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Ontario and Toronto Land Transfer Tax

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1. Introduction

In the current market of soaring real estate values, particularly in and around the City of Toronto (Toronto being the only Ontario municipality to levy its own transfer tax in addition to the provincial tax), an understanding of provincial and municipal land transfer tax (**LTT**) has never been more important. Today, the drive to collect LTT has intensified, and the government bodies responsible for collecting that tax are routinely reviewing and revising their regulations and policies to ensure no revenues are lost. In addition to its use as a revenue generation tool, with the imposition of the non-resident speculation tax, the province has now returned to using the tax for policy purposes. This paper provides a general overview of the LTT regime in Ontario and discusses some of the key areas in which tax battles are currently being won and lost.

The legislation governing LTT in Ontario and Toronto is the *Land Transfer Tax Act* (Ontario) (the "**Act**"), and City of Toronto Municipal Code Chapter 760 (the "**Code**").[1] This paper does not address income taxes or other taxes that may be payable on or relevant to the transfer of real property in Ontario, such as the harmonized sales tax. Except where relevant to note a distinction or difference, this paper treats the Act and the Code as equivalent and provides reference to the relevant provision of the Act only. The Act and the Code differ in certain material respects, including in relation to objections and appeals (for example, see the general four year limitation period for assessments or reassessments by the Ontario Ministry of Finance (the "**Ministry**") under section 12(4) of the Act and the general six year limitation period for assessments or reassessments under §760-74 of the Code). Any person making an objection or appeal should pay particular attention to articles XII of the Code and sections 13-14.1 of the Act.

The rate of LTT payable in Ontario depends on several factors, including the location of real property within the province and the type of property being transferred. Real property located in the City of Toronto is subject to provincial tax under the Act, as well as municipal tax under the Code. Real property in the rest of the Province is subject only to provincial tax. Since inputting a purchase price into a draft transfer in the Ontario land registry Teraview system will automatically calculate the LTT payable on any Ontario transfer, and because the rates are published on government websites, this paper will not discuss the tax rate calculation in great detail.[2] Suffice to say, the rates are graduated with differing rates depending on the total value of the consideration. Once the value of the consideration is above a few million dollars, a rough guide is that the LTT will be 2 percent for properties outside Toronto and 4 percent for all properties within Toronto; with rates slightly higher (2.5 percent outside Toronto and 5 percent inside Toronto) for properties containing at least one and not more than two single family residences where the consideration is over $2,000,000. If part of the lands conveyed are not used for residential purposes it may be possible to apportion the value of the consideration between the parts of the land and pay the increased residential amount only on the residential portion.[3]

LTT is payable under the Act on both registered conveyances of real property and unregistered dispositions of interests in real property. Though there are similarities between each form of taxation, there are also important distinctions between the two. We start, therefore, with a brief overview of the what, who, when, and how of LTT.

The 2018 Ontario and Toronto Land Transfer Tax Update was originally presented by Jane C. Helmstadter at the Definitive Tax-Planning Conference for Advisers to Owner-Managed Businesses by the Canadian Tax Foundation on October 22-23, 2018.

2. Tax on Registered Conveyances: Section 2 Tax

The basic taxing provision in the Act, section 2(1), provides that "Every person who tenders for registration in Ontario a conveyance by which any land is conveyed to or in trust for a transferee shall pay when the conveyance is tendered for registration or before it is tendered for registration, a tax computed at the rate of [rate]... of the value of the consideration."

What is the Tax Payable?

The graduated tax rates are set out in detail in section 2(1) of the Act and §760-9 of the Code. The introduction to this paper sets out a rough guide to estimating the tax payable, and the Teraview system will automatically calculate the tax during preparation of a draft transfer. The term "value of the consideration" is discussed later in this paper.

Who Must Pay the Tax?

Section 2.2 of the Act provides that:

> Every person who immediately after the registration of a conveyance has a beneficial interest in the land that was acquired or increased as a result of a conveyance or as part of an arrangement relating to the conveyance is liable for the tax payable under subsection 2(1), unless the person has previously paid tax on the acquisition of or increase in beneficial interest.

We will discuss beneficial ownership of land shortly; at this point it is enough to say that the transferee of the land is the party who bears the liability to pay the LTT.

When is the Tax Due?

On a conveyance pursuant to section 2(1) of the Act, LTT is payable on the registration of the transfer. As the provision indicates, LTT may also be pre-paid, in which case no tax will be payable when the transfer is registered. In order to pre-pay tax certain administrative steps must be taken and payment must be made in person to the Ministry. It should be noted that pre-payment of the tax will ensure that the value of the consideration is not reflected on the transfer registered on title but this step will not cause the value of the consideration to be kept confidential. Anyone can ascertain the value of the consideration by making a call to the Ministry.

How is the Tax Paid?

If the registration is made by way of electronic registration in the Teraview system, LTT is automatically debited from the trust account of the registering solicitor. If the registration is made in person at a land registry office, tax must be paid by certified cheque or bank draft in order for the conveyance to be accepted.

3. Tax on Unregistered Disposition: Section 3 Tax

In Ontario, it is common for real property to be held by one person or entity in trust for another person or entity by virtue of a declaration of trust, a nominee agreement, or some other form of contract. Where such a structure exists, the person or entity holding title is commonly referred to as a "nominee" or "trustee" and the person or entity for whom title is held is referred to as the "beneficial owner." There are a number of commercial and other reasons to create such a structure, each of which is beyond the scope of this paper. For our purposes, it is sufficient to note that since July 19, 1989, the Act has taxed dispositions of beneficial interests in land and, as a result, off-title transfers of land from one beneficial owner to another are taxable. Specifically, subject to the exclusions in section 3(1), the Act defines a disposition of a beneficial interest in land as including: "(a) a sale, transfer or assignment, however effected, of any part of a beneficial interest in land; and (b) any change in entitlement to or any accretion to a beneficial interest in land."[4]

What is the Tax Payable?

The tax rate applied to a disposition of a beneficial interest in land is equivalent to the tax on a registered transfer. Pursuant to section 3(2), tax on a disposition of a beneficial interest in land is payable "at the rates otherwise determined under section 2."[5]

Who Must Pay the Tax?

Tax under section 3 of the Act is payable "by every person who acquires a beneficial interest in land or whose beneficial interest in land is increased as a result of the disposition."[6] Again, this means that the transferee is liable for the LTT payment.

When is the Tax Due?

