



March 23, 2018

**BY E-MAIL**

Peter Monastyrskyj  
Manager, Land Taxes, Tax Compliance and Benefits Division  
Ministry of Finance  
7th Floor, Frost Building South  
7 Queen's Park Crescent  
Toronto, ON M7A 1Y7

Dear Mr. Monastyrskyj:

**Re: *Land Transfer Tax Act* record-keeping obligations**

We write in today in response to your letter of February 8, 2018, providing a draft Ministry of Finance memorandum clarifying record-keeping obligations under the *Land Transfer Tax Act* (“**LTTA**”).<sup>1</sup> We have considered your letter and memorandum, and consulted with members of the Real Property Law Section Executive of the Ontario Bar Association. We provide you with the following feedback.

***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.

***LTT record keeping obligations***

Our members are lawyers who are frequently retained to perform real estate transactions. As we have indicated previously, the current record keeping requirements are not in any way defined. Clarification is required in order to assist lawyers in advising their taxpayer clients on compliance. Therefore, we note the following points which we believe would benefit from formal clarification:

- **Method of Retention:** it is not clear if the Ministry will consider whether records retained in a digital medium will be sufficient to satisfy the statutory record-retention

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<sup>1</sup> R.S.O. 1990, c. L.6

obligations. Existing legislation, like the *Electronic Commerce Act, 2000*,<sup>2</sup> may apply to documents required to be retained, and we note that the native form of some original documents (for example, the agreement of purchase and sale) may be electronic only.

- **Nil-value Consideration:** In circumstances of a gratuitous, nil-value consideration (for example, an outright gift of unencumbered land, or an inter-spousal transfer for natural love and affection), what evidence should be retained in support of the statement that there was no consideration paid by the transferee? There are often no agreements or statement of adjustments for these types of transactions. In our view, consideration should be given to the practicality of “proving a negative.”
- **Proof of Owner Occupancy:** certain initiatives under the LTTA require a post-closing owner-occupancy (for example, a first-time home buyer rebate). While we appreciate that establishing owner occupancy is inherently specific to each transaction, and ultimately is a finding of fact, a list of supporting documents that may be seen to evidence such occupancy would be helpful.
- **Record Retention by Non-Residents of Ontario:** section 9.3 of the LTTA requires that a person making an affidavit under section 5 of the LTTA retain records in support of the taxes payable “at their place of residence in Ontario or at their principal place of business in Ontario”. This requirement would not appear to give clarity to those who do not have a place of residence or business within Ontario. Examples might include a resident of another province who owns vacant land in Ontario, or a foreign investor who owns a number of rental units but does not occupy any of them. Likewise, the obligations of an individual who ceases to reside (or operate a business) in Ontario before the expiry of the seven-year retention period are undefined. Some clarification (whether by statement of policy in this memorandum, or a statutory amendment) may be advisable. For example, it is not clear whether the Ministry contemplates a requirement that the person making the affidavit appoint a custodian within Ontario in either scenario that we have outlined.
- **Appointment of custodian:** the LTTA and any Ministerial guidance is silent on the formalities required to appoint a custodian of records required under section 9.3 of the LTTA. Specifically, to what degree must the custodian acknowledge and undertake to accept their role under the LTTA? And should a custodian fail to fulfil their duties, who is liable: the taxpayer, the custodian, or both?
- **Transferor as maker of the LTT Affidavit:** the wording of statements 9182-9184 contemplates only that the “transferee” (within the meaning of the LTTA) is the maker of the statements. We note that s. 5 (2.1) permits the transferor to make a land transfer tax (“LTT”) affidavit. Examples of when this provision might be used include a landlord (a “transferor” under the LTTA) registering a Notice of Lease. The responsibility for record-keeping in such a scenario (i.e. whether with transferor or transferee, regardless of

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<sup>2</sup> S.O. 2000, c. 17.

the maker of the LTT statements) requires clarification. In addition, the language of certain statements (e.g. 9170, 9173, 9182, 9183, 9184) may require clarification or alteration, to reflect that the transferee may not in all scenarios be the maker of the statements.

- **Conveyances not subject to tax by operation of s. 1(6) (Leases under 50 years):** certain types of leases are exempt from the operation of the LTTA by virtue of s. 1(6). An approved non-resident speculation tax (“NRST”) exemption statement to be entered into statement 9181 when this scenario arises may be helpful, as the other approved statements may not be applicable to the exemption (or, if a landlord is the maker of the statements, knowledge of the other exemptions may not be within the landlord’s knowledge, but the conveyance is clearly exempt pursuant to s. 1(6)). For example, the language “This conveyance is exempt from taxation under the Land Transfer Tax Act by operation of s. 1(6) of the Land Transfer Tax Act” may be an appropriate approved statement in statement 9181. Likewise, section 5(6) of the LTTA provides for limited record retention when s. 1(6) exempts the conveyance / lease from LTT (and thus also NRST). Clarification of the documents that ought to be retained in this scenario would be beneficial. It is suggested that proof of the lease running for less than 50 years is all that ought to be retained.

Many of the foregoing matters may be best addressed by way of a Q&A section of your proposed memorandum.

Thank you once again for the opportunity to provide this feedback. We will look forward to hearing from you in response, and are more than happy to provide clarification of any of the foregoing points.

Yours truly,

A handwritten signature in black ink, appearing to read 'Ian Speers', written in a cursive style.

Ian Speers, Chair  
OBA Real Property Law Section Executive