixtures, and interests therein)
- Transfers of Beneficial Interest (3 exceptions: Beneficial Owner to Trustee, Trustee to Beneficial Owner, Trustee to Trustee where the Beneficial Owner remains the same)
- Leases that exceed a term of 50 years (including renewals and extensions)

Land Transfer Tax: Value of Consideration

- "the gross sale price or the amount expressed in money of any consideration given or to be given for the conveyance by or on behalf of the transferee ..."
- "... and the value expressed in money of any liability assumed or undertaken by or on behalf of the transferee as part of the arrangement relating to the conveyance ..."
- "... and the value expressed in money of any benefit of whatsoever kind conferred directly or indirectly by the transferee on any person as part of the arrangement relating to the conveyance"

Land Transfer Tax: “Benefit Conferred”

- “Basket clause”: most difficult category to define
- Two requirements:
 - 1. Consideration or benefit flowing to some person (could be a person other than the transferor)
 - 2. Consideration must be related to a larger arrangement involving, or which includes, the conveyance

Land Transfer Tax: Value of Consideration – Ministry Targets

- The Ministry targets:
 - Related agreements which impose additional consideration
 - Vendor obligations that the Purchaser assumes

Land Transfer Tax: Value of Consideration – Related Agreements

- Linked Sale and Construction Contracts
 - Contract for the sale of a vacant land which includes a contract with the vendor for the construction of a building
 - Assaly – Courts will look at the degree of connection between the Purchase Agreement and the Building Contract to determine whether the two contracts are part of the same arrangement
- Multiple Deeds
 - Multiple deeds to the same person to obtain the lower tax rate for property under \$55,000. Since the transferor would not convey one deed unless the transferee acquired all of the other deeds, the consideration for one includes the consideration for all of the others
 - S.2.3 of the LTTA eliminates attempts to reduce tax by using multiple deeds if the Minister is of the opinion that one of the reasons for using multiple deeds is to reduce land transfer tax
- Linked Sale and Property Management Agreements
 - The Vendor or a related entity of the Vendor offers property management services as a condition related to the sale
 - 472601 Ontario Ltd. – The value of related services is included in the value of the consideration and therefore taxable

Land Transfer Tax: Value of Consideration – Vendor Obligations

- Vendor obligations assumed by the Purchaser constitute consideration
- Environmental Remediation (“As-is-where-is” deals)
 - Vendor sells property at a reduced price in exchange for the Purchaser assuming obligations of environmental remediation.
 - Client example: the Purchaser agreed to take the Property “as-is-where-is” at a lower purchase price, instead of requiring the Vendor to provide an environmental representation in the Purchase Agreement
 - Post-closing, the Purchaser spent money on remediation
 - The Ministry audited and calculated Land Transfer Tax on the Purchase Price of the Property + the amount that the Purchaser spent on the remediation of the land

Land Transfer Tax: Minister's Authority to Audit and Inspect

- LTTA grants the Minister a broad authority to audit and inspect land transfer-related documents and information.
- S.10(2) Audit and Inspection -- Demand for information:
 - "The Minister may, for any purpose relating to the administration or enforcement of this Act, serve on any person ... a written demand for information or for the production on oath or otherwise of books, letters, accounts, invoices, financial statements or such other documents as the Minister ... considers necessary to determine compliance with this Act."

Land Transfer Tax: Timeliness Obligation

- S. 10(2.1) imposes a timeliness obligation to be defined in the demand:
 - "A person in receipt of a demand under subsection (2) shall comply with the demand within the time specified in the demand."
- Section 10(5) establishes that anyone who fails to comply with such a demand "is liable on conviction to a fine of \$50 for each day during which the default continues."

Land Transfer Tax: Contravention of the Act

- Ss. 6 and 7 establish harsh penalties for wilfully contravening the Act, including large fines and imprisonment
- Offence, false statements
 - Min: Greater of \$1,000 or 50% tax payable
 - Max: Double the tax payable
 - Imprisonment up to two years
- Offence, general
 - \$10,000 if no other penalty provided for offence
- : 6 year limitation period for offences under the Act

Land Transfer Tax: Assessment

- S.12 describes the assessment process
- Notice of assessment
 - Amount of assessment must be remitted within 30 days of delivery of notice or immediately if the notice indicates that the amount is payable forthwith
- Limitation period
 - 4 years from the day the tax became payable
 - Any time the Minister considers reasonable in cases of neglect, wilful default, or fraud
- Waiver of limitation
 - Minister may assess or reassess at any time if the person has filed a waiver