1. Conventional conveyances

Unlike registered conveyances where the tax payable must be tendered at registration, tax payable under section 3 must be paid "on the thirtieth day after the date of the disposition."[7]

2. Conveyances of interests in "layered" or "stacked" partnerships or trusts

As described in part 4(d) of this paper, a transfer of an interest in a partnership or a trust will generally be a taxable transaction. In the case of a transfer of an interest in a partnership in which fifty or more persons hold an interest (a "**qualifying entity**")[8] and which owns real estate in Ontario through another partnership or a trust (also known as "layered" or stacked" partnerships or trusts) the tax is payable quarterly. This concession is designed to ease the administrative burden on taxpayers who, through a partnership or trust, invest in a widely held partnership that holds a portfolio of real estate in Ontario. In this situation, absent the concession, an increase either directly or indirectly in the partnership interest of the taxpayer triggers a requirement to file a return and pay tax within 30 days after the increase in the taxpayer's partnership interest. The completion of dividend re-investment under a so-called dividend re-investment program for a partnership, or the completion of a capital call where not all partners/beneficiaries contribute equally are all examples of common occurrences that might alter the entitlement to a share of profits (or partnership interest) of each partners/beneficiary in such partnership/trust and thus constitute a taxable event. This quarterly filing is provided for in Ontario Regulation 343/18 under the Act (the "**Timing Regulation**"). The timing should also be the same for municipal tax as §760-14 of the Code states that "No tax

is payable with respect to a transaction which may be exempt from time to time under the *Land Transfer Tax Act* or any other statute of the Province of Ontario", although, as of the date of publication of this paper, the city has not updated its posted materials to speak to such quarterly filings.

Note that part 4(d) of this paper discusses taxation of these interests in general, and part 7(c) of this paper discusses the *de minimis* exemption that applies to these conveyances in certain circumstances.

How is the Tax Paid?

1. Conventional conveyances

Unlike registered conveyances, tax payable under section 3 must be paid by submitting a certified cheque, hard-copy return, and supporting materials to the Ministry, rather than to the land registry office.[9] If the land in question is located in the City of Toronto, true copies of all documents submitted to the Ministry must also be submitted to the City of Toronto along with the municipal portion of the tax payable.[10] The obligation to submit a return lies with both the nominee and the beneficial owner, although in practice many include in the covering letter to the Ministry enclosing the return a request that the return by the beneficial owner be accepted as the return by the nominee.[11] It is important, in the case of a nominee that is not owned or controlled by the beneficial owner, that nominee keep this obligation in mind. If, for example, in the case of a fund which is structured as a limited partnership, a general partner consents to the transfer of a partnership interest and the general partner controls the nominee, it is incumbent upon the general partner to ensure that the partner who acquires the interest file its LTT return and note that the return is also to satisfy the obligations of the nominee under section 5(8).

The form of hard-copy return under the Act is available online, as is the form required by the Code.[12] Along with the hard-copy return, a copy of the agreement of purchase and sale pursuant to which the transfer was effected must be provided. Additionally, the Ministry will typically request the following supporting documentation: statement of adjustments for the transaction, copy of the agreement pursuant to which the beneficial interest was conveyed (if distinct from the purchase agreement), copy of the nominee agreement(s) pursuant to which the nominee holds title for the beneficial owner, copies of the partnership agreement and register of partners for any partnership beneficial owner (which is not in a prescribed form but can be similar to a shareholders' register or simply a list of partners), and forms authorizing a law firm to represent the named transferee (if the return is being submitted by a law firm). Guides to the preparation of this material are available online.[13]

2. Conveyances of interests in "layered" or "stacked' partnerships or trusts

Concurrently with the passage of the Timing Regulation, the Ministry published an alternate form of hard-copy return which form must be used for conveyances of interests in "layered" or "stacked" partnerships or trusts (see part 3(c)(ii) of this paper for further details about these conveyances).[14] This alternate form permits consolidated quarterly filings for these types of conveyances and requires similar information to the typical hard-copy return but, in schedule 2 of such form, also requires details about the type of disposition and the partner or beneficiary's interest in the "layered" or "stacked' partnership or trust.[15] As of the date of publication of this paper the City of Toronto had not published an updated form of return so the appropriate return is, for the time being, the existing City of Toronto form (see note above).

4. Taxation of Certain Transactions

It is obvious that LTT is payable on a conventional sale of land between vendor and purchaser, but the definition of "convey" in the Act significantly broadens the scope of transactions that may be subject to tax. The Ministry publishes a helpful guideline in respect of these transactions, entitled "Guide to the Application of the *Land Transfer Tax Act* to Certain Transactions" (the "**Certain Transactions Guide**").[16]

Purchase Agreements

Though the term "convey" is defined to include "agreeing to sell land in Ontario", since section 2 tax is payable only when a person "tenders for registration in Ontario a conveyance by which land is conveyed", the mere signing of a purchase agreement does not crystallize an obligation to pay LTT under section 2. Likewise, the execution of a purchase agreement alone does not trigger section 3 tax because of the saving provision in section 3(1)(g), which provides that the value of the consideration must change hands before there is a disposition of a beneficial interest in land.

Though the signing of a purchase agreement itself does not trigger an obligation to pay tax, the registration of that purchase agreement (should the parties wish to do so in order to protect the purchaser's right to acquire the land against third parties, or for other reasons) does. This is evident from section 2(1) of the Act, and is confirmed by the Ministry's position in the Certain Transactions Guide, which states "an agreement of purchase and sale or any related notice or caution is a taxable conveyance when tendered for registration."[17] Upon registration of the transfer by which title is actually conveyed, a statement can be completed in the transfer stating that tax was already paid so that tax is not paid twice.

Options to Purchase

The term "convey" is also defined to include "the giving of an option upon or with respect to any land in Ontario". As such, the grant of an option to purchase land is taxable under section 2 if the conveyance document creating the option is tendered for registration. The Act is less clear regarding unregistered options because section 3 does not impose tax based on a "conveyance" but based on unregistered dispositions of an interest in "land" As noted above, section 3(1)(g) specifically excludes unregistered agreements of purchase and sale from the definition of an beneficial interest in land and an option may be a lesser interest than an agreement of purchase and sale. In practice, to the knowledge of the authors, most people do not remit tax on unregistered options, even where consideration is paid for the option.

The value of the consideration for the grant of an option is determined pursuant to the definition of "value of the consideration": namely, the price paid, liabilities assumed, and benefits conferred as part of the arrangement relating to the conveyance. Since the grant of the option is only a grant of a right to acquire the property, not a conveyance of the underlying property itself, the value of the consideration is only the amount paid to acquire the option. This is confirmed by the Ministry's position in the Certain Transactions Guide, which states, "The value of the consideration is the amount of the consideration paid by the optionee to acquire the option, and not the option exercise price".[18] Likewise, when an option agreement is transferred by the original holder of the option to a purchaser of the option, LTT is payable on the purchase price paid for the option rights.[19]

Easements

An easement is a form of tenement, estate, or right to land and, as such, falls within the definition of "land" in the Act. A grant or transfer of easement is, therefore, taxable under section 2 or section 3 just like a freehold interest in land, with tax payable on the value of the consideration exchanged.

