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***Bruce Hallsor chosen to chair the 9th  
Innovative Tax Planning for Real Estate Transactions Conference***

February, 2009

Bruce Hallsor has been selected to chair the 9th Innovative Tax Planning for Real Estate Transactions Conference at the Pan Pacific Hotel on February 25, 2009. In addition to chairing one of the sessions, he will be presenting the attached paper, Understanding and Applying the Property Transfer Tax.

# Understanding and Applying the Property Transfer Tax



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Crease Harman is British Columbia's oldest law firm, and its business practice group has been a prominent player in the Vancouver Island business and legal community for more than 125 years.

## **1. Introduction**

The Property Transfer Tax is better described as a land registration tax. It is a tax that applies to conveyances of real estate when they are registered at a Land Title Office. This paper will briefly explain how the tax applies, and will discuss ways to reduce or avoid the tax. Primarily, avoidance of this tax means either ensuring that a transaction falls within one of the exemptions listed in the Property Transfer Tax Act, or structuring the transfer so that it does not have to be registered. There are also some circumstances that offer the potential for reduction or delay of payment.

Property Transfer Tax must be paid in full at the time of registration of the conveyance at the land Title Office. The amount paid at that time is based on fair market value, as declared by the applicant. This declaration is subject to an audit which may result in a demand for further payment at a future date.

Fair market value is defined in the Act in some detail, but essentially means the price that would be paid by a willing purchaser to a willing seller in the open market on the date of registration. An open market is where the property is offered for sale so that anyone likely to be interested in purchasing it may make an offer.

This paper describes a number of tax reduction and tax avoidance schemes for dealing with PTT issues. It is important to remember that there is no general anti-avoidance section in the Property Transfer Tax Act, and that therefore schemes which are designed solely for the purpose of tax avoidance, and have no other rational purpose, are perfectly legitimate when dealing with this Act. Unlike many other tax statutes, there is no need to justify any scheme designed to avoid PTT on the basis of some other rational basis.

## **2. Assessment of Tax**

The Property Transfer Tax is payable at a rate of 1% of the first \$200,000 in value, and 2% of the balance. Another way of expressing the tax is 2% of the fair market value of the interest transferred, less \$2,000.

The tax applies to all “taxable transactions”, which are defined as any registration purporting to transfer or grant:

- (i) an estate in fee simple
- (ii) a life estate in land,
- (iii) a right to occupy land under a lease agreement, or
- (iv) a right to occupy land or require the transfer of land under an agreement for sale

“Land” is defined to include all fixtures, which includes buildings, improvements, utilities, and even timber values. There used to be an administrative practice of not including certain manufactured homes, but that has recently changed.

### **Split Transactions**

There are rules against splitting transactions into pieces in order to take advantage of the lower 1% rate on more than \$200,000.00. For example, section 3(2) states that if a purchaser acquires a portion of a property, and then acquires another portion within 6 months, those two transactions will be taxable as a single transaction, with the higher 2% rate applying to any amount paid over \$200,000. This is often overlooked by people who purchase more than one ¼ share unit in the same strata development, and it can lead to a nasty surprise for the conveyancing solicitor who finds his clients are suddenly liable for an extra \$2,000 in tax over and above what was in his statement of adjustments.

Section 3(2) creates this obligation for additional tax even where there are two owners, but they are related individuals or corporations.

### **Single Improvement over more than one lot**

Where a single improvement straddles lot lines, the Branch will consider the two purchases to be one transaction. Typically, in such situations, BC Assessment already attaches only one taxation folio to the two lots.

If the improvement is intended to be torn down as part of a redevelopment, and the vendor agrees to let the Purchaser demolish it before registration, you can save \$2,000 by doing this.

## **3. Declaration of Value**

The value to be placed on the transaction is generally accepted as the actual price paid for the interest, so long as the parties dealt at arms length, and in an open market. Where the parties are non arms length, or where the transfer is part of a larger transaction in which the break-out value of the real property interest is open to some interpretation, then the purchaser must declare a fair market value. These declarations will be scrutinized by the Property Taxation Branch, and must be made carefully. Because market appraisal is not a precise science, it may be that there is a range of values that might be considered fair market value. Where so, there is no rule that says you must pick the middle value. If the purchaser believes a value at the lower end of the range is

defensible, he is entitled to declare that value. Of course, the lower the declaration, the more likely it is that there will be an audit.