Land Transfer Tax: Objections

- There is no formal objection process for a demand for information
- S.13 permits a person to file a Notice of Objection to a s.12 assessment or a s.8(7) statement of disallowance within 180 days of delivery

Land Transfer Tax: Judicial Remedies

- Judicial remedies under the LTTA are court proceedings
- A person may appeal an assessment to the Superior Court (s.14), and the Minister may bring an action for the recovery of amounts owing to any appropriate court (s.15)

HST: The Basics

- When: July 1, 2010
- What:
 - A) One 13% value-added tax
 - B) Two rates of tax for new homes and condos
 - One rate on the first \$400,000 of the purchase price and a different rate for amounts above \$400,000
 - C) Three separate provincial rebates for new homes and condos
- Why: Tax Reform

HST: General Rule on HST and Real Estate

- "Supplies of real property and supplies of services in respect of real property situated in Canada are taxable, unless specifically exempted."
 - GST/HST Memoranda Series, 19.1, Real Property and the GST/HST, para. 32
- HST's effect on real estate is virtually identical to that of GST (except for rebate rates and thresholds for rebates)

HST: Types of Supplies

- Three categories of supplies exist under the current GST legislation:
 - a) Taxable supplies - suppliers charge GST at the rate of 5%, and are eligible to claim input tax credits for GST paid on expenses
 - b) Zero-rated supplies - suppliers charge GST at the rate of 0%, but are still eligible to claim input tax credits for GST paid on expenses
 - e.g. groceries, prescription drugs, medical devices
 - c) Exempt supplies - suppliers do not charge GST, and are not eligible to claim input tax credits for GST paid on expenses
 - e.g. health/dental services, long-term residential rents, domestic financial services

HST: Commercial Tenancies

- Most commercial tenants will not experience any significant change.
- 13% HST will be collected on commercial rent rather than 5% GST
- Offsetting input tax credits for the full amount of HST paid on rent will be available to commercial tenants that are GST registrants who provide taxable or zero-rated supplies
- For providers of exempt supplies, rent increases of 8%

HST: Purchases of Commercial Properties

- HST should have no net effect on buyers of commercial properties who are
 - 1. GST registrants
 - 2. Not providing an exempt supply
 - 3. Primarily using the property for commercial purposes

HST: Residential Tenancies

- Residential tenancies will continue to be an exempt supply
- Residential landlords
 - (a) cannot collect Ontario HST from residential tenants
 - (b) cannot claim input tax credits for Ontario HST paid on expenses
- Many services not subject to PST today will be subject to HST, including property management fees, maintenance costs, repair services and electricity
- Residential landlords will face significantly higher costs once the Ontario HST takes effect

HST: Commercial Condo Maintenance Fees

- Commercial condominium maintenance fees will be subject to the 13% Ontario HST
- Like a commercial tenancy, offsetting input tax credits for the full amount of Ontario HST paid on maintenance fees will be available to owners of commercial condominiums, provided they are GST registrants who provide taxable or zero-rated supplies
- Owners of commercial condominiums that provide exempt supplies will see their maintenance costs increase by 8%

HST: Residential Condo Maintenance Fees

- As an exempt supply, no GST is charged on residential condominium maintenance fees
- However, large increases in residential condominium maintenance fees are likely under the Ontario HST because operating costs for the services provided will escalate starting July 1, 2010
- HST will impact residential condominium maintenance fees indirectly rather than directly
- Current estimates are that electricity, gas, communications, cable television, and contracts for management, concierge, elevator and mechanical equipment maintenance, landscaping, cleaning and similar services will increase by close to 8%

HST: Real Estate Services

- Real estate commissions, legal fees/disbursements, surveyor charges, appraisal fees, home inspections and home energy audits will all be subject to 13% HST
- As with the GST, sellers of commercial properties who are GST registrants and not exempt suppliers can claim a full offsetting input tax credit for the Ontario HST paid on real estate commission and other real estate services
- This option is not available to individuals selling a principal residence or other personal-use property

HST: Mortgage Broker Fees, Title Insurance Premiums, Resale Homes and Condos

- Services provided by mortgage brokers are an exempt supply
- Title insurers are financial institutions under the Excise Tax Act providing exempt supplies
- Sales of a resale home or condominium ("used residential complex") are exempt, provided the vendor is not the builder of the unit, and the vendor has not claimed any input tax credits regarding its purchase or any improvements