Transfer of Units in a Partnership or Trust

Sections 2.2 and 3(3) of the Act state that tax is payable by every "person" who obtained an interest in land. The term "person" is not defined in the Act, but means natural persons as well as, pursuant to section 87 of the *Legislation Act, 2006*, corporations.[20] Partnerships (as well as trusts), on the other hand, are not persons but rather are a collective of, or a relationship between, persons.[21] The Ministry's interpretation of the Act is in line with this legal perspective, and, accordingly, the Ministry looks through all partnerships or trusts until it reaches a natural person or corporation. Specifically, the Ministry's administrative position states that "a partnership is not a legal entity and therefore a conveyance or disposition of land to a partnership, whether the partnership is a general partnership or a limited partnership, constitutes a conveyance to the partners of the partnership as tenants-in-common and in proportion to their partnership interest(s)."[22] Likewise, in respect of trusts, the Ministry's published guide notes: "The [Ministry] does not consider a "trust" to be an entity and looks through the trust to the beneficiaries."[23] In the case of a discretionary trust where the class of beneficiaries is not fully known (for example, "all of the issue of John Smith"), the determination is somewhat more complicated. See Part 3 of the Ministry's guide "A Guide for Real Estate Practitioners - Land Transfer Tax and the Registration of Conveyances of Land in Ontario" for some assistance.[24]

As a result of this position, the transfer of units in a partnership that beneficially owns real property is considered a disposition of a beneficial interest in that real property for which tax is to be payable under section 3.[25] For a discussion of the value of the consideration attributable to such disposition, see the next section.

5. Value of the Consideration

Amount Paid and Benefits Conferred

The term "value of the consideration" is specifically defined in the Act to capture many forms of consideration that might be paid in connection with the sale of real property. In a typical real property purchase, the value of the consideration is the purchase price and will be determined pursuant to section (a) of the definition of such term, being:

> 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 [emphasis added].[26]

This definition captures a number of potential forms of payment, including the outstanding principal amount of any mortgage assumed by the transferee. The broad definition can also include amounts paid to acquire personal property. To use the words of the Ontario Superior Court of Justice, "the definition of "value of the consideration" clearly includes consideration for benefits that are not land so long as they are related to the conveyance."[27]

Management and leasing fees payable under an agreement of purchase and sale (or agreements required under the agreement of purchase and sale) have, for example, been found to be taxable, as have nursing home licenses sold together with a nursing home.[28] To the extent there is a significant connection between the benefit being conferred and the land, the courts are more likely to hold that such benefit is taxable.[29]

Determination of the value of the consideration when dealing with the sale of a partnership interest can lead to surprising results, particularly in the case of a limited partnership, for those not accustomed to the way the Ministry "looks through" a partnership. As noted above, the transfer of a partnership interest is treated as a transfer of a beneficial interest in land for the purposes of the Act with the Ministry effectively treating the partners as co-owners. If the partnership has mortgaged its land, the Ministry takes the position that the partner who acquires a partnership interest has assumed a portion of the mortgage equal to the share of the partnership interest acquired. As a result, the value of the consideration for the purposes of the Act can be significantly higher than the purchase price for the partnership interest.

Deferred Purchase Price

It is critical when structuring an agreement of purchase and sale including real property that separate contractual obligations between buyer and seller are not wound into the purchase agreement such that benefits of those contractual obligations become part of the "arrangement relating to the conveyance" and, as such, become taxable. The court's 1987 decision in *Assaly*,[30] followed recently in *OPTrust*,[31] provides a cautionary tale about creating strong connections between the land and other obligations in such contracts. In *Assaly*, the court concluded that where a builder-vendor agreed to sell land to a purchaser and also to build a home on that land, LTT was payable on both the value of the land and the construction costs of the home. The court came to the conclusion reluctantly, making it clear that typically a purchaser of raw land would pay LTT only on the raw land and that any future construction on the land would not be taxed. In the case before the court, however, the parties had wound the construction together with the land acquisition, even making the land purchase agreement conditional on the construction contract being entered into. The court cautioned that "with appropriate tax planning such a result could be avoided", but in the case before the court it could not hold otherwise.

Clearly the court's caution to use appropriate tax planning holds just as true today as it did in 1987, as the 2016 case of *OPTrust* indicates. In *OPTrust*, a purchaser again contracted with a vendor-builder to acquire land and have the vendor build on that land. In order to secure the payments that would become due to it under the agreement, the vendor registered $26 million in mortgages on title at close (no funds were ever advanced under the mortgages - they were there simply to secure payment of future construction fees). The purchaser paid LTT on the land purchase price of $16 million, as well as the $26-million contingent liability secured by the mortgages. When, however, the seller failed to meet the milestones and to earn the additional consideration and the development agreement was terminated, the purchaser demanded a refund of the LTT paid on the $26 million. The Ontario Minister of Finance (the "**Minister**") refused and the parties ended up in court. The court found for the Minister, holding that the development services were a liability assumed as part of the arrangement relating to the conveyance. Despite objections from counsel to the purchaser, the court found that the contingent nature of the obligation to pay for the services did not matter and instead followed another 1987 case, stating that "It is the value of the services calculated at the time of the transfers that must govern the imposition of tax."[32]

Interestingly, the court in *OPTrust* found that the purchaser should have made use of the Ministry's administrative policy of using undertakings when the value of the consideration hinges on a contingent event.[33] Where a portion of the purchase price hinges on a contingent event, such as achieving a certain rezoning which grants additional density, a purchaser can pay tax on the known component of the value of the consideration at the time of closing and give the undertaking to pay tax on the contingent or deferred purchase price. At the time that the contingent or deferred purchase price is known, the tax will become payable. Unfortunately, the Ministry has recently adopted a new approach of charging interest at the prescribed rate from the date of closing up to the date of receipt of payment. The theory behind this appears to be that the deferred payment was a "liability assumed" on closing even though the amount of the payment was unknown and that the tax was therefore due on closing. Failure to pay the tax attracts interest. This can be quite expensive, although not as expensive as paying tax on a deferred purchase price that never becomes payable.

Fair Market Value

In some circumstances the value of the consideration is not the amount paid, liabilities assumed, or benefits conferred, but instead is deemed to be the fair market value of the land in question. The first important instance of this deeming occurs in respect of leasehold interests in land.

Subject to one important exception, a conveyance (which includes an initial grant) of a leasehold interest is generally taxable under the Act. The definition of "land" under the Act includes "tenements and hereditaments and any estate, right or interest therein", which, of course, includes leasehold interests. Likewise the definition of "conveyance" includes "any instrument or writing by which land is conveyed and includes ... a caution or notice of any kind in writing signifying the existence of any instrument or writing by which land is conveyed", which includes leases.[34] The exception to this rule is section 1(6) of the Act, which provides that no tax is payable in respect of leases where the term yet to run does not exceed 50 years (including all extensions and renewals included in any document). For leases having a term of greater than 50 years, therefore, tax is payable and paragraph (c) of the definition of "value of the consideration" states that tax is payable on "the fair market value, ascertained as at the time of the tender or submission for registration, of the land to which the lease extends or of a smaller portion of such land if only such smaller portion is conveyed."[35]

As is the case with calculation of the value of the consideration for the transfer of a partnership interest, the determination of the value of the consideration for a leasehold interest can lead to surprising results. If the leasehold interest has little value (which might be the case if there were under-market subleases) it is possible that the purchase price payable with respect to the leasehold interest would be lower than the fair market value of the underlying fee simple. Under those circumstances, the value of the consideration will exceed the amount of the purchase price.

