

## "LANDLORDS BEWARE – PROPERTY TAX OVERCHARGE!"\*

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In a recent case which is under appeal, the Ontario Superior Court dealt with the complaint of tenants who occupied office space in downtown Toronto and took issue with the way their landlords were calculating each tenant's share of property taxes through occupancy costs.

The Court addressed the following in its ruling:

### "GROSS UP" OF PROPERTY TAXES

Each tenant's share of property taxes payable under its lease as occupancy costs was calculated using a method which assumed that the building was fully occupied (the "gross up" approach).

The Court found that the landlords' standard form leases did not provide a specific right to gross up property taxes. The Court stated that the landlords were "sophisticated parties" and found that "it was open to the Landlords to include specific gross up language in the Leases - and they failed to do so."

Recent amendments to Ontario property tax legislation didn't help landlords. The Court examined the "factual matrix" surrounding the leases and statutory changes to the property taxation regime at the time of execution of the leases.

The Court found that the landlords were not entitled to "gross up" the leases and that the tenants were entitled to receive their share of the benefits of any tax rebates or vacancy credits received by the landlords in respect of the building.

### ESTOPPEL ARGUMENT & BAR TO RECOVERY

The leases contained a provision whereby tenants could not claim a re-adjustment in respect of occupancy costs for any fiscal year except by notice delivered to the landlord within 12 months after delivery by the

landlord of a certified statement of occupancy costs for that fiscal year.

The landlords argued that such provision acted as a bar to recovery where the tenants' complaints were raised more than 12 months after delivery of the certified statements.

In ruling that the tenants were not estopped from disputing the occupancy costs over a number of fiscal years in question, the Court found that:

- It was not material if a statement of occupancy costs was certified by the landlord or by its property manager;
- The "complete failure" of the landlords to certify the correctness of the real property tax component of the occupancy costs was a "fatal flaw";
- The statements contained errors and improper charges; and
- The landlords did not provide any evidence to establish detrimental reliance to support the estoppel argument.

### VACANCY REBATES

The Court examined recent modifications made to the *Municipal Act* which permit tax rebates to an owner of a commercial property with vacant portions.

In this case, the rebate was 30 per cent of the property taxes applicable to the building. The Court ruled that the landlords were required to account for any vacancy rebates and that a reasonable tenant which agreed to pay a percentage of realty taxes payable by its landlord "would reasonably assume that such taxes would be calculated net of any refund or rebate of real property taxes paid to the landlord."

The Court also ordered repayment of overcharged occupancy costs.

This case demonstrates that landlords can't be too careful in drafting the cost, charging and property tax provisions of their leases.