The Land Economist

PHOTO: *(Detail from) 'Black Towers-Toronto', paul (dex) busy @ work, Wikimedia Commons*

Summer 2010 Vol. 40, No. 2

'Bank towers' decision coming soon 2
Ontario's Court of Appeal heard the controversial property tax assessment case in June. At issue is the basis for assessing income properties.

Avoiding unexpected tax increases 3
Municipal bylaws under O.Reg 160 and 161 can trigger an exit from capping and clawback of property taxes.

Welcome New Members 4

Update your Web Info 4

Coming Events 4

News Briefs 4
Municipalities want end to joint and several liability • BC's approach better than ON's? • Hamilton/ TiCats spar over visions of new stadium development

Get more out of AOLE 4

Legislative Update 5
Budget savings to be found in labour? • Watchdogs staying • HST implemented July 1 • Eco fees in then not in • Possible anti-SLAPP bill • Building Code/ Accessibility

Professional Journal of the

Association of Ontario Land Economists

PO Box 26010, 2345 Yonge St.
Toronto, ON M4P 0A8
Tel: 416-283-0440
Fax: 416-480-2589
Email: admin@aole.org
Website: www.aole.org

Journal Chair: Keith Hobcraft
Journal Editor: Rmoyes@idirect.ca

Summary of Valuations as at June 30, 1999						
Property	MPAC Values Returned on Assessment Roll		City's Evidence		Complainants' Evidence	
	1999 CVA	Cap Rate	Value at 1999-06-30	Cap Rate	Value at 1999-06-30	Cap Rate
Scotia Plaza	525,293,000	8.0	610,000,000	7.25	Jenkins: 380,000,000	8.75
Commerce Court	549,938,000	8.0	n/a	7.75	Jenkins: 407,000,000 Benton: 412,328,000	8.75
T-D Centre	1,439,378,000	8.0	1,480,000,000	7.50	Benton: 1,014,068,000	8.75
BCE Place	917,688,000	8.0	1,020,000,000	7.25	650,000,000	8.75
Royal Bank Plaza	503,830,000	8.0	(adjusted) 537,000,000	7.50	Jenkins: 375,000,000 Jech: 358,511,000	8.75
First Canadian Place	825,463,000	8.0	875,000,000	7.50	Bishop: 609,679,000 Jenkins: 657,000,000	8.75
TOTAL VALUE (Excl. Commerce Court)	4,211,652,000	8.0	4,522,000,000	7.25 - 7.75	3,012,258,000 to 3,028,747,000	8.75
TOTAL VALUE all properties	4,761,590,000	8.0	n/a	n/a	3,419,258,000 to 3,028,747,000	8.75

SOURCE: *Appendix 1, Judgment of the Divisional Court: File No. 07-DV-001290*

'Bank Towers' decision coming soon

An Ontario Court of Appeal decision expected this fall could affect billions of dollars in property tax assessment across the province.

The initial Assessment Review Board decision in BCE Place et al v Municipal Property Assessment Corp. (otherwise known as the 'bank towers' case) created a furor when it was released in 2008.

Six major complexes in Toronto's financial core had argued that the definition of 'current value' in the Assessment Act had significantly changed the traditional basis of assessment for income-producing properties.

In total, for those properties, the change could mean as much as $1.5 billion in reduced assessment (down from MPAC's assessed values of $4.76 billion).

The ARB agreed with the building owners.

MPAC and the City of Toronto immediately applied for leave to appeal, and a group of Ontario municipalities – who saw the potential for billions of dollars of their own assessment base to disappear – applied to join in.

Last August, the Divisional Court ruled that the ARB's interpretation had been "unreasonable and unjust" and "approaching the absurd", and that the case should be re-heard by a different panel. Not surprisingly, the building owners appealed that decision, and the case was heard by the Ontario Court of Appeal in June.

The key issues in this dispute are:

- what does 'current value' mean when it is defined as "the amount of money the ***fee simple, if unencumbered***, would realize if sold at arm's length by a willing seller to a willing buyer"?
- how should ***fee simple, if unencumbered*** be calculated for income properties?
- what is the standard of review that the courts should have over the ARB?
- what will the decisions in this case mean for future assessment and taxation?

Meaning

Prior to 1997, the Assessment Act said the basis for assessment was 'market value' – defined as "the amount that the land might be expected to realize if sold on the open market by a willing seller to a willing buyer".