In addition to leasehold interests in land, there are several other instances in which the value of the consideration is deemed to be the fair market value of the land:

i. **Mortgage foreclosures:** when land is transferred to a mortgagee, either as part of a foreclosure or by the mortgagor in satisfaction of the debt, the value of the consideration may be the fair market value of the land if such amount is less than the full amount (including all protective advances) outstanding under the charge.[36]

ii. **Trustee to trustee transfers, where beneficial ownership has changed and consideration was paid:** see the discussion regarding trustee to trustee transfers for nil consideration, below.[37]

iii. **Transfer to a corporation, taking back shares:** if land is transferred to a corporation and the payment of any part of the consideration consists of the allotment and issuance of the corporation's shares (which would include a transaction structured as a section 85(1) rollover pursuant to the *Income Tax Act* (Canada)), the value of the consideration is deemed to be the fair market value of the land.[38]

iv. **Transfer from a corporation to its shareholders:** if land is transferred by a corporation to its shareholders, the value of the consideration is deemed to be the fair market value of the land.[39]

In each of these cases other than (i), the actual purchase price paid for the land can be significantly lower than the value of the consideration on which the tax is calculated and payable.

6. Nil Consideration: No Tax Payable

In most circumstances where no consideration passes between the parties to a real property related transaction, the Act recognizes that no LTT is payable. This may occur in several situations.

Registered Transfers Involving Trustees/Nominees

In transactions involving trustees/nominees there are three circumstances where transfers for no consideration commonly occur:[40]

i. **Beneficial owner to trustee:** Where a party wishes to create a nominee—beneficial owner relationship and to do so effects a transfer of legal title from itself to a nominee title holder.

ii. **Trustee to trustee:** Where a nominee title holder wishes to transfer legal title from itself to a different nominee title holder who will hold title for the same beneficial owner.

iii. **Trustee to beneficial owner:** Where the beneficial owner wishes to take back title from the nominee title holder and so become both the legal title holder and the holder of the beneficial interest in land.

There is a specific Teraview statement that must be completed in the registered transfer for each of these situations. Additionally, the transferee or the transferor must sign and submit a supplementary affidavit that makes a number of statements about the transfer.[41] The statements required in this affidavit are intended to prove to the Ministry that the value of the consideration is nil (and that it should not be deemed to be the fair market value of the beneficial interest in the land).

One potential problem arises in the case of trustee to trustee transfers where there has been a change in the beneficial owner. Section (f) of the definition of "value of the consideration" provides that tax is payable on a trustee to trustee transfer if there has in the past been a change in beneficial owner and valuable consideration was given in connection with such transfer. If, in connection with the change of beneficial owner, a return was filed and tax was paid then these facts may be recited in the supplementary affidavit; however, if no tax was paid (which might arise if the transferor and transferee were affiliates and an affiliate deferral was obtained or if the transfer was a transfer of a partnership interest to which the *de minimis* exemption applied) then tax will be payable. In these situations a transfer is deemed to have been made at the fair market value of the beneficial interest in the land rather than being a "nil consideration" transfer. Section (f) of the definition of "value of the consideration" is a holdover from an earlier iteration of the Act and represents an early attempt by the Ministry to curb off-title beneficial transfers. It now arguably produces an unintended result, but it remains nonetheless and must be considered whenever an affiliate deferral is contemplated.

No Change in Beneficial Owner

Following the same line of reasoning that permits a trustee to trustee (for the same beneficial owner) transfer under section 2 of the Act without payment of tax, a disposition of a beneficial interest where there is no change of beneficial owner for the purposes of the Act will not be taxable to such extent. Situations like this may occur where partnerships or trusts are involved and are possible because of the view of partnerships and trusts at law and in the Ministry's eyes (see discussion above).

Given this position, it is possible that the tax payable on a disposition of a beneficial interest in land to a partnership will be reduced where the transferor is either: (a) a partner in such transferee partnership, or (b) itself a partnership possessing common partners with the transferee partnership. The tax may be reduced because the interest in land being disposed of is less than 100

percent of the land. Since the disposition is for less than the whole of the interest, the amount of the consideration attributable to such disposition is reduced in a like proportion.

In such situations, as with all beneficial dispositions, a complete return must be filed in hard-copy with the Ministry, together with the supporting documentation mentioned earlier in this paper. In addition to such supporting documentation the Ministry will also typically request the partnership register(s) and partnership agreement(s) of the partnership(s) involved. If there is no change in beneficial ownership, no return is required to be filed because no tax is payable.[42]

Relevant to this point, as well as being an interesting illustration of the difference between section 2 tax and section 3 tax, and of the increased flexibility that section 3 permits to a transferee, is the 2007 Ontario Court of Appeal decision *Woodbine Cachet West Inc. v. Ontario (Finance)* ("**Woodbine**").[43] In Woodbine, a nominee title holder owned land for two beneficial owners; it had also charged the land to the Bank of Nova Scotia. The nominee defaulted on the mortgage and the bank sold the land to a new nominee (Woodbine), who acquired the land in trust for one of the existing beneficial owners. The existing beneficial owner argued that it should only have to pay LTT on the percentage by which it increased its interest in the land. The Minister, and the court, disagreed. The decision turned on the fact that the sale was being completed by the bank through its power of sale. The bank was not acting as agent for anyone, and it was selling, pursuant to a registered conveyance under section 2 of the Act, the entire interest in the property that the original nominee had mortgaged to it. Accordingly, tax was payable on the entire purchase price.

Woodbine had essentially been arguing that it should have the benefit of the flexibility afforded under section 3 of the Act and the court, rightly in our opinion, denied it that flexibility. In this scenario, it was perhaps not possible for Woodbine or the bank to complete an unregistered disposition under section 3, but the case is illustrative of the differences between the two sections and how proper tax planning and structuring can have an important impact.

Gifts

Gifts of real property are not specifically excepted from taxation under the Act, but if the value of the consideration passing between the parties is actually zero (absent the transaction being one in which the value of the consideration is deemed to be the fair market value of the land), no LTT will be payable. On a registered transfer, specific Teraview statements must be completed where the transaction is a result of a gift, and the relationship between the parties, as well as the reason for the conveyance, must be set out in the transfer. On an unregistered disposition, a hard-copy return must be filed.[44]

7. Exemptions and Deferrals: No Section 3 Tax Payable

In certain circumstances, LTT under section 3 of the Act is either not payable, may be deferred, or is subject to an exemption of some kind. We will address the most commonly encountered of these situations.