HST: New Homes and Condos

- 13% tax will be charged on the entire purchase price of any new home or condominium (5% federal, 8% provincial), less any rebates
- Enhanced basic rebate:
 - For purchase prices up to and including \$400,000: net Ontario HST is 2%
 - For purchase prices over \$400,000:
 - net Ontario HST is 2% on first \$400,000 (i.e. \$8,000)
 - Ontario HST is 8% on portion over \$400,000
 - These numbers reflect a flat rebate of \$24,000 (or 6%) on the first \$400,000 of purchase price

Ontario Rebate Chart*

From \$350,000 to \$450,000	Partial GST New Housing Rebate (phase-out)
Over \$450,000	No GST New Housing Rebate
As of July 1, 2010 – 13% HST; FEDERAL PORTION (GST): 5%; ONTARIO PORTION: 8%	
PRICE (EXCLUDING GST AND ONTARIO HST)	REBATE
Less than \$350,000	Full federal (GST) New Housing Rebate (36% of 5% of price), plus full Ontario new housing rebate (6% of price) (net tax is 2%)
From \$350,000 to \$400,000	Partial federal (GST) New Housing Rebate (phase-out), plus full Ontario new housing rebate (6% of price) (net tax is 2%)
Over \$400,000 to \$450,000	Partial federal (GST) New Housing Rebate (phase-out) plus flat \$24,000 rebate of Ontario HST
Over \$450,000	No federal (GST) New Housing Rebate, plus flat \$24,000 rebate of Ontario HST

*Silverstein, Alan G. *The Ontario HST and Real Estate 101*. January 2010 at p.4-11

HST: Transitional Rules - New Homes/Condos

- Three criteria determine the obligation to pay Ontario HST:
 - (a) when the Agreement of Purchase and Sale was entered into
 - (b) when occupancy or ownership is transferred
 - (c) what is being bought - a new home or a new condominium

HST: Transitional Rules Chart*

BEFORE JUNE 19, 2009	BOTH AFTER JUNE 30, 2010	Ontario HST does not apply (grandparented)	Ontario HST does not apply (grandparented)
AFTER JUNE 18, 2009 AND BEFORE JULY 1, 2010	EITHER BEFORE JULY 1, 2010	Ontario HST does not apply, based on occupancy / closing date	Ontario HST does not apply, based on occupancy / closing date
AFTER JUNE 18, 2009 AND BEFORE JULY 1, 2010	BOTH AFTER JUNE 30, 2010	Ontario HST applies; not grandparented; buyer MAY BE eligible for PST Transitional Housing Rebate	Ontario HST applies; not grandparented; buyer NOT eligible for PST Transitional Housing Rebate

*Adapted from Silverstein, Alan G. *The Ontario HST and Real Estate 101*. January 2010 at p.4-18

HST: PST Transitional Housing Rebate

- New home/condominium transactions that close after June 2010 could have a significant amount of PST embedded in the purchase price
- Buyers in last row of chart face double taxation (paying Ontario HST on the purchase price in addition to PST on the building materials)
- The PST Transitional Housing Rebate is designed to prevent this
- Eligibility:
 - 1. Buyers of new or substantially renovated homes who pay the Ontario HST
 - 2. Investor buyers or builder landlords who are subject to the Ontario HST, and who first rent a new or substantially renovated home after June 2010
 - Not buyers of new residential condominium units (no explanation provided)

HST: Disclosure

- Agreements of Purchase and Sale for new homes/condominiums must disclose
 - (a) if the purchase is subject to the Ontario HST, and if so,
 - (b) whether the purchase price includes the Ontario HST net of the Ontario new housing rebate
- Inadequate, incomplete or non-disclosure means the purchase price is deemed to include the Ontario HST (i.e. the builder is responsible for paying the Ontario HST, not the buyer)

HST and the Land Transfer Tax

- LTT is paid on the value of consideration
 - Land Transfer Tax Bulletin LT 4-2004 (revised January 2008): “When GST applies to the purchase of land or an interest in land, the value of the consideration does not include the amount of GST paid on the purchase price. Accordingly, land transfer tax is not exigible on the GST paid.”
- This is designed to avoid consumers paying (LTT) on (GST)
- Presumably, this will also apply to HST