Apparently no other jurisdiction in North America uses the concept of 'fee simple if unencumbered' for income-producing properties as Ontario now does. Many use 'leased fee at market' approaches or some other variation recognizing cash flow.

MPAC argues that the buildings should be valued on an income basis, with tenanted space valued as though it were rented at current market rents. It uses a 7% vacancy adjustment.

Lawyers for the bank towers argued that leases constitute encumbrances. Therefore, under 'fee simple without encumbrances' the building should be valued as if vacant and unfinished, with a 24-month lease-up period.

They acknowledge that assessments prepared this way do not reflect sale values in the market, but say that MPAC's values are equally hypothetical. Although the Divisional Court talked about the sale of First Canadian Place for $825 million while the bank towers argument would have valued it at approximately $600 million, it didn't mention the T-D Centre, which sold for $1.1 billion while MPAC assessed it at almost $1.5 billion.

Calculation issues

One key argument is capitalization rates. The bank towers experts called for a cap rate of 8.75% to reflect the vacant status. MPAC used a rate of 8%. Other issues include: what constitutes a typical new lease (the bank towers argue the only new leases were full floors, while MPAC would take into account renewals, etc.), whether only the owners' interest should be valued, and whether tenant improvements should be included.

Review Standard

The question here is whether a court can overturn ARB decisions that it determines to be 'incorrect' or only those that are 'patently unreasonable'.

Implications

Last year, MPAC stated that there are approximately 17,000 properties with a current value assessment of almost $100 billion in Ontario currently assessed on the same basis as the bank towers. Accepting the bank towers' interpretation could put $25 billion in assessment at risk across the province. The City of Ottawa has estimated that it has approximately $4.3 billion of assessment at risk, corresponding to potentially $100 million in property taxes. "A 10% increase in tax rates would be required to compensate for the tax revenue loss," it said.

Other commentators argue that most of the tax reductions would be clawed back. Also, commercial property taxes are very high in southern Ontario, especially in Toronto, and an adjustment may be warranted. **RM**

Avoiding unexpected tax increases

by Gerry I. G. Divaris MIMA, PLE

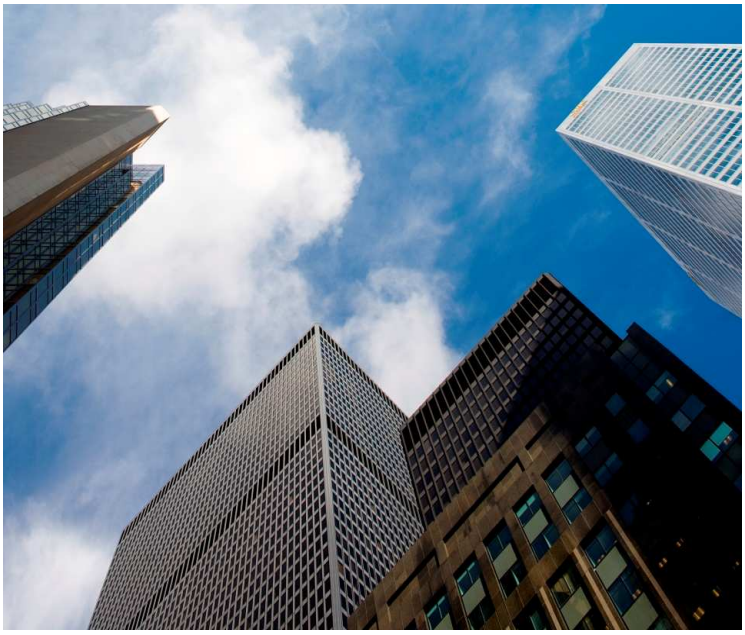


PHOTO: Detail from Toronto 'Centred' by Owen Byrne, on Wikimedia Commons

Over the past twelve years Ontario has had a property tax nightmare visited upon it by a "Common Sense Revolution" that quite frankly made no sense.

This 'revolution' imposed on the tax payers an unmanageable and unnecessarily complex system of capping and clawback of taxes. This regime, in effect, continued the tax advantage for certain properties by capping their tax liabilities to a fraction of what they should have been under the Current Value Reassessment, while others were penalized by having the reduced tax liabilities or refunds they were entitled to clawed back.

The system of capping and clawbacks was intended to be an 'interim measure' for the first three year reassessment 1998-2000. It has never been revoked.

In July 2009, the provincial government introduced two new Ontario Regulations which allow municipalities to opt out of the capping and clawback regime.