Sale of Shares in a Corporation

As we have seen, an unregistered disposition of a beneficial interest in land is subject to tax under section 3 of the Act, but does this include a sale of the shares of a corporation that owns land? The answer is no, provided that such corporation holds title to the land in its own right (not as trustee for another person), which is consistent with both the interpretation of the term "person" under the Act as including a corporation, and with the Ministry's view of a corporation. The Minster's statements in the published guide regarding unregistered dispositions clarify as follows:

> The transfer of shares of a corporation which holds land in its own right does not ordinarily attract tax under the Act. The Ministry considers that it is well-established law that the property of a corporation is that of the corporation and not of the shareholders of the corporation. Accordingly, the transfer of shares of such a corporation will not affect the ownership of the property ... Care must be exercised in instances of the transfer of shares of the corporation which holds the registered or legal title to land but not the beneficial title to the land. This is because in most trust transfer cases, the transfer of shares of a trustee corporation signals a change in the underlying beneficial ownership of the land. While the transfer of shares of the trustee corporation may not be of itself a taxable matter, the change in beneficial ownership of the land, which often occurs coincident with the transfer of the shares, is taxable.[45]

Affiliate Deferral

The Act recognizes that in some circumstances there may be a legitimate need to transfer land to an affiliated entity where it would be unjust to impose tax. As such, section 3(9) and 3(11) of the Act provide for the deferral of, and potential cancellation of, LTT that would otherwise be payable. The rules governing the affiliate deferral mechanism are complex and must be carefully adhered to; the points in this paper should serve as a general guide only. Also useful is the Ministry's published guide "Land Transfer Tax and the Treatment of Unregistered Dispositions of a Beneficial Interest in Land" (the "**Unregistered Guide**").[46]

In brief, the Act provides that an affiliate deferral is available for corporation to corporation transfers where the two corporations are affiliates and the transferee corporation: (i) undertakes to remain an affiliate of the transferor corporation for three years following the transfer; (ii) undertakes that the beneficial interest in the land will continue to be owned by it or an affiliate for three years following the transfer; (iii) posts security in the amount of the tax that would otherwise be payable together with interest for three years calculated at the prescribed rate; and (iv) no conveyance or instrument or electronic document evidencing the disposition has been registered at the end of the three year period.[47] At the end of the three year period, the Ministry will return the security posted if: (i) the undertaking has been satisfied; (ii) no conveyance or instrument evidencing the disposition of the beneficial interest in land has been registered; and (iii) no subsequent conveyance has been registered nor beneficial disposition occurred in respect of the land for which tax was paid.[48] Parties wishing to make use of this section must also review the provisions of section 3(15) to ensure that they meet the definition of "affiliate."

In addition to the undertaking, the Ministry will also require a hard-copy submission of a return on the acquisition of a beneficial interest in land, a copy of the agreement of purchase and sale, and other supporting documents. Prior to returning the security, the Ministry will require evidence of the satisfaction of the undertaking, which may include: an affiliation chart showing the corporations graphically, details of any name change or amalgamation in the last three years, an affidavit of a director of the corporation making statements to support the information on the chart, copies of shareholders and directors ledgers, copies of title abstracts, and copies of all registered instruments since the date of the disposition.

As noted above in section 5(c)(ii), completion of an affiliate deferral will eliminate the transferee corporation's ability to complete a trustee to trustee for same beneficial owner transfer at any point in the future until the beneficial ownership changes hands and tax is paid.

The affiliate deferral provisions are useful for any number of restructuring purposes. A person may wish, for example to organize a new investment vehicle which will receive funds from investors and then acquire the beneficial interest to properties already owned by affiliated parties. Or a person may wish to transfer the beneficial interest in properties from one investment vehicle to another. In each instance the affiliate deferral mechanism permits these transactions on a tax-free basis. In these examples registered title could be left in the original owner or, by completing a beneficial owner to trustee (or trustee to trustee) registered transfer, registered title could be transferred to another person to be held for the new beneficial owner.

The affiliate deferral provisions can also be used when a party wishes to wind up or dissolve a corporation that holds title to real property. Through section 3(9), the dissolving corporation can transfer its beneficial interest in real property to another corporation or a corporate shareholder and have the tax deferred and ultimately cancelled. section 3(12) permits for such a transfer-out and subsequent dissolution of a transferor corporation, and provides that the dissolved corporation will (for affiliate deferral purposes only) be deemed to continue to be an affiliate of the transferee corporation. If a party intends to rely on section 3(12) for this purpose, it is critical to keep in mind the following:

i. Transfer to a nominee: The affiliate deferral cannot be used to avoid section 2 LTT - it applies only to unregistered dispositions of a beneficial interest in land under section 3.[49] Prior to completing an affiliate deferral, a corporation that holds both legal and beneficial title to land must complete a beneficial owner to trustee transfer. Such transfer is, itself, not taxable (see the section of this paper regarding situations where section 2 tax is not payable), but is a prerequisite to completing an affiliate deferral. If, however, the corporation already holds only a beneficial interest in land, no preliminary step is required.

ii. Organize affiliate entities before dissolution and complete transfer before or concurrently with dissolution: section 3(12) specifically states that the corporations claiming the deferral must be affiliates "immediately before the winding-up or dissolving" and that the deferral is available only in respect of "any disposition of a beneficial interest in land made before the winding-up or dissolution of the corporation or in the course of any distribution of property of the corporation on the winding-up or dissolution." If the dissolution occurs before the affiliate structure is organized, or if the beneficial disposition occurs post-dissolution (for example, via a power of attorney granted on dissolution), the deferral will not be available.

An additional consideration when structuring and completing an affiliate deferral is maintenance of clean title for the three year period. The Act is clear that if a "conveyance or instrument evidencing the disposition of the beneficial interest in land has been registered" the security will not be returned.[50] But what exactly constitutes a conveyance or instrument evidencing the disposition of the beneficial interest in land? The registration of a conveyance of legal title to the transferee corporation is such an instrument.[51] Additionally, the

registration of a conveyance of legal title to a trustee/nominee for the transferee corporation is deemed to be such an instrument, underscoring the need to complete the transfer of legal title to a nominee corporation prior to completing the unregistered disposition to the transferee corporation.[52]

In addition to these two situations, each of which is specifically enumerated in the Act, the decision in *2143569 Ontario Inc. v. Ontario* (*Minister of Revenue*) ("**214**") is instructive.[53] In this decision the appellant corporation and two of its affiliates, NMH and YHM, properly structured an affiliate deferral whereby: (i) YHM initially held legal and beneficial title; (ii) YHM transferred legal title to NHM; and (iii) YHM subsequently transferred beneficial title to the appellant (with NHM holding legal title for the appellant). Once the three year period had elapsed, the appellant submitted the required evidence of compliance with the undertaking and requested a return of its security. The Minister refused to return the security because during the three year period a development agreement between the City of Niagara Falls and the appellant had been registered on title. The development agreement stated, in its recitals, that "the trustee holds title to the lands ... as trustee for the owner", where trustee was defined as NMH and owner was defined as the appellant. The development agreement did not use the term "beneficial owner", nor did it discuss YHM, nor did it mention how the appellant came to obtain its interest in the property.