Even where the parties are arms length from each other, the Branch may reject a declaration of value based on the actual price paid if they have reason to believe the transaction did not reflect true market value. One example of this is in a municipal tax sale, where there is a forced bidding situation.

### **3.1 Non-market valuation tools: Assessments and Appraisals**

Generally, if the transaction is a fee simple one, the Property Taxation Branch will accept the current assessed value. In a rising market, this is usually favourable for the taxpayer, because BC Assessment's figures are based on the state and condition of the property on July 1 of the previous calendar year. Of course, in the current falling market, purchasers might prefer to have their own appraisal done in order to support a lower value. Appraisals, being performed in relation to the individual property in question, are accepted as better evidence of value than the assessment, which is based on a mass appraisal, and may not accurately reflect the individual characteristics of any specific property.

Please note that not all BC Assessment values are considered market value. If the property is classed industrial, for example, the assessed value is based on a regulatory scheme that does not reflect a market based appraisal. The Assessed value can still be used as a declared value, but if the taxpayer does not like the assessment, it is advisable to have an appraisal done.

There is an information bulletin (PTT 020) published which provides further details about how to calculate the fair market value of land with industrial improvements.

### **3.2 Changes in Value before Registration**

Even where the transaction is an arms length one made on the open market, there can be some limited room to reduce the value declaration. The declared value of a transaction is to be made on the date of the transfer, not the date on which the bargain was struck. If you purchase a property for \$1 million, with a three month closing period, but the market drops by \$100,000 by the time of closing, you can declare a value of \$900,000, and save \$2,000 in tax. Of course, for any declaration like this, it is important to have appraisal evidence to support your valuation. You do not need to pay for an appraisal up front, as there is no need to file any proof of value with your transfer. However, in the event that you are audited, you will be asked at that time for evidence of the value you declared, and if you did not prepare an appraisal originally, you will want

to have a lot of confidence that the value you declared can be supported by a subsequent appraisal.

### **3.3 Under-reporting Value**

If the Property Taxation Branch determines that you underreported the value, but did so without any attempt to deceive, they will simply issue a supplementary demand for taxes, which must be paid within 30 days, subject to your right to object under section 19, and ultimately to appeal a determination to the BC Supreme Court. However, if the Branch is of the opinion that your valuation was materially false or deceptive, you will be required to pay the difference with interest, and with a fine of up to \$25,000 for individuals, and \$50,000 for corporations. Offences under the Act also carry the possibility of imprisonment for up to two years.

It is important to note, however, that achieving a lower value for property transfer tax purposes may not always be desirable. If the property is not being used for a principal residence, and is being purchased with an expectation that it will be sold in not too distant future with gain in value, then declaring a higher acquisition price will reduce the capital gains tax payable upon a subsequent sale. The immediate benefit of a lower property transfer tax must be weighed against this future tax planning issue.

### **3.4 Pre-Sold Strata Units**

There is one further caveat to the issue of valuation based on the date of registration. Due to amendments made to the *Property Transfer Tax Act* in 2001 and 2004, section 1.4(2) the Property Taxation Branch no longer considers fair market value when considering the tax payable on registration of sales of pre-sold strata units. Instead, taxpayers can declare the “total consideration paid” as the equivalent of fair market value for PTT purposes.

This provision was added in order to provide specific relief to buyers who purchased pre-sold strata units, and saw the value of the unit increase dramatically before the actual closing date. It remains to be seen how impressed buyers will be in the coming year when they find that the price they are paying on closing is now much higher than its market value.

The meaning of “total consideration” is defined in an interpretation bulletin (PTT024) rather than a statute. According to the interpretation bulletin, that phrase includes not only the original contract price, but also any additional payments made by subsequent purchasers or assignments from the original purchaser. For example, if A signs a pre-sale contract for

\$500,000, and then assigns it to B for \$600,000, the total consideration paid for the unit is \$600,000.

My interpretation of the bulletin suggests that the reverse will also be true however. If A takes a loss, and assigns his pre-sales contract to B for only \$400,000, the total consideration of B is only \$400,000, even though the developer is receiving an additional \$100,000 from A. PTT is only payable on the lower price, regardless of actual fair market value at the time of registration. I have had this opinion confirmed in an e-mail from the property taxation branch, but to date, they have issued no formal interpretation bulletin to reflect this position.