HST: Government Information Sources

- Ontario Ministry of Revenue HST notices:
 - <http://www.rev.gov.on.ca/en/notices/hst/>
- Ontario Ministry of Finance Tax bulletins:
 - <http://www.fin.gov.on.ca/en/publications/bulletins/>
- CRA GST/HST Alphabetical Index of Topics:
 - <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/menu-eng.html>
- CRA GST/HST Memoranda Series, Chapter 19 -- Special Sectors: Real Property
 - http://www.cra-arc.gc.ca/menu/GTMS_19-e.html
- CRA GST/HST Notices:
 - <http://www.cra-arc.gc.ca/menu/GTNO-e.html>

Due Diligence

Neil M. Smiley

Due Diligence - Defined

“**Due Diligence**” is a term used for a number of concepts involving either the performance of an investigation of a business or person prior to signing of a contract, or the performance of an act with a certain standard of care.

- It can be a legal obligation, but the term will more commonly apply to voluntary investigations. A common example of due diligence in various industries is the process through which a potential acquirer evaluates a target company or its assets for acquisition.

From Wikipedia, the free encyclopedia

Due Diligence – Types of Affected transactions

- Purchases and Sale of real property
- Joint Ventures
- Partnerships
- Share Transactions – involving property
- Loan Transactions – secured by real property assets
- Asset transaction – involving leases and/or licences

Due Diligence – Who, When, What, Where?

- Who?:
 - Create a Due Diligence Strategy at the outset
 - Analyze the type of information to be reviewed and determine the extent of professional assistance that will be required (engineering/planning/environmental/forensic accounting/lease specialists etc.)
 - Determine who will coordinate, engage and manage the Due Diligence Team
 - Consider if solicitor client privilege needs to be attached to outcome of any study, report or investigation
 - Strategy needs to recognize back-up support

Due Diligence

- When:
 - Strategy needs to be able to respond immediately
 - Do not wait until the legal agreements are signed
 - If retainers are required, have them in place or a phone call away, particularly if environmental site assessment is required
 - As a potential vendor/landlord/borrower, make sure documentary records are up to date and accurately affect the status quo

Due Diligence

- What to Review/Consider:
 - anything that will bear on marketability/value or usage of the Property
 - materiality - err on side of caution
 - do not be rigid in investigations
 - review/consider the “obvious” and the “not-so obvious”

Due Diligence – The Obvious

- Registered title records, including deeds, charges, notices, agreements, options, rights of first refusal (ROFR)
- Unregistered agreements; may include options or ROFRs
- Environmental reports, studies, site specific risk assessments; records of site conditions,
- Leases, offers to lease and licences - assignable?

Due Diligence – The Not so Obvious “Forget Me Nots”

- Municipal:
 - Development Agreements - Site Plan, Severance, Financial, Subdivision, Condominium, Encroachments); Section 37
 - Interim Control By-law
 - Ravine Control – Conservation Authority
 - Heritage Protection
 - Tree Preservation
 - Permits
 - Fire Code Compliance
 - Official Plan reviews and Zoning By-law reviews
 - OMB Proceedings/appeals

Due Diligence - The Not so Obvious

- Provincial
 - EPA - Certificates of Approval
 - Water Taking Permits
 - Green Belt Plan
 - Oak Ridges Moraine
 - Parkway Belt
 - Niagara Escarpment
 - Food Belt
 - Heritage Act
 - Minister's Zoning Order



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ccarter@fasken.com

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Partner
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acent@fasken.com

Neil M. Smiley
Partner
416 865 5122
nsmiley@fasken.com



BIOGRAPHIES



Mark S. Brennan

Partner

Toronto

Direct Line: 416 865 5129

Facsimile: 416 364 7813

mbrennan@fasken.com

www.fasken.com/mark-brennan

Mark Brennan is a commercial real estate lawyer with more than twenty-five years of experience advising pension funds, real estate investment trusts, off-shore funds, financial institutions, partnerships and real estate corporations. Mark has expertise in financings, acquisitions and developments and is experienced in directing and overseeing large teams of lawyers in due diligence and transaction work. He is rated in the Canadian Martindale & Hubbell Legal Directory with the highest possible ratings for both legal ability and ethics.

Mark's recent experience includes acting for:

- DEGI International and DEGI Global Business in their acquisitions and financings of Canadian commercial real estate; these entities are German open-ended funds connected with Dresdner Bank, the Aberdeen Group (one of Europe's largest property fund managers) and the Credit Suisse Group;
- Toronto International Film Festival Inc. in the financing of its downtown Toronto office/cinema/retail project; and
- CDPQ Mortgage Investment Corporation, the mortgage arm of the Caisse de dépôt et placement du Québec, in various Canadian real estate financings.

