THE DEED TRANSFER TAX ACT - PART II

I. INTRODUCTION - IN THE BEGINNING

Firstly - a disclaimer. Unlike others who will provide you today with valued information and precedents to assist you in your busy practices, this is merely a chronicle. Hopefully it will provide some answers for you - but I can guarantee it will raise more questions than answers.

The announcement by the Honourable Greg Kerr, Minister of Finance in his budget address of 1990 to the house of Assembly is the beginning of my story. Mr. Kerr's announcement included the introduction of a new tax measure for Nova Scotian's. As promised, on May 24, 1990 Bill 121 was introduced to the Legislature establishing the new provincial deed transfer tax.

As with proposals for municipal deed transfer tax increases in the past few years there was no separately identifiable consumers group armed to lobby against this tax. The Canadian Bar Association (N.S.) Real Estate Section made representations to the Law Amendments Committee on behalf of those consumers and on behalf of real estate practitioners whose role it would be to advise their clients on the implications of this tax.

Additional lobbying was carried out by real estate organizations that feared a business backlash and economic

decline as a result of this tax. The objections of the Halifax-Dartmouth Real Estate Board were based as well on their interpretation that this was a metro area tax. Their statistics indicated that over 32.2% of the homes in the Metro area would attract this tax compared to an outside Metro average of 7.8%. They felt a more equitable tax would see the highest valued homes in each area of the Province subjected to a tax to accord a fairer application. I'm sure many areas are thankful this suggestion was not pursued.

The municipalities appearing before the Committee felt that the introduction of this tax eroded any leeway they might have had to increase their revenue bases, but for this tax. This was particularly so for those municipalities still without a municipal deed transfer tax.

But enough of the beginning. This tax was clearly here to stay and so the thrust of the CBA (N.S.) concerns focused on the way in which this tax would be implemented.

II. An Act Respecting Certain Financial Measures - Bill 121

Bill 121 set out the framework for the implementation of the new transfer tax. It would become Part II of the Deed Transfer Tax Act (R.S.N.S. 1989, c. 121). Rather than reviewing in detail all of the sections, I will highlight some of the sections that have caused practitioners difficulty in practice since the introduction of this part of the Act:

s. 16B - Exemption - This section exempts properties being transferred pursuant to an Agreement of Purchase and Sale entered into on or before May 28, 1990. Representations were made to the Law Amendments Committee recommending that Option Agreements entered into prior to the announcement of the tax should be included in this exemption. This was not accepted but options exercised on or before May 28, 1990 would be captured by this exemption.

s. 16C(1) - Definitions - The new tax is based on definitions of commercial and residential properties as defined in the Assessment Act. Practitioners should note this tax does not attach to properties other than those defined. Properties falling within the "resource property" classification are therefore exempt.

s. 16C(2) The Tax - This sets out the tax to be applied, and in mixed use properties, the first $100,000.00 exemption will still apply to the residential portion of the property. Purchasers and vendors cannot contract the apportionment of value in a mixed use property transaction. The apportionment ratios must mirror the assessment ratios. If the purchase price differs from the assessed values, as is often the case, prorating down or up may be required. If the assessment ratios are incorrect they must be appealed before any change in allocation can take place. Residential apartment buildings do qualify for the first $100,000.00 exemption - investment property is not to be confused with "commercial" property.

s. 16D Exemptions - This section incorporates by reference the exemptions set out in Part I of the Act namely, sections 4(2), 6 and 7. Of particular interest is the section 4(2) exemption, which has been the subject of much controversy in the past. Section 4(2) exempts transfers between "persons married to one another". Mr. Doug Campbell's comments submitted to the Law Amendments Committee clarifies the history of this section. He indicated that the purpose of this exemption under Part I of the Act was to ensure that transfers between spouses would not attract the tax. After the introduction of this exemption, most municipalities took the position that while this exemption applied to voluntary transactions between happily married spouses, transactions between separating or divorcing spouses would not benefit from the exemption. It was their interpretation that the parties had to be married at the time of the transfer and the transfer had to be a gift. This conjunctive interpretation was defeated with Missions v. The City of Dartmouth. This case held that the exemption applied between spouses or when the transfer was by way of gift and therefore divorcing spouses could qualify for the exemption. The problem becomes one of timing. To qualify for the spousal exemption the transfer must be "between persons married to one another" at the time of the transfer. With the introduction of the new Divorce Act parties cease to be spouses automatically thirty days following the grant of the divorce judgment. This is a variance from the old Divorce Act under which the parties remained spouses until the decree absolute was granted - sometimes many months after issuance of the decree nisi.