Under O-160/09 (Municipal Act) and O-161/09 (City of Toronto Act) municipalities can pass bylaws that remove capping and/or clawbacks under specific circumstances.

The three most dangerous triggers are:

1. a property moves from a clawback to a capping position
2. a property moves from a capping to a clawback position
3. a property has reached CVA taxation in the previous year

If one of these triggers gets activated, the effect for the majority of commercial and industrial properties in Ontario will be the instantaneous raising of property taxes.

For municipalities that have passed bylaws, some changes have already occurred, but the bulk will be realized with the issuance of the final 2010 property tax bills.

So, how will it work in practice?

CASE 1: Industrial property moves from clawback to cap

This assumes an industrial property with a property tax bill of $27,000 for 2008 versus its CVA taxes of $25,500. In 2009, the provincial reassessment produced a doubling of the property's CVA, with the resulting CVA taxes increasing to approximately $51,000. Under the old system, the increase would have been capped at 10% over the 2008 level, or $29,700. Under the new system, the property moves from a clawback to a capped position. This activates the first trigger noted above, and makes the property liable for the full $51,000 CVA tax bill.

CASE 2: Office property moves from cap to clawback

This assumes a mixed use commercial office property with ground floor retail. Taxes ($550,000 in 2009) are still being capped but are close to CVA level, so the property will probably come out of capping protection at the 2012 reassessment.

As well, it is currently being marketed and the expected purchase price is significantly higher than the 2009 assessed value.

The owner has appealed the 2008 assessment. If successful, this appeal would yield a small tax rebate of a few thousand dollars. However, pursuing this appeal would also have two very negative effects:

- it would activate trigger #2, moving the property from a cap to a clawback
- the pending sale might be considered, triggering an early reassessment of the CVA at the higher value

The result of this property being removed from capping protection would be a total annual property tax bill of $2 million – far beyond competing properties' tax liability.

CASE 3: Retail property reaches CVA taxation

This assumes a retail property that was in a clawback position in 2008, but due to an increase at the 2009 reassessment it has moved to a capped position. It is determined that the property is over-assessed for the 2009 taxation year.

The standard strategy would be to appeal all years between 2009 and 2012. But that would end up costing the owner a significant amount of money. Why? Because a successful appeal of the 2009 assessment will leave the property trapped in a clawback position.

The better alternative is to accept the 2009 increase and challenge the assessment for years 2010-12. That will activate the third trigger above (the property reaches CVA taxation level). As a result, it escapes from the current clawback regime. Refunds can flow in full – a little change which in this case is worth an extra $1.3 million over the four years.

Diminished property values

Valuations/appraisals should take into account the effects of these regulations on potential cash flows. Serious attention must be paid to current taxes and appeals, as well as unresolved appeals for previous years, to ensure that tax liabilities are kept at reasonable, competitive levels.

Gerry Divaris is Vice President and National Practice Director of Cushman & Wakefield Property Tax Services. Based in Toronto, with offices across the country, C&W is the first national real estate brokerage to provide property tax services in Canada.

Welcome New Members

Dan Brewer AACI, Papp, MRICS, CRP, PLE
Appraisers Canada Inc., Richmond Hill
905-884-5499
danbrewerappraisers@rogers.com

Jeffrey Climans MIMA, PLE
The Climans Group Inc., Toronto
416-483-8148
jsclimans@theclimansgroup.com
www.theclimansgroup.com

Dan Washik MIMA. PLE
Municipal Property Assessment Corp.
Kitchener
519-653-4774 ext 270
washikda@mpac.com

Members of the Association of Ontario Land Economists (AOLE) are entitled to use the widely recognized Professional Land Economist designation (PLE). See www.aole.org.

COMING EVENTS

mid Sept: **Renovation tour: plans are being finalized now**

October 7: **ANNUAL GENERAL MEETING Royal Canadian Yacht Club**

Watch your inbox for more details!

Update your web info

Every AOLE member can update her or his own listing info on the Association's website. We have just added an option to list **YOUR BUSINESS WEBSITE** and a brief **NOTE ON YOUR SERVICES**. Login from the banner on any page, using your username and password.

News Briefs

Municipalities want end to 'joint and several' liability

In early July, the Association of Municipalities of Ontario (AMO) sent the province's Attorney General nearly 100 resolutions from councils and conservation authorities calling for reform of joint and several liability (JSL).