Representative Experience

- *Toronto International Film Festival secures \$46 million loan from Ontario Infrastructure Projects Corporation*
Advised Toronto International Film Festival Inc.
- *DEGI International acquires Petroleum Plaza in Edmonton for \$130 million*
Advised DEGI International
- *CDPQ approves assumption of mortgage financing against 155 University Avenue, Toronto*
- *DEGI INTERNATIONAL purchases Ottawa Telus Tower*
Acted for DEGI INTERNATIONAL
- *DEGI INTERNATIONAL purchases 90% interest in major Calgary office complex*
Advised DEGI INTERNATIONAL
- *CDPQ Mortgage Corporation closes \$381 million construction mortgage loan for Maple Leaf Square in Toronto*
Advised CDPQ Mortgage Investment Corporation and MCAP Financial Corporation
- *Acted for CDPQ Mortgage Investment Corporation in a \$391 million loan to Legacy REIT*
Advised CDPQ Mortgage Investment Corporation

Areas of Practice

Real Estate

Corporate / Commercial

Education

LLB,
Queen's University, 1981

BA (Hons), Business
Administration
University of Western Ontario,
1978

Year of Call

Ontario, 1983

- *Acted as lead counsel for CDPQ Mortgage Corporation in loans secured by major office, retail and hotel properties*
Advised CDPQ Mortgage Investment Corporation
- *Acted for Canadian Real Estate Investment Trust in the acquisitions and financings of more than \$500 million of retail, office and industrial properties throughout Canada and the United States (including development and construction projects).*
Advised Canadian Real Estate Investment Trust
- *Acted as lead real estate counsel for an institutional lender in a \$450 million loan to one of Canada's largest retailers, secured against 25 major Canadian retail properties/ shopping centres.*
Acted as lead real estate counsel for an institutional lender
- *Acted for a real estate corporation in the sale of a \$275 million portfolio of southern Ontario office, industrial and retail properties.*
Advised a real estate corporation
- *Acted as lead real estate counsel for Orlando Corporation in the sale of a \$106 million shopping centre outside of Toronto.*
Acted as lead real estate counsel for Orlando Corporation
- *Acted for the Metro Capital Group in the acquisition and financing of a 10 building, 2,000 unit Toronto apartment complex.*
Advised Metro Capital Group
- *Acted for a group of pension funds and PenEquity Realty Corporation in the acquisition and development of a \$200 million downtown Toronto retail and entertainment project.*
Advised a group of pension funds and PenEquity Realty Corporation
- *Acted for Canadian Real Estate Investment Trust in \$100 million of facility loans from a banking syndicate, secured against 27 properties.*
Advised Canadian Real Estate Investment Trust
- *Acted for a substantial American real estate corporation in acquisitions and dispositions of Canadian office/industrial properties on its own behalf and on behalf of off-shore investors.*
Advised a substantial American real estate corporation
- *Acted as lead real estate counsel for a syndicate of financial institutions in the renegotiation and securitization of movie theatre leases in approximately 70 of Canada's major shopping centres.*
Acted as lead real estate counsel for a syndicate of financial institutions
- *Acted for 4 unrelated real estate investment trusts in substantial land transfer tax matters and several corporations in significant land transfer tax planning matters*
Advised 4 unrelated real estate investment trusts
- *Acted for a group of pension funds and PenEquity Management Corporation in the aborted acquisition and redevelopment of Maple Leaf Gardens (Toronto).*
Advised a group of pension funds and PenEquity Management Corporation
- *Acted for a real estate corporation in the securitization of approximately \$100 million of commercial subdivision and development property with Royal Bank.*
Advised a real estate corporation

Presentations

- The State of the Commercial Real Estate Market, Real Estate Group Seminar, April 28, 2010

Publications

"Drafted the Carswell standard form agreement of purchase and sale for commercial real estate transactions", January 2007



Craig R. Carter

Partner

Toronto

Direct Line: 416 865 4359

Facsimile: 416 364 7813

ccarter@fasken.com

www.fasken.com/craig-carter

Craig Carter is engaged in a commercial real estate practice including: commercial purchases and sales, easement issues, mortgage law, real estate insolvency, powers of sale and opinions on solicitor's practice. He has acted as counsel in real estate litigation and has been accepted by the Courts of Ontario as an expert on real estate issues and the standards of practice in real estate matters.