Consistent with its standard practice, the Ministry took the position that the mere mention of the appellant transferee in a document on title constituted the development agreement an instrument evidencing the disposition of the beneficial interest in land, breaching the undertaking and permitting the Ministry to cash in the security. The court disagreed, and in doing so gave useful guidance about the interpretation of this section of the Act. The court took the view that the use of the two words "the disposition" in section 3(11) of the Act meant that an instrument must not just refer to any disposition of land, but the specific disposition that is the subject of the deferral application. According to the court, the mention of the appellant as owner "may evidence that the appellant acquired the property (that is that there has been an acquisition), but does not refer to a specific disposition" and so did not offend this provision of the Act.[54] The court went on to say that "Evidence of "the" disposition would at the very least have to identify the entity disposing of the property ... and the entity benefitting from the disposition ... The recital in the development agreement with the city of Niagara Falls does not accomplish this."[55]

Though the 214 decision was a successful outcome for the taxpayer, clearly the safest course of action is not to refer to the beneficial owner in any registered instrument.

De Minimis Exemption

At the time that section 3 of the Act was enacted, Ontario Regulation 70/91 (the "***De Minimis* Regulation**") was introduced. The *De Minimis* Regulation provides for an exemption from tax on the transfer of partnership interests below a certain threshold.[56] Until February 17, 2016, the *De Minimis* Regulation provided simply that "Section 3 of the Act does not apply to a disposition of a beneficial interest in land if it is an interest of a partner in a partnership and if the person acquiring the interest would not be entitled ... to a percentage of the profits of the partnership ... [of] more than five percent ..."[57]

As of February 18, 2016, however, the *De Minimis* Regulation was substantially revised, to curb what the Ministry perceived to be an abuse of this exemption. The revised *De Minimis* Regulation has retroactive effect, applying to any transaction back to July 19, 1989.[58] In response to criticism from the legal community, however, including a joint submission from the Chair of the Ontario Bar Association Taxation Law Section, the Canadian Bar Association, and the Chartered Professional Accountants Joint Taxation Committee, the Ministry published an update to its bulletin on the amended D*e Minimis* Regulation stating that it would not reassess or prosecute transactions that occurred prior to February 18, 2012 (which follows the general four year limitation period for assessments or reassessments by the Ministry under section 12(4) of the Act), and that if disclosure is made prior to December 31, 2016, no interest would be applied to amounts payable until December 31, 2016.[59]

The changes to the *De Minimis* Regulation apply equally to municipal tax pursuant to §760-14 of the Code which states that "No tax is payable with respect to a transaction which may be exempt from time to time under the *Land Transfer Tax Act* or any other statute of the Province of Ontario". Likewise, if a party is entitled to a refund under the Act a refund is also available under the Code,[60] and items that call for the judgment of the city under the Code are deemed to be satisfied or determined in the same manner as decided by the Ministry under the Act.[61] Note, however, that the city has not published a bulletin confirming that it will not reassess or prosecute transactions occurring prior to a certain date, and that the City has a general six year limitation period for assessments or reassessments under §760-74 of the Code.

The revised *De Minimis* Regulation does not eliminate the exemption completely. Rather, the amended language states that the exemption is not available "if the partner who acquires the partner's interest in the partnership is a trust or another partnership".[62]

As a result, the exemption may still be used, but not by "layered" or "stacked' partnerships or trusts. Where real estate investment trusts hold their interests in land through a limited partnership, for example, the exemption is no longer (and is deemed never to have been) available. In 2016, the retroactive nature of this *De Minimis* Regulation was of serious concern and parties who had completed such transfers scrambled to review such transactions prior to the end of 2016 to determine if additional disclosure and payment was required. Going forward from 2016, greater care must be taken in structuring new transactions to ensure that the revised *De Minimis* Regulation is complied with and no more than a single trust or partnership is involved in a transaction that seeks to rely on this exemption (which may have income tax implications for property owners, depending on the structure used).

For dispositions of interests in "layered" or "stacked' partnerships or trusts which are widely held (meaning, in which 50 or more persons hold an interest), special timing and submission rules apply to the payment of the applicable tax. See parts 3(c)(ii) and 3(d)(ii) of this paper for a discussion about such rules.

Assuming that a transaction is structured properly in order to make use of the exemption, the implication of the *De Minimis* Regulation and the Act is that no return is required to be filed in respect of an acquisition of a beneficial interest in land that does not meet the *de minimis* threshold. Because the *De Minimis* Regulation states that section 3 does not apply to transactions that meet the specified criteria, and because section 5(7) of the Act provides that only persons liable to pay tax under section 3 must file a return, a partner acquiring a less than five percent entitlement to profit in a partnership (assuming the other criteria is met) is not required to file notice of same nor a return to the Ministry.

8. Non-Resident Speculation Tax: Section 2(2.1) Tax

Effective April 21, 2017, the Ontario government, in an effort to curb what it perceived as harmful residential property market speculation by non-resident investors, introduced an additional tax (the "**NRST**") of 15 percent of the value of the consideration paid for the transfer of certain residential real estate in the Greater Golden Horseshoe Region. The Greater Golden Horseshoe Region is a significant area of Southern Ontario focused around the municipalities of Toronto and Hamilton but defined to include a list of 21 cities, regions, and counties as set out in the Act.[63] The NRST is levied under the Act and collected along with LTT, and applies to both registered transfers and unregistered dispositions of a beneficial interest in land.[64]

Lands Affected

The NRST applies only to "designated land", which is defined as land that contains at least one and not more than six single family residences, in the "specified region", defined as land in any one of the 21 cities, regions, and counties as set out in Act, focused around the municipalities of Toronto and Hamilton.[65]

Until the introduction of the NRST it was only relevant to consider whether land contained single family residences for the purposes of determining the rate of tax payable under the Act, and even then practitioners needed only consider if there were one, two, or more than two single family residences on the subject land to determine the applicable rate. With the NRST, the existence of single family residences on land has become increasingly important, and land that might otherwise have been considered primarily "commercial": for example, a mixed-use building that contains a commercial storefront with three residential apartments above the commercial space will now be considered, at least for the purposes of the NRST, to have three single family residences, whether or not that land is zoned to permit residential use. So long as the structure or part of the structure has been designed for use and/or occupation as the residence of a family it will be a single family residence.