"Under the current joint and several liability system in Ontario, a defendant whom is found to be only 1% liable for damages ... can be burdened with responsibility for paying the entire damage award if the co-defendants lack the ability to pay," AMO says in a paper recently presented to Hon. Chris Bentley. "As 'deep pocket' defendants with seemingly limitless public resources at their disposal through the power of taxation, municipalities have often become the targets of litigation when other defendants do not have the means to pay high damage awards."

Claims against municipalities have arisen out of facility rentals, roads, traffic accidents, planning, and building inspections. "Further still," AMO says, "there have been instances of municipalities being sued for negligent building inspections with homeowners not even bothering to name or search for the homebuilders or contractors who are often more responsible for a plaintiff's loss."

As well, JSL contributes to the slow pace of brownfield redevelopment, results in higher insurance premiums, and has caused municipal governments to scale back on services to avoid attracting a 'duty of care'.

The Association calls on the Ontario government to significantly modify JSL or replace it with a liability system where defendants are only responsible for their proportion of guilt and damages. Many jurisdictions have enacted this kind of change, it points out. "In fact various forms of proportionate liability have now been enacted by all of Ontario's competing Great Lakes states as well as 38 other states south of the border."

BC approach better than ON's?

Altus Group Economic Consulting's July Housing Report focuses on outcomes of the Growth Plan for the Greater Golden Horseshoe. One nugget: "In contrast to the Growth Plan's top-down approach to growth management, the Livable Region Strategic Plan (LRSP) was adopted in 1996 by the Greater Vancouver Regional Development Board, appointed by the councils of member municipalities ... The Board can amend the LRSP, whereas the Growth Plan can only be amended by the Provincial cabinet. Objectives to increase the GVRD's share of population in the Growth Concentration Area from about 65% in 1991 to 70% in 2021 ... and about 72% of household growth are being achieved so far."

Hamilton/TiCats spar over visions for new stadium development

With funding available for a Pan Am games stadium for 2015, it looked as though Hamilton and the Tiger Cats football franchise could build something that would also house the beloved team. But the City's vision of an entertainment area spurring urban renewal in the West Harbour doesn't fit with TiCats' owner Bob Young's business plan based on highway visibility and access, parking and development opportunities. Stay tuned!

Get more out of your Association

AOLE is looking for active members to serve on occasional ad hoc task forces or join the Board of Directors. If you would like to volunteer yourself or nominate someone, please email admin@aole.org.

Legislative Beat *cont'd from Page 4 ...*

densities and thus runs counter to provincial growth planning and affordability objectives. They would also add significant costs.

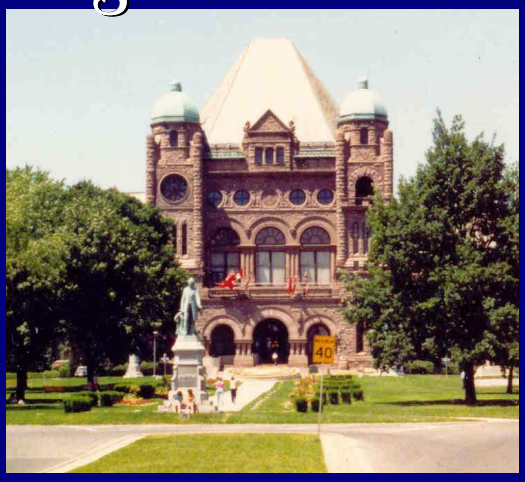
A costing study provided to the Province by the Residential Construction Council of Ontario in February 2010 estimated that, under the then-proposed standards:

- a typical suburban Toronto apartment would incur increased costs of approximately $20,000
- a typical townhouse would increase by $50,000.

Two of the most contentious recommendations are that walk-ups would no longer be allowed, and balconies would require zero (no step) thresholds. Although the most immediate impacts will be on new construction, the legislation will require all existing buildings to be in compliance by 2025.

Andy Manahan, Executive Director of the Residential and Civil Construction Alliance of Ontario (RCCAO), is a member of AOLE's Board of Directors and its Legislative Chair.

The Legislative Beat



By Andy Manahan PLE

Budget savings to be found in labour?

The Province's trial balloon to create a SuperCorp as a way to raise additional revenues to reduce the deficit, initially floated in late 2009, has been dropped. This scheme would have merged LCBO, Hydro One, Ontario Power Generation and the Ontario Lottery and Gaming Corporation, and then sold off a partial stake in the new conglomerate. These four Crown Corporations contribute $4 billion per year to the province.

