



# NEWS Release

September 30, 2003

## To Search or Not to Search – That is the Question

A recent decision of the Ontario Superior Court of Justice raises the following question - when negotiating a lease, should a tenant conduct a title search? The short answer is, yes. It is better to spend the money to search and find out the nature of the interest being acquired than to find out later that the lease does not achieve what the tenant intended.

Ownership structures of shopping centres or other developments may not always be what they first appear. One apparently integrated shopping centre may in reality be comprised of several parcels of land, which are subject to different ownership and encumbrances. This very scenario formed the basis of a recent injunction motion. The decision in *CSFY Inc. et al. v. CREIT Management Limited et al.* is a lesson on the importance of a tenant conducting a title search, when negotiating a lease.

In *CSFY Inc.*, a dollar store franchisee (the “Dollar Store”) and its franchisor sought an injunction requiring the defendants (two landlords and a second dollar store) to comply with its restrictive covenant. The Dollar Store sought to prevent the other dollar store from opening for business on the basis that its operation would be in breach of the Dollar Store’s restrictive covenant.

At one time, the shopping centre in which the Dollar Store was located was comprised of a single parcel of land made up of a developed portion and an undeveloped portion. The land was subsequently severed into two parcels of land. The first parcel (the developed portion where the Dollar Store was located) was owned and controlled by one landlord; the second parcel (the undeveloped parcel upon which the other dollar store was built) was owned and controlled by another landlord.

To the casual observer, the two parcels of land appeared to be one shopping centre. In fact, the two parcels were separately owned and operated by two unrelated landlords. The relationship between the two landlords was governed by a Mutual Easement and Operating Agreement (“Mutual Easement Agreement”) which was registered on title. The Dollar Store claimed it was not aware of this and believed that the two parcels formed one shopping centre, which was owned and controlled by one landlord.

The legal description in the Dollar Store’s lease made it clear that its restrictive covenant only applied to the first parcel of land. The Dollar Store’s lawyers argued that its landlord was a joint venturer with the landlord of the adjoining parcel of land, and, as a result, argued that the Dollar Store’s restrictive covenant extended to the adjoining parcel. The Dollar Store pointed to various facts that bolstered its “joint venture” argument, including the uniformity in appearance of the buildings on the two parcels, the existence of one main entrance and one pylon sign, as well as marketing materials of both landlords, which suggested that they each owned the entire shopping centre.

On September 3, 2003, the judge decided that there was no joint venture between the two landlords and the restrictive covenant did not extend to the second parcel.

In coming to this decision, the judge reviewed the transaction which severed the two parcels and looked carefully at the Mutual Easement Agreement. Under the Mutual Easement Agreement, the landlords granted each other certain easements but otherwise provided that each landlord would operate independently. The Mutual Easement Agreement specifically stated that nothing in the agreement “shall be construed to make the parties partners or joint venturers or render either of the parties liable for the debts or obligations of the other”.



Of greater importance is the judge's determination that since the agreement was registered on title "for the whole world to see", a title search would have clearly established that the two parcels of land were separately owned and operated. The registration acted as notice to the world of the existence of the agreement between the two owners and the statements contained in it.

Neither the Dollar Store's franchisor who negotiated the lease, nor its lawyers, searched title. The court ultimately determined that the Dollar Store could not rely on its mistaken impression that its landlord owned and controlled both parcels of land, when the documents registered on title clearly established that the shopping

centre was comprised of two separate parcels of land, each owned by separate owners. The title search would have established that the Dollar Store's restrictive covenant did not extend to the adjoining parcel. On this basis, the Dollar Store's motion for an injunction was dismissed.

This case brings to light the benefits of a title search as standard practice in a lease negotiation, especially where a restrictive covenant is being negotiated. If a party is truly intent on restricting competition, it must conduct a title search to establish the scope of its restrictive covenant. Considering the potential ramifications of failing to do the search, it's worth the cost and the effort.

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## Daoust Vukovich Baker-Sigal Banka LLP Welcomes Two New Members to the Team!

### **Wendy Donnelly** Litigation Law Clerk

As a Litigation Law Clerk, Wendy Donnelly provides cost effective service to Daoust Vukovich Baker-Sigal Banka LLP's clients in the area of rent and debt collection matters in the Small Claims Court, as well as under the Ontario Superior Court's simplified procedures. Wendy assists our litigation team in keeping its litigation files moving towards resolution in a timely and cost effective manner, whether through mediation or formal hearings.

**Wendy Donnelly**  
(416) 597-9306  
wdonnelly@dvbb.com

### **Bitali Fu** Senior Law Clerk

As a Senior Law Clerk, Bitali Fu brings with her 15 years of commercial leasing experience. Her most recent position was as Manager, Legal Services of CREIT Management Limited where she negotiated and administered leases and other legal documents. Prior to joining CREIT, Bitali served as Legal Services Manager for TD Investment Real Estate and as Senior Law Clerk for The Cadillac Fairview Corporation Limited.

**Bitali Fu**  
(416) 598-7053  
bitalif@dvbb.com



**Daoust Vukovich Baker-Sigal Banka LLP**  
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Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

DENNIS DAoust  
416~597~9339  
ddaoust@dvbb.com

NATALIE VUKOVICH  
416~597~8911  
nvukovich@dvbb.com

FRANCINE BAKER-SIGAL  
416~597~8755  
francine@dvbb.com

JEANNE BANKA  
416~597~0830  
jbanka@dvbb.com

WOLFGANG KAUFMANN  
416~597~3952  
wolfgang@dvbb.com

DEBORAH A. WATKINS  
416~598~7042  
dwatkins@dvbb.com

RONALD HABER  
416~597~6824  
rhaber@dvbb.com

DAWN MICHAELOFF  
416~597~8578  
dmichaeloff@dvbb.com

KENNETH A. BEALLOR  
416~597~8758  
kbeallor@dvbb.com

JOSEPH GRIGNANO  
416~598~7049  
jgrignan@dvbb.com

JOANNA BOARD  
416~597~9225  
jboard@dvbb.com

LYNN LARMAN  
416~598~7058  
llarman@dvbb.com

MIMI LIN  
416~597~8493  
mimil@dvbb.com

ALICE PERALTA  
416~597~1536  
aperalta@dvbb.com