Craig is involved in extensive continuing legal education for the legal profession. He has chaired many programs for the OBA and Law Society, given papers for the Law Society, OBA, Canadian Institute, Insight and Federated Press. Craig is the co-editor of Butterworths book *Agreements of Purchase and Sale* and the author of *CCH Real Estate Guide Chapter on Land Transfer Tax* and author of 5 chapters for Falconbridge on Mortgages.

Craig is an adjunct Professor of Real Estate Transactions Queen's Law School and Osgoode Hall Law School. He is a past lecturer Masters of Law in Real Estate at Osgoode Hall Law School, past lecturer, Bar Admission Course Real Estate and Landlord and Tenant for Law Society, past Associate Head, Bar Admission Course - Real Estate and Landlord and Tenant, and past instructor, Business Law at Ryerson.

Craig joined the firm as an associate in 1985 and became a partner in 1987.

Representative Experience

- *FCI sells North American-based electrical division to Hubbell for US\$360 million*
Advised FCI S.A.
- *TD Bank provides \$54 million in mortgage financings to Morguard Corporation*
Advised The Toronto-Dominion Bank
- *Ornge purchases aviation assets from CHL for \$30 million; enters into \$90 million service agreement for helicopter fleet*
Advised Ornge
- *FCI acquires IMPLO Technologies*
Advised FCI Canada
- *CDPQ Mortgage Corporation closes \$381 million construction mortgage loan for Maple Leaf Square in Toronto*
Advised CDPQ Mortgage Investment Corporation and MCAP Financial Corporation
- *Goodyear sells Engineered Products Division to Carlyle Group for US\$1.475 billion*
Advised Goodyear on the Canadian aspects of this transaction
- *CN Pension Fund sells its 75% interest in Hudson's Bay Centre in Toronto to Brookfield Properties*
Advised CN Pension Fund

Areas of Practice

Real Estate

Education

BSc,
University of Toronto, 1974

LLB,
University of Toronto, 1977

LLM,
Osgoode Hall Law School at
York University, 1986

Year of Call

Ontario, 1979

- *Panattoni Canada Inc purchase of \$100 million warehousing facility including acquisition, financing, construction, leasing and sale*
Advised Panattoni Canada Inc.
- *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd., (2001) 196 D.L.R. (4th) 621 (Ont. C.A.)*
Counsel to Greater Toronto Home Builders' Association
- *Silaschi v. 1054473 Ontario Ltd. (2000), 48 O.R. (3d) 313, 186 D.L.R. (4th) 339; 31 R.P.R. (3d) 158 (Ont. C.A.)* Co-counsel.
- *Harris v. McNeely*
Counsel to Howard Harris

- *Dravidian Management Ltd. v. Vrhounik*
Ontario Court of Appeal - specific performance with abatement. Co-counsel.
- *Greenbanktree Power Corporation v. Coinamatic Canada Inc. et al.*
Ontario Court of Appeal - partition and sale. Co-counsel.
- *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.*
Ontario Court of Appeal - priority of mortgages and leases in mortgage remedies. Co-counsel.
- *Fire v. Longtin*
Supreme Court of Canada - clarification of title search obligations. Co-counsel.
- *Lot Six Acquisition Corp. v. Richmond Hill Centre Ltd.*
Ontario Court of Justice, General Division - Mortgages; conversions to foreclosure. Co-counsel.
- *CN Pension Fund acquires and subsequently sells its 50% interest in the Bay-Adelaide Centre site in Toronto*
Advised CN Pension Fund
- *The Toronto-Dominion Bank v. Goldberger*
Ontario Supreme Court - mortgage and powers of sale. Co-counsel.
- *Royal Bank v. Marra*
Ontario Court of Appeal - mortgages; aborted sales. Co-counsel.

Presentations

- The State of the Commercial Real Estate Market, Real Estate Group Seminar, April 28, 2010
- Real Estate: Severe Weather Warning - Are You Prepared?, Navigating The Financial & Economic Crisis Seminar Series, January 27, 2009
- OBA Annual Institute of Continuing Legal Education Conference 2007, February 5-6, 2007
- Annotated Agreements of Purchase and Sale, Law Society of Upper Canada, 2007 and 2008
- The Six-Minute Real Estate Lawyer, Chair, half day programme, The Law Society of Upper Canada, 1998-2008
- Covenants Concerning the Use of Land, Chair, full day programme, Ontario Bar Association - Real Property Section, October 16, 2006
- Real Estate Summit, Speaker, Law Society of Upper Canada, 2003-2008
- Real Estate, Co-facilitator, drafting workshop, The Law Society of Upper Canada, April 29, 2003
- Real Estate Wars, Co-chair, Ontario Bar Association, June 17, 2002
- Real Estate and the Waterfront, Co-chair, full day programme, Ontario Bar Association, 1991 and 2001