If this interpretation is consistently applied, however, depending on how dramatically market prices fall between the time of a particular pre-sale contract and the time of registration, it may be possible for buyers to reduce their tax by assigning their contracts to a related company, a business partner, or a spouse for less than the value of the original purchase, provided the new price is fair market value. Although these are non-arms length transfers, the Act suggests that in these circumstances, so long as the assignment is for fair market value at the time of the assignment, the calculation can be made based on that (lower) figure.

I have run this by the Property Taxation Branch as well, and they have confirmed that theoretically a person could actually assign a pre-sale contract to himself for a lower value that reflects the market at the time of the assignment, they would accept a lower declaration based on that assignment transaction. They tell me that there is no prohibition on a person conveying a property to himself (although PTT would apply to such a transaction), so they see no way they could ignore an assignment to oneself either. I believe, however, that until I have seen this done, it would be better to do the assignment to a spouse if that is possible.

#### **4. Exemptions**

The statute contains a number of exemptions from the tax. In general, exemptions are available for transactions involving first time home buyers, certain farm properties, transfers to charities or public bodies, and certain transfers between related parties.

## **4.1 Principal Residence Exemptions**

### ***Related Individuals -- Section 14(3)(a)(b)(c)(d)***

A transfer of a principal residence (or an interest in a principal residence) is exempt as between related individuals. This only applies if the related individuals are both Canadian Citizens or permanent residents. One of the individuals must have lived in the property for 6 months prior to the transaction in order to establish residency, and can have had no other principal residence during that period.

The property must be classified as residential and must be no larger than 0.5 hectares. The structures must be residential in nature, and must be built to accommodate, and in fact accommodate, no more than three families on the property. If the property is larger than 0.5 hectares, a partial exemption can be claimed based on a formula.

This also applies if the transfer is being made by an executor or trustee to a beneficiary who is a related individual of the deceased or the settler of the trust. In all cases however, one of the related individuals must meet the principle residence definition in the 6 months prior to the transaction. I note that the settler of a trust does not need to be the creator of the trust for this exemption to apply. If the settlor donates the property to an existing trust for the benefit of a related individual, the transfer can still be the subject of an exemption claim.

Related individuals, for the purposes of the Act, mean a spouse, parent or child, grandparent or grandchild (and in laws); but not siblings, uncles and aunts, or nieces and nephews. Related means vertically related, but not horizontally related. A Company cannot be an individual, and cannot have a principal residence, so transfers to and from wholly owned companies will not achieve an exemption under this section. Spouse is expansively defined in keeping with contemporary legal developments.

If you have an elderly parent who is in a care facility, and who wishes to transfer their residence to a child who has no principal residence, it is often worth it to take the time to ensure that the child is able to establish the home as a legal principle residence before you register the transfer.

### ***First Time Home Buyers – Section 5***

A purchaser who is a British Columbia resident, has never owned real property before *anywhere in the world*, and is a Canadian Citizen or permanent resident, can qualify for a complete exemption from the PTT if the property is residential, the value of the land plus improvements is less than \$425,000.00, and the size is less than 0.5 hectares.

A purchaser will be considered a resident of British Columbia if he has filed two BC income tax returns in the last 6 years, or can otherwise prove continuous residency for more than 12 months prior to the registration date.

Further, the purchaser must occupy the property as a residence within 92 days of the transfer, and must live there for at least 12 consecutive months after registration. This is enforced by a follow up letter sent to the buyer on the first anniversary of the registration. If the property is vacant at the time of purchase, a residence must be completed on the property within a year, the combined value of the residence and land must not exceed \$425,000, and it must be resided in for 12 consecutive months after the date of occupation.

If the value is between \$425,000 and \$450,000, a partial exemption can be claimed. If the land is larger than 0.5 hectares, a partial exemption can be claimed for that portion which has the residence on it.

This exemption is frequently audited, and the penalty for filing a false return is equal to the amount of exemption claimed, which effectively doubles the tax payable, plus interest.

