

Commercial (NB) Real Estate Investing | 10 Key Legal Considerations

McInnes Cooper

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NB Commercial Real Estate



Legal Liability Risk Management



1. The Purchaser

Corporate
Purchaser

Individual
Purchaser

Purchaser | Pros & cons

Corporation

- Tax Treatment: Rental income taxed @ (lower) corporate rate
- Creditors: Asset not available to personal creditors

Individual

- Ownership Stake: No shared interest with other shareholder(s)

2. The Seller



Seller | Due diligence

Corporation

- Evidence of “good standing”
- Evidence of authority to legally bind corporation

Individual

- Assurances they are the sole owner, or else other owners must sign
- Assurances of marital status

3. Documents



Documents | 3 Key

Letter of Intent (LOI)

- Specifies one party's intentions vis-à-vis other(s)
- Lays groundwork of agreement
- Typically not legally binding but can include binding aspects

Documents | 3 Key

LOI

Non-disclosure Agreement (NDA)

- Commonly for rental property & sometimes for owner sales
- Allows selling landlord or real estate agent to disclose financial or confidential tenant information to prospective buyer
- Prospective buyer has legal obligation to keep all information private or landlord will have legal right to seek compensation damages

Documents | 3 Key

LOI

NDA

Agreement of Purchase & Sale

- Not required to be in writing to be enforceable but highly recommended & typical
- Buyer should consider including expiration date in offer

4. Agreement of Purchase & Sale



Agreement | Key elements

- ✓ Who, what, how much \$
- ✓ Closing date
- ✓ Objection date & objection delivery
- ✓ Reps & Warranties
- ✓ Allocation of purchase price
- ✓ Boiler plate “legalese”
- ✓ Conditions of sale
 - Financing
 - Building inspection
 - Environmental assessment
 - Evidence of seller residency or tax clearance
 - Purchaser right to view property pre-closing
 - Migration of property & title review

5. Title Insurance



Title Insurance

- ✓ Types:
 - ❑ Owner Insurance
 - ❑ Lender Insurance
- ✗ “Property Insurance”
- ✓ Each policy is unique to the property
- ✓ Single premium @ issuance
- ✓ Stays in effect until property is transferred
- ✓ Exceptions to coverage (e.g. environmental risks)
- \$ Generally much cheaper than property survey

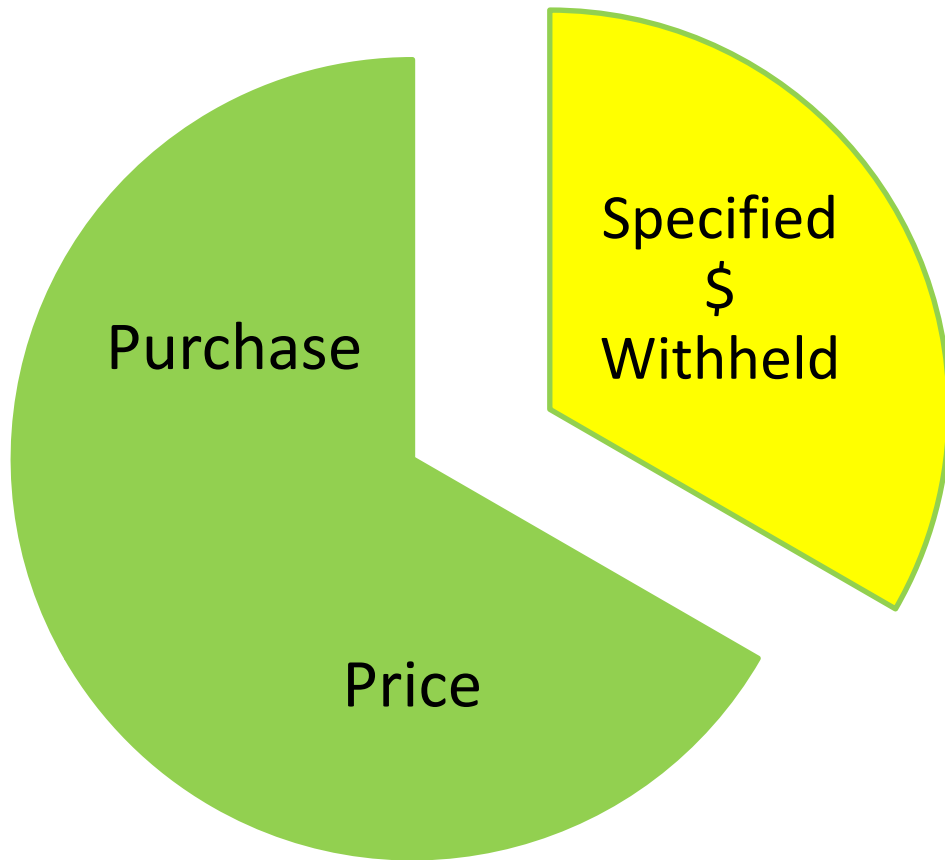
6. Harmonized Sales Tax (HST)