- Cottage and Rural Issues in Real Estate Conveyancing, Co-chair, full day programme, CBAO, April 2000
- Not Just Another Pretty Lake, Co-Chair, 2000
- Mortgage Law Update 1997, Ontario Bar Association, Chair, 1997
- The Agreements of Purchase and Sale, Ontario Bar Association Co-Chair, 1992-1997
- Mortgage in Possession, Speaker, The Canadian Institute, 1996
- Mortgage Remedies, Speaker, The Canadian Institute, 1995

Publications

- "Toronto Land Transfer Tax", Real Estate Bulletin, November 2007
- "Falconbridge on Mortgages", 5 chapters, 2006
- "Agreements of Purchase and Sale", Butterworths, 1997

Memberships and Affiliations

- Member, Ontario Bar Association
- Member, Law Society Real Estate Specialization Committee
- Past chair, OBA Continuing Legal Education Committee, OBA Real Property Section and CBA National Real Property Section
- Past member, OBA Executive

Rankings and Awards

- Recipient of 2001 Award for Excellence in Real Estate - Ontario Bar Association
- "Consistently Recommended" for Property Development by Lexpert
- Listed in the 2008 *Best Lawyers in Canada* directory for Real Estate Law
- Martindale Hubbell "AV" rating
- Certified as a specialist in Real Estate Law by the Law Society of Upper Canada
- Decade of Distinction award, Big Brothers of Metropolitan Toronto

Community Involvement

- Coach AA Baseball Toronto 1999-2007
- Past Board Member Big Brothers of Metropolitan Toronto



Andrea Centa

Partner

Toronto

Direct Line: 416 868 3348

Facsimile: 416 364 7813

acent@fasken.com

www.fasken.com/andrea-centa

Andrea is a partner in the firm's Real Estate group, specializing in commercial acquisitions and dispositions, financings and leasing. She has a transaction-based practice and advises domestic and cross-border clients in a variety of industries. Andrea's experience has included advising clients in the institutional lending, brokerage, property management services, real estate investment and hospitality industries.

Andrea has experience in asset purchase transactions involving negotiation and preparation of documentation relating to the acquisition, disposition and financing of office buildings, business parks and shopping centres.

Andrea is also experienced in the negotiation and preparation of documentation in connection with term financing, construction financing and bond financing, title insurance, reviewing title issues including mining transfers, negotiating office and industrial leases and related lease documentation and negotiation of hotel sales contracts.

Presentations

- The State of the Commercial Real Estate Market, Real Estate Group Seminar, April 28, 2010

Publications

- "Licensed to Lend", Canadian In-House Lawyer Magazine, February 2010

Memberships and Affiliations

- Member, Ontario Bar Association
- Member, NAIOP and NAIOP Developing Leaders Committee
- Member, Toronto CREW
- Member, Toronto Board of Trade
- Member, Moore Park Residents Association

Areas of Practice

Real Estate

Education

LLB,
Osgoode Hall Law School, 1997

BA, with distinction
York University, 1994

Year of Call

Ontario, 1999



Neil M. Smiley

Partner

Toronto

Direct Line: 416 865 5122

Facsimile: 416 364 7813

nsmiley@fasken.com

www.fasken.com/neil-smiley

Neil M. Smiley is engaged in a specialized multifaceted real estate development practice. Neil is an experienced commercial real estate lawyer in the acquisition, financing, leasing and disposition of real property. In so doing, he provides corporate support for such transactions including the negotiation of joint ventures, co-ownership and partnership agreements. He is also an experienced municipal planning and development lawyer who specializes in assisting clients with assessing the development potential of land, in securing development approvals, including approvals for severances, subdivisions, condominiums, official plan amendments, zoning amendments and site plan approvals and where required on appeal, in litigating such cases before the Ontario Municipal Board. Given his dual practice areas, Neil provides value-added service to his clients rarely seen in Ontario's legal community. His prior education and work experience as an urban planner allows Neil to apply such experience to complex legal transactions.