It is possible to claim this exemption on a transaction that is over \$425,000 or \$450,000 if you back out appliances from the deal on registration, or even if you ask a builder not to complete certain items until after the transfer date. However, it is important to remember that there will be tax payable on goods and services purchased outside of the real estate conveyance contract. For example, if a first time buyer of a \$430,000 condo asks that the price be reduced by \$10,000 and that the appliances not be included, he will likely have to pay 7% provincial sales tax when he buys the appliances in a separate transaction (GST is a separate matter). However, this \$700 PST cost will be well worth it when he considers that he is saving \$6,600 in PTT. Likewise, if he instructs his builder not to install the garden shed and the back deck, but he does that a month after closing for \$30,000, he will have to consider the tax implication. Many first time home buyers, of course, are financing a large portion of the transaction, and may require their lender to be cooperative if they are going to enter into a separate \$20,000 or \$30,000 appliance or improvement contract, using borrowed funds, after completion.

A more common tax avoidance scheme for this exemption involves first time purchasers who are couples. Because each person can only claim this exemption once, and couple who are purchasing their first home are well advised to register that home only in the name of one of them. When they move later in life, and purchase a new home, the other spouse can then register as sole owner of that residence (if it is an eligible residence),

and the couple has the chance of getting the exemption twice. Of course, there are some family law issues which can arise here, but the tax savings are potentially significant. I have saved many young couples thousands of dollars by use of this scheme.

There used to be an additional requirement that a significant portion of the purchase price be financed, but this was removed in 2007.

## **4.2 Recreational Residence Exemption**

A transfer of recreational residence is also exempt from the PTT if it is between related individuals, is not larger than 5 hectares, and has a market value of less than \$275,000. There is also a requirement that the property be classified as residential, and that the transferor must have actually resided on the property on a seasonal basis prior to the transfer. If the transferor (or deceased) usually resided there on a seasonal basis, but did not do so in the year(s) immediately before the transfer, the exemption may still be applied for.

## **4.3 Family Farms**

A family farm is property which is classified as farm under the Assessment Act, and is owned by an individual, several related individuals, or a family farm corporation. A family farm corporation is a company whose principal activity is farming farm land, and which does not have any corporate shareholders. (Section 14(1)). As with principal residence and recreational residence exemptions, related individuals mean vertically related, so transfers to children and grandchildren are exempt, but transfers to siblings, nephews and cousins are not.

In case of a transfer from an individual to a family farm corporation, there will be an exemption so long as the shareholders of the corporation are all related individuals. If a half of the shareholders are not vertically related to the transferor, then the corporation will only be entitled to claim a 50% exemption.

Curiously, there is no exemption in the case of a transfer between two family farm corporations, even if all the individuals involved are related individuals. If parents want to transfer a farm from their family farm corporation to their son's and daughter in law's family farm corporation, they can only avoid the PTT if they transfer it to them as individuals, and then the transferees transfer the property to their corporation. While in some cases it will be easier simply to issue shares in the parents corporation to the children, sometimes there may be good reasons to have two separate companies, and to execute a double transfer in order to avoid PTT.

#### **4.4 Matrimonial Settlements**

##### ***Section 14(3)(h)***

A transfer made between spouses (or former spouses) in accordance with a written separation agreement or a Court Order under the Family Relations Act, is exempt from PTT, regardless of the classification or use of the property. Proper documentation must be filed with the LTO to support such a transfer.

#### **4.5 Severance of Joint Tenancies**

##### ***Section 14(3)(l), 14(3)(m)***

If a transfer is made simply to sever a joint tenancy, and created a tenancy in common where the persons registered on title are the same as before, and each tenant in common holds an equal interest to the others, then no tax is payable.

Similarly, if the transfer is to remove one joint tenant because of death, and to provide that interest to the survivor, there is no PTT.

#### **4.6 Subdivision Creation**

##### ***Sections 14(3)(j), 14(4)(k), and 14(4)(k.1)***

The tax is not payable upon subdivision, so long as the holders of the subdivided properties have no greater proportionate interest than they had before the parcel was subdivided. In the case where common owners agree to split up the subdivided lots, the question of whether the post-subdivision interest is the same as the pre-subdivision interest will be decided by value of the post-subdivision holdings of each person, rather than square footage or some other measure. (see *Brock Holdings Ltd. v. R* [1993] B.C.J. No. 1083 (S.C.))

While in many subdivisions, all new lots will have the same value, in cases where there is significant variation in size and quality between the new lots, ensuring equivalent valuation can be tricky. Unless there is a good reason for dividing title among individuals, it is often better to let the original common owners remain in title over all subdivided lots.

