



TAXATION FOR General Practitioners 2016

Ontario and Toronto Land Transfer Tax Update – September 2016

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**ONTARIO AND TORONTO LAND TRANSFER TAX UPDATE –
SEPTEMBER 2016**

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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 additional transfer tax in addition to the provincial tax), an understanding of provincial and municipal land transfer tax has never been more important. Today, the drive to collect land transfer tax has intensified, and the government bodies responsible for collecting that tax are reviewing and revising their regulations and policies to ensure no revenues are lost. This paper provides a general overview of the land transfer tax regime in Ontario and discusses some of the key areas in which tax battles are currently being won and lost.

The legislation governing land transfer tax ("**LTT**") in Ontario and Toronto is the *Land Transfer Tax Act* (Ontario) (the "**Act**"), and City of Toronto By-Law No. 1423-2007 (the "**Bylaw**").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 Bylaw as equivalent and provides reference to the relevant provision of the Act only. The Act and the Bylaw 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 Ministry under Section 12(4) of the Act and the general six year limitation period for assessments or reassessments under Section § 760-74 of the Bylaw). Any person making an objection or appeal should pay particular attention to Articles XII – Article XIII of the Bylaw 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 Bylaw. 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 that 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: for commercial properties, 1.5% outside of Toronto and 3% in Toronto; and for residential properties 2% outside of Toronto and 4% in Toronto.

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 land transfer tax.

¹ *Land Transfer Tax Act*, RSO 1990, c L6 [**Act**]; City of Toronto, by-law No 1423-2007 *To adopt a new Municipal Code Chapter 760, Taxation, Municipal Land Transfer Tax, to make minor consequential amendments to Municipal Code Chapter 27, Council Procedures, and to Chapter 767, Taxation* (13 December 2007) [**Bylaw**].

² For municipal LTT rates see: City of Toronto, online: www1.toronto.ca/wps/portal/contentonly?vgnextoid=a690a58e82cc1410VgnVCM10000071d60f89RCRD&vgnextchannel=4f90ff0e43db1410VgnVCM10000071d60f89RCRD; For provincial LTT rates see: Ministry of Finance, online: www.fin.gov.on.ca/en/tax/ltt/.

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 ... of the value of the consideration".

(a) What is the tax payable?

The graduated tax rates are set out in detail in Section 2(1) of the Act and Section § 760-9 of the Bylaw. 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.

(b) 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.

(c) 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 Section 2(1) 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 of Finance (the "**Ministry**").

(d) How is the tax paid?

If the registration is made by way of electronic registration in the Teraview system, land transfer tax 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 REGISTERED UNREGISTERED DISPOSITIONS – SECTION 3 TAX

In Ontario, as in the rest of Canada, 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, tax,

confidentiality, 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".³

(a) **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".⁴

(b) **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".⁵ Again, this means that the transferee is liable for the LTT payment.

(c) **When is the tax due?**

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".⁶

(d) **How is the tax paid?**

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.⁷ 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.⁸ The obligation to submit a return lies with the nominee, as well as 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.⁹

³ Act, *supra* note 1, at s 3(1).

⁴ Act, *supra* note 1, at s 3(2).

⁵ Act, *supra* note 1, at s 3(3).

⁶ Act, *supra* note 1, at s 3(2).

⁷ Act, *supra* note 1, at s 5(7).

⁸ Bylaw, *supra* note 1, at § 760-42(A).

⁹ 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."

The form of hard-copy return under the Act is available online, as is the form required by the Bylaw.¹⁰ Along with the hard-copy return, a copy of the agreement of purchase and sale pursuant to which the transfer was affected 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, 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.¹¹

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 Transaction Guide**").¹²

(a) 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 cannot be said to 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 Transaction Guide, which states "an agreement of purchase and sale or any related notice or caution is a taxable conveyance when tendered for registration".¹³ 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.

¹⁰ Forms available online: [www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/013-0775E~1/\\$File/0775E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/013-0775E~1/$File/0775E.pdf); Forms available online: www1.toronto.ca/City%20Of%20Toronto/Revenue%20Services/Taxes/Files/pdf/0/0775.pdf.

¹¹ 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: www1.toronto.ca/wps/portal/contentonly?vgnextoid=e6c4ff0e43db1410VgnVCM10000071d60f89RCRD&vgnextchannel=4f90ff0e43db1410VgnVCM10000071d60f89RCRD.

¹² 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 Transaction Guide*].

¹³ Certain Transaction Guide, *supra* note 12 at s 1.

(b) **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"). In practice, to the knowledge of the authors, most people do not remit tax on unregistered options.

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 conveyance creating the option is only a conveyance of an option, not of the underlying property, 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 Transaction 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".¹⁴ 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.¹⁵

(c) **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.