A number of factors were against this restructuring such as federal tax implications on any asset sales, a lukewarm response from Bay St. and public pension funds and a negative reaction from public sector unions. Finance Minister Dwight Duncan called the plan off on July 11th noting the "unwieldy" nature of this entity, although he also pointed out that a restructuring of smaller assets worth hundreds of millions of dollars would be looked at.

Minister Duncan has more recently initiated a discussion with Ontario public sector union leaders to address possible wage freezes in an effort to rein in the province's $21.3 billion deficit. Labour leaders have threatened to launch court action if a freeze is imposed and have questioned the prudence of corporate tax cuts in a deficit environment.

Watchdogs staying

Despite an expected culling of three top provincial commissioners (AOLE, Vol. 40, No. 1), Environmental Commissioner Gord Miller, Integrity Commissioner Lynn Morrison and Ombudsman André Marin will remain in place. This has enabled two of these individuals to continue with a relatively robust agenda.

Miller, for example, has called for road tolls and a carbon tax as ways to reduce greenhouse gas emissions, questioned the decision to reduce the feed-in-tariff for ground-mounted solar installations, and published recommendations for improvement of the household hazardous waste management (eco fees) program – "a good plan that should not be scrapped".

Marin has announced "an investigation into the origin and subsequent communication of the controversial security regulation passed by the province" as part of the G20 Summit. (The temporary regulation gave police powers to search individuals within a five metre buffer zone of the security fence. Premier Dalton McGuinty has acknowledged the government could have explained the rules more clearly.)

HST implemented on July 1st

As everyone knows, the new 13% Harmonized Sales Tax now applies to most goods and services except for certain exemptions (e.g., only the 5% federal portion will apply to qualifying prepared food and beverages sold for $4 or less; and for child car seats).

There was no GST or PST charged on sales of existing homes before, and there will not be any HST now.

New home sales, on the other hand, do attract HST. Buyers are eligible for a rebate of 75% of the Ontario portion of the HST (8% x 75% =6% of the purchase price) to a maximum of $24,000. This is supposed to ensure that people buying homes up to $400,000 will pay no more sales tax under the HST regime than they did before on embedded sales taxes. However, people who purchase a home for more than $400,000 are paying higher taxes now.

Also, a range of previously PST-exempt services now have to pay the additional 8% . This includes real estate commissions, lawyers' fees, movers and home inspection fees.

For our drinking members, even though sales taxes on alcohol are decreasing, prices will remain the same ostensibly to support "social responsibility." Paternalism reigns supreme!

Eco fees in, then not in

Eco-management fees for 'Phase 1' household hazardous wastes have been collected from manufacturers since 2008 to offset the industry-funded recycling program costs. The funds go towards Stewardship Ontario programs in an effort to divert these products away from landfills.

On July 1st, the program was expanded to include thousands of new items such as household cleaning products, batteries and aerosols. Three weeks later, after public confusion and outcry because some retailers chose to show passed-on – and widely varying – 'eco fees' as a separate charge at the cash register, Environment Minister John Gerretsen imposed a 90-day moratorium.

Possible anti-SLAPP bill

On May 28th, the Attorney General announced the appointment of a three-person advisory panel to suggest possible legislation to help prevent so-called Strategic Litigation against Public Participation (SLAPP).

This was driven partly by a campaign by EcoJustice, Environmental Defence and CELA. These groups were incensed by Geranium Corp.'s filing of lawsuits against local ratepayers groups over the Big Bay Point development on Lake Simcoe.

It also follows on a recommendation from Ontario's Environmental Commissioner about legislation that has been applied in Quebec and many U.S. states. The panel is to make recommendations by September 30th. Public consultations will be held with interested parties.

Building Code/Accessibility

It is expected that there could be 800 code additions or revisions to the 2011 Ontario Building Code, with many of these related to Energy and Accessibility.

A major objective of the 2005 Accessibility for Ontarians with Disabilities Act is to develop a road map for accessibility standards that will identify, remove, and prevent barriers for people with disabilities in five key areas of living: customer service, public transportation, employment, information and communication, and the built environment.

At this time only the customer service standards within the public sector have been completed and brought into force.

However, controversial built form standards have been completed recently and are awaiting a decision by Social Services Minister Sophia Aggelontis. As proposed, the standards will significantly reduce allowable

The Legislative Beat continues on page 4