The effect of the new Divorce Act is that often spouses are no longer "married" by the time the transfer takes place, and these spousal transfers are thereby caught by the tax. It is often the situation that 30 days has elapsed before a court ordered transfer between spouses takes place. More frequently, the divorce settlement itself gives a wife or husband a period of exclusive use of the matrimonial home before a transfer is to be effected and by then they may have been divorced for a year or more. Divorce judgments may be issued more than 30 days after the hearing, but are dated to be effective from the hearing date. For all of these reasons it appears that the exemption of spouses as drafted should be widened to include former spouses where the transfer is pursuant to Minutes of Settlement or a Court order. The Law Amendments Committee accepted this recommendation with respect to Part II of the new Act but to date no regulations changing the wording of the exemption have been introduced. We will continue to lobby for this amendment as it is not one which offends the spirit of the exemption as drafted. In incorporating this section by reference in s. 16D all of the difficulties set out above with respect to the municipal deed transfer tax apply now to the Provincial tax as well until amended.

The section 6 exemption incorporated by virtue of s. 16D is the charitable organization exemption and without controversy. The Section 7 exemption referred to in 16D may cause some concerns, however, in particular s. 7(2). The Attorney General's Department interpretation is the narrow and literal one and practitioners are cautioned not to

assume that the interpretation placed by the province will be the same as the interpretation of some municipalities over the years. Section 7(2) exempts transfers between "a wholly-owned subsidiary company and its parent company, or between companies that are wholly owned by another company or person". For the exemption to apply transfers must firstly be between companies. Transfers from an individual to a company solely owned by that individual will not benefit from the s. 7(2) exemption.

Secondly, strict interpretation is placed on "person". Two companies proposing to transfer land between them that are both owned by the same two persons, will not benefit from the exemption as framed, unless they are successful in arguing the "parent-subsidiary" exemption. In a recent meeting of the CBA (N.S.) Real Estate Section, Mr. Randall Duplak, (the lawyer for the Attorney General's office responsible for Part II of this Act) indicated that the municipalities may be adopting different and perhaps a more liberal interpretation of s. 7(2) than that of the Attorney General's Office. Practitioners are cautioned to consult with Mr. Duplak's office before proceeding to rely on the exemption set forth in this section.

s. 16D(2) - This section creates a further list of specific exempted transactions and includes (16D(2)(1)) "persons, bodies or organizations, the deeds to whom are exempted by the regulations". In discussions with the

Attorney General's office it is hoped that a mechanism will be created to advise practitioners of additional exemptions created by regulation from time to time.

s. 16E(1) - This is the section that designates the 72-hour time frame within which the tax must be paid. Indications from members of the Law Amendments Committee were that this would likely be interpreted as three business days. This is not in fact the case. Seventy-two hours is seventy-two hours running from the time of the transfer. The Act provides (s. 16K) that failure to pay the tax "when due" shall give rise to firstly interest at the prescribed rate (1.5% per month) until paid (S. 16K(a)), secondly a penalty at the prescribed rate on any portion thereof unpaid after thirty days from the date of transfer (s. 16K(b)), AND thirdly, a penalty in the prescribed amount (s. 16K(c). To date there have been no regulations passed "prescribing" a penalty although they are planned and until "prescribed" the penalty would not attach.

The balance of s. 16E(1) deals with the particulars of the affidavit which is to be filed either by the grantee or "someone having full knowledge of the facts", who shall swear "personal knowledge" of the facts stated. This combined with s. 16E(3) deeming the person if other than the grantee personally liable, jointly and severally with the grantee for payment of the tax should be enough to discourage practitioners from signing these on behalf of their clients as a general practice. Mr. Duplak's office indicates however that approximately 90% of the affidavits filed since the implementation of this tax were completed by someone "other than the grantee". This is

somewhat surprising in light of the liability created by this section. This liability doe not differ from that created in Part I of the Act, s. 9, and in the Halifax City Charter transfer tax provisions.

s. 16D(2) - This section requires that the affidavit filed be in the prescribed form. This form requires the name and address in full of the former owner, grantor. Practitioners acting for Vendors obtain the new address for their clients in the usual course of their transaction and are requested, as a courtesy, to advise the purchaser's lawyer of this address. While some registries have accepted the address of the grantor to be c/o their lawyer, other registries have refused to accept affidavits without a specific mailing address for the grantor other than that of their solicitor.

s. 16H - This section requires the registrar of deeds in whatever jurisdiction the affidavit is filed to endorse the deed in the prescribed form. This endorsement is now in place in the Halifax registry, although the endorsement does not distinguish the nature of the tax, or make specific reference to the legislation under which it is collected or exempt. This creates some confusion and may require some explanation to your clients if they see the two levels of tax endorsement on the face of their deed. (see sample Appendix "B").