If land being transferred includes both residential and non-residential lands, section 2.1(6) of the Act provides (in a similar fashion to section 2(2) of the Act which deals with partial residential lands for the determination of section 2 tax) that the NRST will apply only to the consideration paid for the portion of such land that is residential. Technically, the Act only permits an apportionment of the consideration if the Minister considers it practicable, meaning that the right to an apportionment is not guaranteed, but the Ministry's interpretive bulletin indicates that self-assessments will be considered: "A reasonable self-assessment is required by taxpayers in apportioning the value of the consideration for the purposes of the NRST. The apportionment would be based on the value of the residential land as compared to the non-residential land, not the square footage of the two". Teraview statement 9172 specifically permits apportionment by a transferee in a registered transfer.[66]

Persons and Entities Affected

The NRST applies if land is conveyed to a "foreign entity" or "taxable trustee". A foreign entity includes foreign nationals (natural persons who are not Canadian citizens nor permanent residents) and foreign corporations.[67] Foreign corporations are corporations formed outside Canada, or corporations formed inside Canada which are controlled in whole or in part by foreign nationals or by corporations formed outside Canada (a foreign corporation that is listed on a Canadian stock exchange is exempt). More specifically, the Act defines a "foreign corporation" as one of the following:

1. A corporation that is not incorporated in Canada.
2. A corporation, the shares of which are not listed on a stock exchange in Canada, that is incorporated in

Canada and is controlled, directly or indirectly in any manner whatever, within the meaning of section 256 of the *Income Tax Act* (Canada), by one or more of the following:

iii. A foreign national.

iv. A corporation that is not incorporated in Canada.

v. A corporation that would, if each share of the corporation's capital stock that is owned by a foreign national or by a corporation described in paragraph 1 were owned by a particular person, be controlled, directly or indirectly in any manner whatever, within the meaning of section 256 of the *Income Tax Act* (Canada), by the particular person;[68]

By virtue of reference to section 256 of the *Income Tax Act* one must look not only at the *de jure* control of the corporation but also at the *de facto* control.

A taxable trustee is a trustee that is itself a foreign entity or that acts as a trustee for a foreign entity, however trustees acting for the following types of trust are specifically excluded: mutual fund trusts, real estate investment trusts, and SIFT trusts (all as defined in specified sections of the *Income Tax Act*).[69] There are certain exemptions for persons who are refugees or fall under certain immigration programs. There are also certain rebates that may be available for persons who become Canadian citizens or permanent residents, are full-time students, or who work full-time in Ontario for certain periods. In each case, the property must have been used as the principal residence of the person.[70]

These definitions are purposefully broad and force institutional investors who acquire NRST-subject lands on behalf of others to be particularly careful in determining who their investors are and to what extent the nature of their investors will affect the tax payable. Though section 2.1(6) of the Act provides a mechanism for apportioning the consideration between residential and non-residential lands, there is no such mechanism for apportioning the consideration between purchasers of lands, only one of which might be a foreign entity; the existence of a single foreign entity will subject the entire consideration paid to NRST. Furthermore, section 3(4.1) of the Act specifically provides that all purchasers are jointly and severally liable for the full amount of the NRST payable relating to the conveyance.

Payment, Reporting, and Statements

Since December 30, 2017, payment of NRST has been accepted through the Teraview registration system in the same manner that payment of LTT is accepted, upon registration of a transfer. Pre-payment of NRST may likewise be made in the same manner that prepayment of LTT to the Ministry of Finance's offices in Oshawa, and NRST is accepted along with the payment of LTT made in connection with an unregistered disposition of a beneficial interest in land.

One notable change accompanying the introduction of NRST is the inclusion of additional statements to be made by the transferee in each registered transfer (or hard-copy affidavit for a paper transfer), and in the hard-copy return required to be filed along with an unregistered disposition of a beneficial interest in land. The transferee must state that he/she/it has considered the new definitions and terms related to the NRST in the Act, and that the conveyance is either subject to the NRST or not subject to the NRST. If the conveyance is not subject to the NRST then the transferee must state why - whether because the land is not in the specified region, is not designated land, or the transferee is not a foreign entity or taxable trustee. If the transferee is a foreign entity or taxable trustee but is stating that tax is not payable he/she/it must explain the exemption being relied upon. Clients and practitioners alike must carefully consider these questions, their responses, and ensure proper documentation is obtained and retained to support the answers given.[71]

9. Conclusion

Despite being a relatively short piece of legislation focused on a very specific form of taxation, the Act is not as simple as it might first appear. The provisions of the Act are at times counter-intuitive and often forego clarity in favour at affording maximum flexibility to the Ministry. It comes as a surprise to many, for example, that the *Land Transfer Tax Act* taxes more than just transfers of land, including transfers of chattels and interests in partnerships or trusts that happens to own Ontario real estate. Parties also frequently fail to consider the specific provisions of section 3 of the Act and the flexibility inherent in off-title dispositions, not to mention to the specific rules for affiliate deferrals. Given the host of recent changes to the Act, to curb the de minimis exemption, to increase tax rates, and to introduce the NRST, it seems that LTT disputes and structures will become more complex before they become simpler, especially if Ontario real estate continues as one of the driving forces in the provincial economy. Our hope is that this paper has provided food for thought and a roadmap of things to consider when structuring transactions and preparing to comply with the Act and its many rules.

