



May 15, 2017

BY E-MAIL

The Hon. Charles Sousa, Minister of Finance
Ministry of Finance
7th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Dear Minister Sousa:

Re: Recent *Land Transfer Tax Act* Measures

We write in response to two recent initiatives announced by the Ministry of Finance (the "Ministry"): the implementation of the non-resident speculation tax (NRST), and the collection of prescribed information for the purposes of a form (the "Return") under section 5.0.1 of the *Land Transfer Tax Act* (the "LTTA").¹

The Ontario Bar Association

Established in 1907, the Ontario Bar Association ("OBA") is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and students. The Real Property Law Section constitutes approximately 600 lawyers who serve as legal counsel to virtually every stakeholder in the industry. As you know, our members are lawyers who are frequently retained to perform real estate transactions.

The Real Property Law Section Executive of the Ontario Bar Association has considered the Return and the NRST (together, the "LTT Measures") and wish to raise several issues for your consideration.

The LTT Measures

We note that the legislation required to implement the NRST has not yet been tabled in the Legislative Assembly. However, it has become evident through our review of interim guidance provided by the Ministry, and in our discussions with Ministry officials, that the Ministry views

¹ R.S.O. 1990, c. L.6

the role of a real estate solicitor as more than a mere conduit for the delivery of client information in relation to the Return and the NRST. Rather, the Ministry has articulated a position that the real estate solicitor submitting this information has a positive duty to the state to take active and independent steps to ensure its veracity. In our view, that duty exceeds that mandated through the *Rules of Professional Conduct*. As currently implemented, a lawyer who fails in this duty is then subject to fines or imprisonment as set out in the *Land Transfer Tax Act*.

The professional duties of a solicitor hold that he or she cannot knowingly submit false information on his or her clients behalf (or, in the alternative, cannot be willfully blind as to irregularities that ought to put the solicitor on constructive notice that the information may be false). In this respect, the solicitor is a conduit for client information, but cannot be considered a surety or guarantor thereof.

It is our position that it is inappropriate for the state to impose an active duty of care on a solicitor to act as an agent of the state to the end of actively auditing and verifying client statements, and may in fact be an unwarranted intrusion by the state into the solicitor-client relationship. The Supreme Court of Canada recently struck down portions of federal anti-money laundering legislation that required lawyers to gather and retain considerably more information than the profession considered necessary for ethical and effective client representation, ruling that:

[t]his, coupled with the inadequate protection of solicitor-client privilege, undermines the lawyer's ability to comply with his or her duty of commitment to the client's cause. The lawyer is required to create and preserve records which are not required for ethical and effective representation. The lawyer is required to do this in the knowledge that any solicitor-client confidences contained in these records are not adequately protected against searches and seizures authorized by the scheme. This may, in the lawyer's correctly formed opinion, be contrary to the client's legitimate interests and therefore these duties imposed by the scheme may directly conflict with the lawyer's duty of committed representation.²

We must therefore request that the Ministry take immediate steps to clarify that the role of the solicitor in submitting NRST and Return information is limited to serving as a conduit for client information that is procured within the current professional standards in Ontario.

In addition, any penalties that could be imposed on a lawyer for offences under the *Land Transfer Tax Act* should be clearly articulated, and provide a defence for lawyers acting in good faith in accordance with existing professional standards.

² *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401 at para. 108.

Conclusion

We urge the Ministry to carefully consider the issues raised in this letter, and would be pleased to answer any questions that may arise.

Yours truly,

A handwritten signature in black ink, appearing to read "Ian Speers". The signature is written in a cursive, flowing style.

Ian Speers, Chair
OBA Real Property Law Section Executive

cc: The Honourable Yasir Naqvi, Attorney General of Ontario