In the event that the subdivision is not of a single large parcel, but of two or more adjacent parcels, the adjacent parcels must be transferred to a trustee, who is registered under the Land Title Act as such, and then the transfer to subdivision must follow the same rules as set out above. The ultimate owners of the subdivided parcels must have no greater interest

than they had before the amalgamation and subdivision process. Also note that the trustee in this case must be specifically registered as a trustee under the Land Title Act in order for the exemption to be claimed.

Where the trustee returns some of the land to the original owners, and some to third parties, there is a partial exemption available under subsections (3.3) and (3.4) for the portion returning to the original owners. The Branch has issued a bulletin (No. 006) with examples of calculations.

Where, as is often the case, the owners adjust their holdings immediately prior to creating the subdivision, those adjustments will be subject to the tax.

Finally, the Registrar is empowered to allow for land to be subdivided by a process not contemplated in the Property Transfer Tax Act, for example, not using a trustee in the manner contemplated. Although the Registrar may allow an exemption in this case, all of the other requirements in section 14(3) and (4) must still be met.

#### **4.7 Lease Agreements**

##### ***Section 14(4)(o)***

Lease Agreements are *prima facie* taxable upon registration. However, if the time left to run on the lease is less than 30 years as of the date of registration, the tax is exempt. You cannot avoid this by registering multiple cascading or stacking leases. In the case of a 31 year lease, (or a twenty one year lease with two five year renewal periods) you can avoid the tax if you simply wait a year before registering your leasehold interest.

The process for valuing leases is set out in BC Reg 74-88. The process is a bit complex, but must be followed, even when you are claiming an exemption. It is important to note that the calculation of time must include all possible renewal periods, regardless of whether the renewals are ever exercised.

Oddly, Regulation 74-88 states that in the case of lease modification agreements, the time is calculated by the term of the original lease, plus the extended term of the modification. There is no adjustment for any portion of the lease term that has passed by the time of registration. Therefore, you could register a 25 year lease, and be exempt from tax, but then six years later you could register a lease modification that adds an additional ten years to the lease. Even though there are only 29 years to run on the lease from the time of registration of the lease modification agreement, the lessor will be bound to pay PTT because the total lease now exceeds 30 years.

One common strategy early in the life of the PTT was to create stacking leases, all under 30 years, in the name of different but related parties. These transactions were non-taxable until 1994, when the Act was amended to treat these stacked leases as a single transaction, provided they meet the following conditions, which apply regardless of the identity of the lessors:

- (1) the transactions are in respect of the same land
- (2) the applications for registration of the leases (or options) are registered at the LTO within 6 months of each other
- (3) each of the transactions provides the right to occupy the land (or enter into a lease agreement in the case of options)
- (4) the total duration of all the leases and options is greater than 30 years.

The administrative practice of the Branch in such cases is to charge one tax, and divide the amount payable up proportionately among the various registered leaseholders.

#### **4.8 Escheat and Forefit**

##### ***Section 14(3)(k)***

Where property has escheated to the Crown, or been forfeited to the Crown, and then is returned to its original owner, the owner is not liable to pay PTT.

#### **4.9 Life Estates**

##### ***Section 14(3)(r)***

When an owner transfers the fee of a property to a purchaser, and received back a life estate, the owner can register the life estate without paying PTT.

#### **4.10 Transfers to Charities and Crown Agencies**

##### ***Sections 14(3)(s) and 14(4)(a-j)***

When the transfer is to the Crown, or to one of several types of governmental or non-profit bodies set out in the Act (Schools, Universities, Hospitals, Libraries, cultural groups), or to a registered Charity under the Federal Income Tax Act, the recipient organization is not liable to pay PTT.

Registered Charities and educational institutions can only claim the tax exemption if they declare that the land will only be used for an educational or charitable purpose.

So, while a sale to a Library under 14(4)(g) will avoid the tax even if the Library Board subdivides the property off and sells it, a sale to a Church under 14(3)(s) will only avoid the PTT if the Church uses the property for its own purposes. For example, If the primary purpose the church puts to the property is to rent it out for revenue, then it will not be able to claim the exemption.

Note that BC Reg 52/2004 includes as exempt some religious bodies that might not otherwise qualify as charities.

### ***Conservation Covenants (Section 16)***

Where a conservation covenant is granted to the Crown, the value of this covenant is exempt from tax provided that the covenant prevents the natural state of the land from being altered, and that the covenant can only be altered or removed with the consent of the Lieutenant Governor in Council.