Notes

1. *Land Transfer Tax Act*, RSO 1990, c L6 [**Act**]; City of Toronto Municipal Code Chapter 760, Taxation, Municipal Land Transfer Tax (1 February 2008) [**Code**].
2. For municipal LTT rates see: City of Toronto, online: https://www.toronto.ca/services-payments/property-taxes-utilities/municipal-land-transfer-tax-mltt/municipal-land-transfer-tax-mltt-rates-and-fees/. For provincial LTT rates see: Ministry of Finance, online: https://www.fin.gov.on.ca/en/bulletins/ltt/2_2005.html
3. Act, *supra* note 1, at s 2(2).
4. Act, *supra* note 1, at s 3(1).
5. Act, *supra* note 1, at s 3(2).
6. Act, *supra* note 1, at s 3(3).
7. Act, *supra* note 1, at s 3(2).
8. See: *Timing of Tax Payable under Subsection 3(2) of the Act* O Reg 343/18 [**Timing Regulation**] at s 1(2) and 1(3).
9. Act, *supra* note 1, at s 5(7).
10. Code, *supra* note 1, at § 760-42(A).
11. Act, *supra* note 1, at s 5(8); In Ontario, Ministry of Finance, "Land Transfer Tax "*De Minimis*" Partnership Exemption: Clarifying Amendments for Certain Dispositions", (Published February 2016), online: www.fin.gov.on.ca/publication/ltt-deminimis-amendments-en.pdf [**De Minimis Bulletin**], the Ministry acknowledges its acceptance of this practice under the heading "Filing Returns", specifically stating: "To help facilitate compliance and in accordance with its usual practice, the ministry accepts returns and payments made by a partner on behalf of other partners, as well as by trustee(s) on behalf of beneficiaries."
12. Forms available online: www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/013-0775E~1/$File/0775E.pdf; Forms available online: https://www.toronto.ca/wp-content/uploads/2017/09/8e8d-MLTT-Return-Acquistion-Beneficial-Interest-Land-Appln-2015.pdf.
13. For provincial guides see: Ontario, Ministry of Finance, "Land Transfer Tax and the Treatment of Unregistered Dispositions of a Beneficial Interest in Land" (Published May 2006), online: www.fin.gov.on.ca/en/guides/ltt/guidenote1.html [**Unregistered Guide**]; for municipal guides see: City of Toronto, "Instructions for Lawyers", online: https://www.toronto.ca/services-payments/property-taxes-utilities/municipal-land-transfer-tax-mltt/municipal-land-transfer-tax-mltt-resources-for-lawyers/
14. Forms available online: http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/013-10016E~1/$File/10016E.pdf
15. See the following bulletin for additional information: "Quarterly Reporting Periods for Land Transfer Tax on Qualifying Unregistered Dispositions of a Beneficial Interest in Land" at: https://www.fin.gov.on.ca/en/tax/ltt/quarterlyreporting.html
16. Ontario, Ministry of Finance, "Guide to the Application of the *Land Transfer Tax Act* to Certain Transactions", Bulletin LTT 1-2001 (Published June 2001), online: www.fin.gov.on.ca/en/bulletins/ltt/1_2001.html [**Certain Transactions Guide**].
17. Certain Transactions Guide, *supra* note 18 at s 1.
18. Certain Transactions Guide, *supra* note 18 at s. 2.
19. Act, *supra* note 1, at s 1(1); Consider the inclusion of the words "interest of an optionee" in the definition of "land".
20. *Legislation Act*, 2006, SO 2006, c 21, Schedule F.
21. See, for example, *Superstars Mississauga Inc. v Ambler-Courtney Ltd.*, [1993] OJ No 1871, 15 OR (3d) 437 at para 5.
22. Unregistered Guide, supra note 15 at part 7.
23. Ontario, Ministry of Finance, "A Guide for Real Estate Practitioners - Land Transfer Tax and the Registration of Conveyances of Land in Ontario" (Published June 2010), online: www.fin.gov.on.ca/en/guides/ltt/3250.html [Registration Guide] at part 3.
24. Registration Guide, supra note 25.
25. Unregistered Guide, supra note 24 at part 10.
26. Act, supra note 1, at s 1(1).
27. *CSH Aurora Resthaven Inc. v Ontario (Minister of Finance)*, 2012 ONSC 4376 [**CSH**] at para 13.
28. 472601 Ontario Ltd. v Ontario (*Minister of Revenue*), 1987 Carswell Ont 689, 36 DLR (4th) 738, 47 RPR 91; CSH, *supra* note 29.
29. CSH, *supra* note 29 at paras 15 and 16.
30. *Assaly v Ontario (Minister of Revenue)* (1986), 41 RPR 309, 56 OR (2d) 30, 30 DLR (4th) 291.
31. *OPTrust Amaranth 1 Inc. v Ontario (Minister of Finance)*, 2016 ONSC 3648 [**OpTrust**].
32. Optrust, supra note 33 at para 31.
33. Registration Guide, supra note 25 at s 2.
34. Act, *supra* note 1, at s 1(1).
35. Act, *supra* note 1, at s 1(1), definition of "value of the consideration", para (b) and (b.1).
36. *Ibid.*
37. Act, *supra* note 1, at s 1(1), definition of "value of the consideration", para (f).

Notes

38. Act, *supra* note 1, at s 1(1), definition of "value of the consideration", para (g).

39. *Ibid*.

40. See the following for details: Ontario, Ministry of Finance, "Conveyances Involving Trusts", Bulletin LTT 1-2005 (Published March 2005), online: www.fin.gov.on.ca/en/bulletins/ltt/1_2005.html

41. See the complete description for the text of the affidavit at: Ontario, Ministry of Finance, "Guide to the Requirements to Evidence NIL Value of Consideration for Conveyances Involving Trusts - Land Transfer Tax Act", (Published April 2004), online: www.fin.gov.on.ca/en/guides/ltt/0693.html.

42. Act, *supra* note 1, at s 5(7).

43. *Woodbine Cachet West Inc. v. Ontario (Finance)*, 2007 ONCA 809.

44. Ontario, Ministry of Finance, "Transactions for Nominal Consideration", Bulletin LTT 10-2000 (Published November 2000), online: www.fin.gov.on.ca/en/bulletins/ltt/10_2000.html

45. Unregistered Guide, *supra* note 24.

46. Unregistered Guide, *supra* note 24.

47. Act, *supra* note 1, at s 3(9).

48. Act, *supra* note 1, at s 3(11).

49. Unregistered Guide, *supra* note 24 at part 6.

50. Act, *supra* note 1, at s 3(11).

51. Act, *supra* note 1, at s 3(13.1); Contrast the current legislation with the decision in *932292 Ontario Inc. v Ontario (Minister of Finance)*, 1997 Carswell Ont 2418, [1997] OJ No. 2276, 30 OTC 394 (affirmed at the Ontario Court of Appeal in *932292 Ontario Inc. v Ontario (Minister of Finance)*, 1998 Carswell Ont 3578, 82 ACWS (3d) 813), where the court permitted an affiliate deferral and tax cancellation using the nominee as the affiliate transferee through a registered transfer followed by a beneficial disposition. This decision is arguably no longer relevant given the provisions of Section 13.1 of the Act.

52. Act, *supra* note 1, at s 3(13.1).

53. *2143569 Ontario Inc v. Ontario (Minister of Revenue)*, 2014 ONSC 4628, 242 ACWS (3d) 970, 44 RPR (5th) 285.

54. 214, *supra*, at para 16.

55. 214, *supra*, at para 18.

56. De Minimis Regulation, *supra* note 9 at s 1(3).

57. *Exemptions From Tax Under Section 3 of the Act* O Reg 70/91 as it appeared on 17 February 2016 at s 1(2).

58. For a discussion of the changes to the De Minimis Regulation and their retroactive effect, see: Jane C. Helmstadter and Martin A.U. Sorensen, "Ministry of Finance Ready to Party like it's 1989: Retroactive Changes to Ontario Provincial Land Transfer Tax" (22 February 2016), *Bennett Jones Thought Network* (blog), online: blog.bennettjones.com/2016/02/22/ministry-of-finance-ready-to-party-like-its-1989-retroactive-changes-to-ontario-provincial-land-transfer-tax/

59. De Minimis Bulletin, *supra* note 13.

60. Code, *supra* note 1, at 760-58.

61. Code, *supra* note 1, at 760-1.

62. De Minimis Regulation, *supra* note 9 at s 1(3).

63. Act, *supra* note 1, at s 1(1).

64. Act, *supra* note 1, at s 2.1(2)

65. *Ibid*.

66. Ontario, Ministry of Finance, "*Non-Resident Speculation Tax*", (Published April, 2017), online: https://www.fin.gov.on.ca/en/bulletins/nrst/ [**NRST Bulletin**]

67. Act, *supra* note 1, at s 1(1) and Immigration and Refugee Protection Act, SC 2001 c 27 at s. 2(1).

68. Act, *supra* note 1, at s 1(1).

69. Act, *supra* note 1, at s 1(1).

70. See *Tax Payable under Subsection 2(2.1) of the Act by Foreign Entities and Taxable Trustees*, O Reg 182/17.

71. From a practitioner's perspective, LawPro recommends reviewing and making copies of original and independent source documents, such as a passport, birth certificate, permanent resident card, or articles of incorporation. Although it arose in a different context, the recent judgment of the Tax Court in the case of *Kau v The Queen*, 2018 TCC 156, is instructive on this issue.

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