(d) **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 can be taken to mean natural persons as well as, pursuant to Section 87 of the *Legislation Act, 2006*, corporations.¹⁶ Partnerships (as well as trusts), on the other hand, are not persons but rather are a collective of, or a relationship between, persons.¹⁷ 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)".¹⁸ 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".¹⁹ In the case of a discretionary trust where the class of beneficiaries is not fully known (for example, "all

¹⁴ Certain Transaction Guide, *supra* note 12 at s. 2.

¹⁵ Act, *supra* note 1, at s 1(1); Consider the inclusion of the words "interest of an optionee" in the definition of "land".

¹⁶ *Legislation Act, 2006*, SO 2006, c 21, Schedule F.

¹⁷ See, for example, *Superstars Mississauga Inc. v Ambler-Courtney Ltd.*, [1993] OJ No 1871, 15 OR (3d) 437 at para 5.

¹⁸ Unregistered Guide, *supra* note 11 at part 7.

¹⁹ 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/lt/3250.html> [*Registration Guide*] at part 3.

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.²⁰

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 payable under Section 3.²¹ For a discussion of the value of the consideration attributable to such disposition, see the discussion below.

5. VALUE OF THE CONSIDERATION

(a) **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 sale 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].²²

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."²³

Management and leasing fees included in an agreement of purchase and sale have, for example, been found to be taxable, as have nursing home licenses sold together with a nursing home.²⁴ 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.²⁵

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

²⁰ Registration Guide, *supra* note 19.

²¹ Unregistered Guide, *supra* note 18 at part 10.

²² Act, *supra* note 1, at s 1(1).

²³ *CSH Aurora Resthaven Inc. v Ontario (Minister of Finance)*, 2012 ONSC 4376 [*CSH*] at para 13.

²⁴ *472601 Ontario Ltd. v Ontario (Minister of Revenue)*, 1987 Carswell Ont 689, 36 DLR (4th) 738, 47 RPR 91; *CSH, supra* note 23.

²⁵ *CSH, supra* note 23 at paras 15 and 16.

relating to the conveyance and, as such, become taxable. The court's 1987 decision in *Assaly*,²⁶ followed recently in *OPTrust*²⁷ 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 wouldn't 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 in anticipated building costs to be secured by the mortgages. When, however, the construction project fell apart 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 that the construction services were a benefit conferred 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".²⁸

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.²⁹ These undertakings are often requested by the Ministry when a purchase agreement provides for payment of an additional amount in the event some additional event occurs, like the acquisition of some other lands within a specified period of time.

(b) **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,

²⁶ *Assaly v Ontario (Minister of Revenue)* (1986), 41 RPR 309, 56 OR (2d) 30, 30 DLR (4th) 291.

²⁷ *OPTrust Amaranth 1 Inc. v Ontario (Minister of Finance)*, 2016 ONSC 3648 [*Optrust*].

²⁸ *Optrust*, *supra* note 27 at para 31.

²⁹ Registration Guide, *supra* note 19 at s 2.

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.³⁰ 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".³¹

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 transfer 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 sale price and the amount outstanding under the charge.³²
- (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.³³
- (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.³⁴
- (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.³⁵

6. NIL CONSIDERATION: NO TAX PAYABLE

In 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.

³⁰ Act, *supra* note 1, at s 1(1).

³¹ Act, *supra* note 1, at s 1(1), definition of "value of the consideration", para (b) and (b.1).

³² *Ibid.*

³³ Act, *supra* note 1, at s 1(1), definition of "value of the consideration", para (f).

³⁴ Act, *supra* note 1, at s 1(1), definition of "value of the consideration", para (g).

³⁵ *Ibid.*

(a) **Registered transfers involving trustees/nominees**

In transactions involving trustees/nominees there are three circumstances where transfers for no consideration commonly occur:³⁶

- (i) Beneficial owner to trustee: Where a party wishes to create a nominee – beneficial owner relationship and to do so wishes to effect 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.³⁷ 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 fair market value).

One potential problem arises in the case of trustee to trustee transfers where there has been an affiliate deferral during the time the trustee owned the land. In such a case the provisions of Section (f) of the definition of "value of the consideration" will be triggered, because there will have been a change in beneficial ownership of the land, during the time the nominee held title, for which valuable consideration was paid (the consideration that was the subject of the deferral). In these situations a transfer will not be permitted for nil consideration but will instead be deemed to be at the fair market value. The statements that are required to be made in the supplementary affidavit require the parties to disclose whether or not this is the case. 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.

(b) **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 the parties on each side of such disposition are the same, to the extent they are the same, will not be taxable to such extent. Situations like this may occur where

³⁶ 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>.

³⁷ 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>.