If a buyer is purchasing property with the intention of creating such a covenant, he can apply for a reduction in his PTT even if the covenant is not ready to be registered on the day title passes to the buyer. Under section 16(5) the purchaser can apply for a certificate which postpones payment of the PTT for up to 6 months by providing evidence that he intends to register a conservation covenant within that period. If the covenant is not registered, then Likewise, under section 16(6), the purchaser can apply for a refund on PTT paid in respect of the value of a covenant that is registered on title within a year of the initial transfer.

Section 16(8) provides that the tax becomes payable upon a subsequent discharge of the covenant, in the amount that would have been payable at the time of original registration of the fee simple interest. This is the case even if the fee simple interest has subsequently been conveyed. So, if A purchases Blackacre for \$1 million in 2000, but gives a conservation covenant to the Crown valued at \$500,000 (measured by the diminution in property value of Blackacre), he will claim an exemption ofm \$10,000 in PTT. If he sells his fee simple interest in Blackacre to B for \$1 million in 2005, and subsequently, B has the conservation covenant removed, B will only have to file a return for \$10,000, rather than the \$20,000 the covenant may now be taxed at if it were registered in the changed real estate market.

#### **4.11 Agreements for Sale**

### ***Sections 14.3(1), 14.4(1), and 14.4(n)***

If the tax was paid on the value of the property when an Agreement for Sale was registered, it is not payable again when the property is ultimately transferred. Similarly, if the agreement for sale has not been completed, and the registered owner transfers title to another person, still subject to the agreement for sale (for example, a trustee), the transfer is exempt from PTT. Finally, if the agreement for sale is revoked pursuant to a court order or a quit claim, and the land is transferred back to the original owner, the tax is exempt on this transaction.

### **4.12 Bankruptcy**

#### ***Sections 14.3(n-p)***

Where property is transferred to a trustee in bankruptcy, no PTT is payable. Where the property is transferred back upon discharge of a bankruptcy to the original owner, no PTT is payable provided no consideration was paid to the Trustee for the transfer. Where the property is also the Bankrupt's principal residence, it may be transferred from the trustee to the spouse without attracting PTT, again, providing that no consideration was paid to the Trustee for the transfer.

### **4.13 Veteran's Housing**

#### ***Section 14.4(r)***

In the currently rare case where a transfer of land is made by the Dominion to a veteran (or spouse or widow) pursuant to the federal Veteran's Land Act, such transactions are exempt from PTT.

### **4.14 Amalgamations**

#### ***Section 14.4(u)***

The Property Transfer Tax Act exempts changes in the registered name caused by corporate amalgamations but only if those amalgamations are made under the CBCA, the BCA, or a similar provincial statute, and the transfer is made in accordance with certain time limits set by the administrator.

The statute uses the words "similar provision" to the CBCA amalgamation criteria, which means that the statute under which the amalgamation takes place must provide that the corporation continues in the new amalgamated entity, including that all the property, interests, rights, and liabilities of the predecessor corporations continue in the amalgamated

company. If the statute does not provide for this, but instead provides that one or both of the amalgamating companies does not continue into the new company, or is dissolved, then this exemption will not apply.

If this is an issue, the problem can be solved if it is caught ahead of time by changing the structure of the amalgamation in the home jurisdiction to ensure there is a continuation, and that the certificate of amalgamation provided with the transfer satisfies this criteria.

#### **4.15 Correcting Conveyancing Errors**

In the case of a conveyancing error which required correction by a subsequent transfer of an interest, it is possible to obtain an Administrators Certificate in advance of registration, which can be attached to the application for registration, and grants an exemption from the tax.

The Property Taxation Branch will issue such certificates where there is clear documentation to show an error in carrying out the intention of the parties. It will not issue a certificate when a lawyer discovers, after the fact, that there is a better or more tax efficient way to structure the transaction. For example, if a conveyancer conveyed the wrong strata lot to somebody, but paid the right amount of tax because the declared value was correct for the lot which was intended to be transferred, an Administrators Certificate will be issued. This kind of thing is happily rare, but it can happen in a new subdivision or condo, where two neighbours accidentally get switched on title.

Other kinds of conveyancing errors will not attract an exemption by way of Administrators Certificate. Examples of these errors are where the property was not supposed to be transferred at all, but the Notary filed the transfer documents anyway; or the purchaser claimed an exemption because he thought that all the conditions for exemption had been met, and then later wants to rescind the conveyance and re-submit it a few days later when the conditions have been met.