s. 16I - This section indicates that a filing is reviewable within on year of the endorsement referred to in s. 16H. This raises an interesting question as I am not aware whether the endorsement practice as required is in effect in all registration districts. As well the endorsement in Halifax began in approximately January, 1991, so the registered deeds between July 1, 1990 and January, 1991 have no endorsement. The provincial tax endorsement has no date unlike the municipal transfer tax endorsement (see Appendix "B") so it is unclear whether the review period of one year from the endorsement will run from the date of the affidavit or the date of deed registration. If the affidavit filed is false, there are no time limits for its review.

s. 16L(2) - This section provides that a lien for any unpaid tax due pursuant to Part II shall be created upon the filing by the Minister of Municipal Affairs with the registrar of deeds a certificate evidencing the tax with interest and penalty if at the time the certificate is filed the grantee is the owner of the property. This language differs from the lien set out for Part I. Section 15 of Part I provides that the lien attaches on the date when the tax is due and continues until payment. Section 16L(2) is much more specific and appears fairer to the bona fide purchaser for value without notice.

The balance of the provisions in this Part II deal with appeal procedures and the enabling provision for regulations under this Part.

III. PRACTICE NOTES

In speaking with the CBA (N.S.) Real Estate Section in December, 1990, Mr. Duplak, Legal Counsel for Municipal Affairs provided some valuable information based on his first few months experience with the new tax. They are incorporated here for the benefit of real estate practitioners generally:

1. Only one copy of the affidavit need be filed. Many of us are so used to the tri-colour coded municipal forms that it seems sacrilege somehow to file only one white one. However, this is all that is required.

2. For information of practitioners the staff involved in this tax consists of four persons currently:

   (a) The Chief Mechanical Appraiser;
   (b) The Administrative Clerk;
   (c) The Appraiser; and
   (d) Legal Counsel (Randall Duplak)

   It is hoped by the Department that an interpretation bulletin will be prepared to facilitate dissemination of information to the practicing bar but it will require government approval which has not yet been received. For general information and being forewarned lawyers seeking opinions from the Department based on "hypothetical" situations will be flatly refused.

3. Appeals - To December 1990, all appeals filed except two were allowed. Many of these involved issues surrounding resource property transfers in particular forest property. If a Vendor owns less than 50,000 acres of forest property and their assessment reflects this, no transfer by hat Vendor to a purchaser will attract the provincial transfer tax. If however the Vendor owns in excess of 50,000 acres, their assessment is deemed commercial (s. 2(d) of the Assessment Act) and the sale of any portion of that land will attract deed transfer tax as would the transfer of any other commercial property.

4. This brings us to one of the major points of misunderstanding and confusion by lawyers - namely the basis on which the tax is payable. The tax is payable on the assessed use of the property at the time of the transfer. The intended use by the purchaser of the property is irrelevant as is the legal use of the property to the extent that it varies from the assessed use. Let's examine for a moment a situation Mr. Duplak cited at his presentation. On January 15th, Jane Doe owned a two storey house in which she resided on Birmingham Street, in the City of Halifax. The property was assessed as residential and zoned commercial by the City of Halifax. In July, Jane Doe decides to sell her residence and the house was listed as commercial property. The purchaser proposes to establish a

restaurant business within the property. The transaction would not be subject to the 2% Provincial transfer tax on the first $100,000.00, as the assessed use was residential at the time of the transfer.

5. Certificates of Assessment - Inquiries have been received from numerous lawyers as to whether Assessment Department was planning or prepared to issue a certificate similar to a tax certificate on which lawyers could rely for purposes of accurately determining the assessed use of the property their client is about to purchase. There is no certificate available presently, nor are there any plans to introduce a certificate process. However, lawyers can inquire in writing to the Assessment Department who will respond accordingly confirming the assessment roll information relating to a particular property. Lawyers should confirm that they are acting for a purchaser of a property when requesting confirmation of assessment information, and the information requested should include whether or not an appeal from the assessment has been filed. An appeal, if successful, could vary the assessment and therefore vary the application of the transfer tax payable. The assessor will only provide particulars of appeal however with the vendor's written consent so purchaser's lawyers are advised to obtain this in advance of their inquiries.

6. Sample Situations - Attached as Appendix "C" are examples of situations Mr. Duplak's office has

encountered posed in the form of questions - with the answers. These examples help clarify the way in which the tax will be interpreted and thereby assist us in our daily practice.

IV. CONCLUSION

The discussions surrounding the introduction and implementation of the provincial deed transfer tax will continue. Hopefully, these discussions will, as they have to date, foster a greater understanding by lawyers of the way in which this tax will be applied so that we can better advise our clients. Efforts will continue to be made to create a clear and efficient channel of information from the Department of Municipal Affairs to the practicing bar. At the same time, practitioners are encouraged to bring forward difficulties they encounter so that they can be addressed in a timely fashion for the benefit of us all.

Hopefully, my chronicle has provided the answers to some questions you had before I started - it undoubtedly has raised some new ones you may not have even thought of, as I promised at the beginning. As with any new law the questions will continue - as will our search for the answers.