HST | General rules

- ✓ Commercial property
- ✗ Apartment buildings
- ✓ Sale of a new building
- ✗ Sale of a “used” building
- ✓ Commercial portion of mixed commercial & used-residential
- ✓ Equipment included in commercial purchase

Collection | Non-resident seller



- To cover potential liability if seller doesn't pay tax
- Until Canada Revenue Agency issues "Certificate of Compliance" confirming seller paid

7. Seller's Reps & Warranties



Reps & Warranties | Options

- “As is where is”

Or

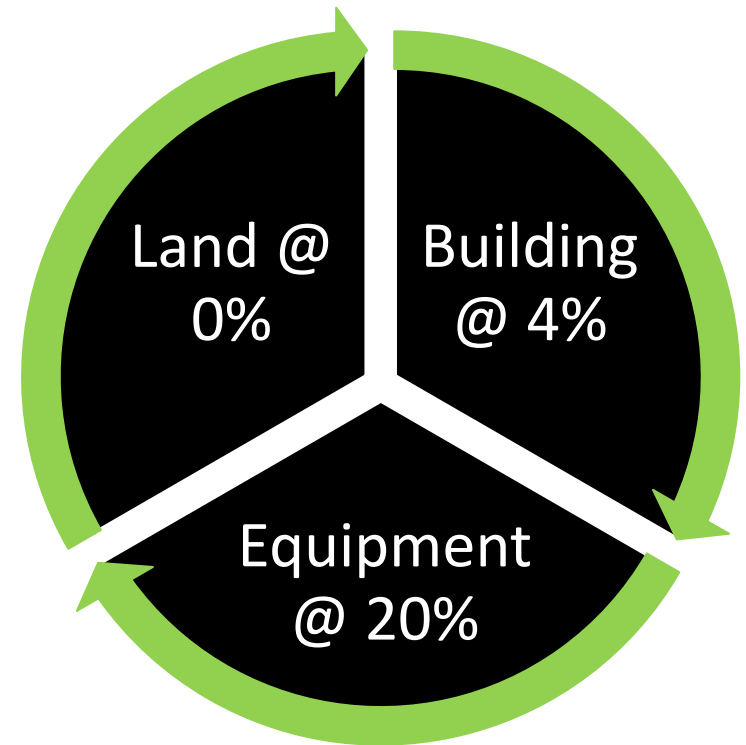
- Reps & warranties
 - ❑ What’s the seller’s proposed use?
 - ❑ What’s the history of the property?
 - ❑ What are the known defects?

8. Allocation of Purchase Price



Allocation | Depreciation purposes

- § “Capital Cost Allowance” claim of depreciation expenses to reduce taxable income
- Agreement of Purchase & Sale
 - ✓ Explicitly state allocation
 - ✓ Covenant to prepare all income tax filings per allocation



9. Rental Property



Rental Property | Due diligence

☐ Tenants

- ✓ Nature of tenants (residential or commercial)
- ✓ Names, rent, written lease, damages deposit, prepaid rent
- \$ Closing adjustments

☐ Lease Review

- ? Assignment to purchaser

☐ Post Closing notification to tenants

- ✓ Seller direction to pay purchaser

10. Financing



Financing | Common instruments

- ❑ (First ranking) Mortgage on real property
- ❑ Personal guarantee of corporate borrower's shareholder(s) to guarantee corporate debt
- ❑ General Security Agreement (“GSA”) granting security interest over borrower's personal property
- ❑ Assignment of leases of rental property from the seller to the buyer
- ❑ General assignment of rents & leases (“GARL”) of rental property from the buyer to the lender

Questions?



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