Areas of Practice

Real Estate

Municipal Law

Energy, Environmental, Climate
Change and Regulatory

Mining - Global Mining

Corporate / Commercial

Transportation

Project Finance

Education

B.E.S. (Hons) - Urban Planning,
University of Waterloo, 1984

LLB,
Osgoode Hall Law School at
York University, 1987

Course in Corporate Real Estate
Finance,
NACORE Capstone, 1997

Year of Call

Ontario, 1989

Representative Experience

- *CCMP Capital stalking horse bidder in Eddie Bauer bankruptcy*
Advised CCMP Capital Advisors
- *Barrick Gold purchases Hemlo stake from Teck Cominco for US\$65 million*
Advised Barrick Gold
- *Armistice Resources completes financing*
Advised Armistice Resources Corp.
- *Barrick Gold sells interest in Geraldton district to Premier Gold Mines*
Advised Barrick Gold Corporation
- *Yildiz Holding A.S purchases Godiva Chocolatier business from Campbell Soup for US\$850 million*
Advising Yildiz Holding A.S.
- *Pelangio Mines completes sale of Detour Lake Property*
Advised Pelangio Mines Inc. in its sale of Detour Lake Property to Detour Gold Corporation.
- *Bell Globemedia acquires CHUM*
Advised CHUM Limited
- *Industry wins significant victory before the Ontario Municipal Board*
Advised Valspar Inc., Rohm & Haas Canada Inc. and Crompton Company Inc.
- *DuPont Canada sells textiles and interior businesses in its largest transaction ever*
Advised DuPont Canada
- *St. Lawrence Cement acquires indirect subsidiary of Lafarge*
Advised St. Lawrence Cement Inc.

Presentations

- The State of the Commercial Real Estate Market, Real Estate Group Seminar, April 28, 2010
- 19th Annual Operation Update, Ontario Bar Association Professional Development, October 2, 2009
- Rental Housing Demolition and Conversions in the City of Toronto, Speaker, Joint OBA/OPPI Program, April 7, 2009
- Real Estate: Severe Weather Warning - Are You Prepared?, Navigating The Financial & Economic Crisis Seminar Series, January 27, 2009
- The Missing Client, Featured Panelist, CLE Teleseminar, May 31, 2006
- Getting Your Project Off the Ground, Canadian Institute, Municipal Approaches to Commercial Development, March 2006
- Fighting Real Estate Fraud, Featured panelist, LSUC, October 2004
- The Greater Golden Horseshoe - Greenbelt Legislation, Chair and speaker, Strategy Institute, January 2005

Publications

- "2009 Property Tax Assessment Update", Municipal Law Bulletin, March 2009
- "FILING DEADLINES: Property Tax 2007 - Vacancy Rebate Applications for Commercial and Industrial Buildings", Municipal Law Bulletin, February 2008
- "Toronto Land Transfer Tax", Real Estate Bulletin, November 2007
- "Property Tax 2006 - Vacancy Rebate Applications for Commercial and Industrial Buildings and 2007 Assessment Appeals", Municipal Law Bulletin by Neil Smiley and Thomas Barlow, February 2007
- "Vincent v. DeGasparis: The talk around the office cooler... and other topics", Municipal Law Bulletin by Neil M. Smiley, November/December 2005
- "Corporate Fraud: Identity Theft with a Difference", author, LawPro, June 2004

Memberships and Affiliations

- Executive Member of the Municipal Law Section of the CBAO
- Member of CBAO
- Member of the University of Waterloo Planning Association, which through its annual dinner, raises funds for the University of Waterloo's School of Planning
- Member of [Pragma Council](#), which involves high-level planning experts in Ontario

REFERENCE MATERIALS

CONTACT SHEET

Real Estate Group

**FASKEN
MARTINEAU** 

www.fasken.com

Toronto



W. Thomas Barlow
416 868 3403
tbarlow@fasken.com



Steve Blimkie
416 865 4416
sblimkie@fasken.com



Mark S. Brennan
416 865 5129
mbrennan@fasken.com



Craig R. Carter
416 865 4359
ccarter@fasken.com



Andrea Centa
416 868 3348
acenta@fasken.com



Katherine Christie
416 865 5418
kchristie@fasken.com



Dugan R. Edmison
416 865 4351
dedmison@fasken.com



Martin Emmons
416 868 3473
memmons@fasken.com



Todd Evershed
416 868 3502
tevershed@fasken.com



Paul R. King
416 868 3419
pking@fasken.com



Daniel R. Law
416 868 3479
dlaw@fasken.com



Neil M. Smiley
416 865 5122
nsmiley@fasken.com