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% 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.³⁸

Relevant to this point, as well as being an interesting illustration of the difference between Section 2 tax, 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**").³⁹ 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 likely wasn't possible for *Woodbine* or the bank to complete an unregistered disposition under Section 3 (as the bank's enforcement remedies likely precluded it from completing the sale through an unregistered disposition), but the case is illustrative of the differences between the two sections and how proper tax planning and structuring can have an important impact.

(c) **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

³⁸ Act, *supra* note 1, at s 5(7).

³⁹ *Woodbine Cachet West Inc. v. Ontario (Finance)*, 2007 ONCA 809.

reason for the conveyance, must be set out in the transfer. On an unregistered disposition, a hard-copy return must be filed.⁴⁰

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.

(a) 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 Minister'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.⁴¹

(b) 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**").⁴²

⁴⁰ Ontario, Ministry of Finance, "Transactions for Nominal Consideration", Bulletin LTT 10-2000 (Published November 2000), online: <www.fin.gov.on.ca/en/bulletins/lt/10_2000.html>.

⁴¹ Unregistered Guide, *supra* note 18.

⁴² Unregistered Guide, *supra* note 18.

In brief, the Act provides that an affiliate deferral is available for corporation to corporation transfers where 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.⁴³ 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.⁴⁴ 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.

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. This is because Section (f) of the definition of "value of the consideration" deems such a transfer to be at fair market value if the beneficial ownership has changed hands and consideration has been exchanged. See the discussion regarding trustee to trustee transfers for nil consideration, above.

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

⁴³ Act, *supra* note 1, at s 3(9).

⁴⁴ Act, *supra* note 1, at s 3(11).

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 3.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸

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.⁴⁹ 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

⁴⁵ Unregistered Guide, *supra* note 18 at part 6.

⁴⁶ Act, *supra* note 1, at s 3(11).

⁴⁷ 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.

⁴⁸ Act, *supra* note 1, at s 3(13.1).

⁴⁹ *2143569 Ontario Inc v. Ontario (Minister of Revenue)*, 2014 ONSC 4628, 242 ACWS (3d) 970, 44 RPR (5th) 285.

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 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 not return 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.⁵⁰ 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."⁵¹

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.

(c) *De minimis* exemption

Perhaps in recognition of the fact that the administrative position by which the Ministry looks through partnerships could be unduly burdensome, Ontario Regulation 70/91 under the Act (the "**Regulation**") provides for an exemption from tax for on the transfer of partnership interests below a certain threshold.⁵² Until February 17, 2016, the 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 5 per cent ...".⁵³

As of February 18, 2016, however, the Regulation was substantially revised, perhaps to curb what the Ministry saw as an abuse of this exemption. The revised regulation has retroactive effect, applying to any transaction back to July 19, 1989.⁵⁴ 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

⁵⁰ 214, *supra*, at para 16.

⁵¹ 214, *supra*, at para 18.

⁵² *Exemptions From Tax Under Section 3 of the Act* O Reg 70/91 [**Regulation**] at s 1(3).

⁵³ *Exemptions From Tax Under Section 3 of the Act* O Reg 70/91 as it appeared on 17 February 2016 at s 1(2).

⁵⁴ For a discussion of the changes to the Regulation and their retroactive effect, see: Jane C. Helmstadter and Martin A.U. Sorenson, "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/>.

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, 2016.⁵⁵

The changes to the Regulation apply equally to municipal tax under the Bylaw pursuant to Section § 760-14 of the Bylaw 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 available under the Bylaw,⁵⁶ and items that call for the judgment of the City under the Bylaw are deemed to be satisfied or determined in the same manner as decided by the Ministry under the Act.⁵⁷ 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 Section § 760-74 of the Bylaw.

The revised 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".⁵⁸

As a result, the exemption may still be used, but not by 'layered' or 'stacked' partnerships or trusts. Where real estate investment trusts held their interest in land through a limited partnership, for example, the exemption is no longer (and is deemed never to have been) available. The retroactive nature of this regulation is of serious concern and it will be extremely important for any party who may have completed such a transfer in the last four years to complete a review of such transactions prior to the end of this year in order to determine if additional disclosure and payment is required. Additionally, great care must be taken in structuring new transactions to ensure that the revised 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 commonly used).

Assuming that a transaction is structured properly in order to make use of the exemption, the proper analysis of the 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* 5% threshold. Because the 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 5% 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. 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 of affording maximum flexibility to the Ministry. It comes as a surprise to many, for example, that the *Land Transfer Tax Act* taxes more

⁵⁵ De Minimis Bulletin, *supra* note 9.

⁵⁶ Bylaw, *supra* note 1, at 760-58.

⁵⁷ Bylaw, *supra* note 1, at 760-1.

⁵⁸ Regulation, *supra* note 52 at s 1(3).

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. If the recent amendments to the *de minimis* regulation are any indication, land transfer tax disputes and structures will become more complex before they become simpler. 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.