### **5. Avoiding Registration**

The other principal method of avoiding or deferring the PTT is to simply avoid registration of the transfer. This method can be very effective, but it is only generally appropriate where the buyer does not require registration for financing purposes, and where the buyer and seller have the kind of relationship which is conducive to the establishment of a trust. Of course, if there is enough tax

savings involved, even truly arms length parties might be tempted to enter into a fiduciary/beneficiary relationship for mutual profit.

There are three common examples of where such a structure might work:

- (1) Parents desire to give their property to their children. Unless the principal residence exemption can be made to apply, a straight gift will involve a transfer of title, and will require the children to pay property transfer tax. However, the tax can be delayed if the parents give the children a transfer in registerable form, but also execute a nominee agreement whereby the parents continue to hold legal title, but the agreement acknowledges that the children now hold the beneficial interest. At some point in the future the children may exercise their right to actually register title, and cancel the nominee agreement. Tax will be payable then.

This scheme works just as well if the parents are not in a position to give the property away, but need to sell it in order to finance their retirement. The child or children can pay the parents cash when the agreement is made, but still delay registration until a future date. If, for any reason, the children decide to sell the property before title is registered, then the tax really has been avoided altogether, because the property can be listed for sale and sold by the parents directly to a subsequent purchaser.

- (2) Business partner or joint venturer sells a portion of his property to another partner or joint venturer. Unless the new partner or joint venturer requires title in order to secure financing of the purchase price, the new partner may agree not to register his interest, as a way of saving the property transfer tax. Whether this is a short term subdivision or development venture (where the property will be developed and sold in the near future) or a long term holding partnership, there may be enough trust in the various mutual business relationships between the owners that the non-registered owner is content to permit the other to remain as sole registered owner, subject to fiduciary obligations which may be contractual, or simply imposed by conduct.
- (3) Vendor sells property to an unrelated purchaser, in an essentially commercial transaction where it is anticipated that the purchaser will only hold the property for a short period of time. If the property has a high value, and the purchaser is able to finance the purchase without registering any security on the property, it is possible for the vendor to agree to hold the property in trust for the purchaser, without registering the transfer. It is usually important to the vendor (and trustee) that the trust agreement specify that the purchaser has an obligation to dispose

of the property, or register a transfer, within a fixed period of time. This way the vendor can limit his involvement, and ensure that the purchaser fully assumes the risk of any decline in value of the property over time. When the purchaser flips the property to another, the vendor transfers the property to the subsequent purchaser, and the PTT has been avoided.

Usually, the parties will agree to split the PTT savings amongst themselves. This is the incentive for the Vendor to accept the fiduciary obligations that come with the trust agreement. If the property declines in value, and the purchaser decides not to sell it, but to register title in its own name, then at least there is the benefit of a reduced PTT based on the actual value at the time of transfer.

## **6. Conclusion**

I hope this paper has showed that there are several ways to look at reducing, delaying, or avoiding the payment of Property Transfer Tax. In too many cases, buyers simply pay the tax without looking to see if there is a way for avoidance.

Of course, one needs to be careful, and mindful of the assessment process. In cases where a lot of money is involved, it might be worth considering obtaining an advance tax ruling. These rulings are available from the Property Taxation Branch, at a charge of \$90 per hour. The Branch currently estimates that rulings will be provided within 20 days of the request, although it will not guarantee any specific timeline. They can be requested from the Administrator, Property Transfer Tax, Ministry of Small Business and Revenue, PO Box 9427 St. Prov Govt., Victoria, British Columbia, V8W 9V1.

Once a PTT return has been filed, the branch has one year in which to issue a Notice of Assessment (two years in the case of a subdivision). The Assessment must be paid within 30 days, even if the taxpayer wishes to dispute the assessment. Interest will be paid at a prescribed rate on any overpayments, and interest will be charged on any payments made after 30 days.

Disputes of an assessment can be made by mailing a notice of objection to the Minister within 90 days of the date shown on the Notice of Assessment. The form of objection is set out in section 19 of the Act, and it is the Minister himself who has discretion to rule on the substance of the objection.

Further appeals to the Court are permitted under section 21, which require a Petition to be filed within 90 days of the date of the Minister's Notice, and that it be served on the Crown within 14 days of the filing of the Petition. There is also

a provision under section 22 for a taxpayer to require an arbitration of his dispute, but in order to do so, he must waive his rights to any recourse from the Courts.

As one might expect, the Crown has a full range of enforcement tools at its disposal for the collection of taxes owing, including the right to garnishee debts owing to the taxpayer, seize and sell property, and lien the property in priority over other chargeholders.

There are several public policy criticisms that have been brought against this Act, which are not within the scope of this paper. For an exploration of some of these issues, I attach a copy of an article which was published in the Vancouver Sun in 2005. I also enclose a copy of a recent paper done by the C.D. Howe Institute on the economic impact of a similar tax in Toronto. I note that the BC Liberal party members passed a resolution to eliminate this tax at their 2006 convention, but that there is no present indication of any interest from the government on following through on this resolution.



# This tax hurts the homebuyer

We have a housing affordability crisis in B.C. and the property transfer tax is one of the biggest culprits

**B**ritish Columbia is facing a housing affordability crisis. Young people find it difficult to get into the condo market. Young families are having trouble affording a house big enough to raise kids.

B.C.'s housing affordability gap is glaring in comparison to the rest of the country. A Royal Bank report in June showed that British Columbians spend an average of 54 per cent of their pre-tax household income on housing, compared to 28 per cent in Alberta and 35 per cent in Ontario.

This is a crisis for everyone because B.C. will have trouble attracting young workers needed to sustain our economic growth. The young people we pay to educate will find it challenging to start their careers here and will be tempted to build an economic future outside B.C.

The property transfer tax is one of the biggest culprits in the housing affordability crisis. It is a regressive tax that limits personal choice and prevents people from buying and moving homes.

A young family moving up from a \$200,000 condo to a \$400,000 house will find itself saddled with a \$6,000 property transfer tax bill, just for the privilege of committing to our community, buying a house, putting down roots. If they are borrowing the \$6,000, as virtually all buyers are forced to, the mortgage payments on this tax inflates to \$20,000 to \$30,000 over a 25-year term.

The property transfer tax is a job killer. In some cases, the cost of the tax is enough to convince people to look for employment in some other housing market.

In the case of bigger companies, looking to locate a facility in B.C.,

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the extra tax that we impose on their commercial property and their employees' properties can add up to hundreds of thousands of dollars.

The property transfer tax is also a tax on mobility, which is detrimental to both the economy and our fundamental principles of tax fairness.

Take, for example, the case of two engineers who graduate from UBC in the same year. One takes a job in Vancouver, buys a house, and stays there for 50 years. The other moves around the province looking for economic opportunities, working in many communities over his lifetime.

Over the same 50-year period, both people might earn the same total salary, but one will pay no property transfer tax, and the other might pay \$50,000. On what basis does the more mobile person deserve to be attacked with that kind of tax burden?

Another common reason why people move is because of changing family circumstances: The addition of a new baby, the end of a marriage, the need for more space to take in elderly relatives. Why should people going through these kinds of ordinary life changes have to pay thousands of dollars to the government, when others do not?

Finally, the property transfer tax is inflationary because the percentage of tax grows with higher prices.

While a the purchase of a \$200,000 home is taxed at only one per cent, a \$400,000 purchase is taxed at 1.5 per cent, and it keeps going up.

In 2000, the last year of the NDP government, the property transfer tax raised about \$250 million in revenue. In 2004, thanks to a booming economy and a dramatic rise in housing prices, this tax took in more than \$600 million and is still growing.

On the backs of homebuyers, who are struggling with crippling mortgages, rising utility costs and inflated prices, the government has seen fit to more than double their tax burden. The answer to an unprecedented affordability crisis should not be to make housing even less affordable, but rather to cut the tax.

The property transfer tax was introduced in 1988. It has had no known benefit to the economy. It is a job-killing tax that discourages companies from locating in British Columbia and creating jobs here.

Every time someone chooses not to buy a house in B.C., we lose jobs in the moving industry, the real estate industry, the legal industry, and construction and renovation industry, and retail.

Every time a company chooses to locate a facility in another province because of the property transfer tax, we lose jobs and revenues that are far greater than the tax revenue we might have gained.

It is high time the B.C. government cut this tax, and free British Columbians to make their own decisions on where they choose to live, without penalizing their decisions.

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