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April 21, 2017

The Honourable Charles Sousa
Minister of Finance
7 Queen's Park Crescent, 7th floor
Toronto, Ontario
M7A 1Y7

Dear Minister Sousa:

Yesterday's announcement of a package of policy measures meant to cool the housing market in the GTA has sparked a number of questions amongst real estate lawyers across Ontario and we would appreciate clarification from your Ministry as soon as possible to avoid chaos and unintended consequences in the coming days. Our concerns are not with the specific policies – we will leave that for others to comment on – but with the process and uncertainty that surrounds the hurried implementation of these measures.

Our concerns are primarily around a potential new professional liability exposure and about the process and required forms that are not yet clear or even available.

With respect to the issues around professional liability, the new Land Transfer Tax return requires new information including the following:

- whether the home is intended to be occupied by the person who purchases or acquires the land, or their family member(s), as their principal residence;
- whether the property, in part or in whole, is intended to be leased out;
- information about beneficial owners, if the person who purchases or acquires the land is acting as a trustee, nominee or in a similar capacity.

What level of evidence are lawyers required to obtain to confirm this information?

Section 6 of the *Land Transfer Tax Act* reads, in part, as follows:

6. (1) *Every person is guilty of an offence who,*

(a) makes, participates in, assents to or acquiesces in the making of false or deceptive statements in a statement, affidavit, return or other document prepared, submitted or filed under this Act;

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Our fear is that the new LTT Return will be caught by this penalty provision of the Act and ensnare lawyers who act in good faith, but are misled by clients. Since the offence is one of strict liability, on strict statutory interpretation it is immaterial whether a lawyer made or participated in making a false return while reasonably believing the information to be true: the offence is merely one of proving that the lawyer “made or participated” in a false or deceptive return.

It has also been pointed out that “intention” cannot be legally tested in a circumstance like this. Does the solicitor face liability if the purchaser changes their mind a month after the transaction and decides to lease the property, instead of occupying it themselves?

According to the Land Transfer Tax bulletin, the prescribed information to be obtained from individuals includes “residency, citizenship and permanent resident status”. Do we have to obtain all three? Will a verbal statement suffice, or will solicitors have to obtain written proof? If written proof is required, what will constitute adequate proof of residency, citizenship and permanent residency status? An Ontario Drivers’ License does not provide all that information. Will it therefore become mandatory for every purchaser client to bring their passport to a pre-closing meeting? What if they lack a passport?

A similar set of concerns can be raised with respect to incorporated entities. According to the Land Transfer Tax bulletin, where the purchaser is a corporation, further information is needed about “incorporation, ownership and control”. Again, what constitutes adequate proof? What is meant by ownership? What is meant by control? The Law Society’s Appendix 6 (ID verification for organizations) uses 25% as the threshold. Does that apply here, or is it something different?

In recent days we have received correspondence from a lawyer who is presently facing Ministry of Finance audit relating to a first-time home buyer rebate, in which the purchaser deliberately misled the lawyer about occupancy (and made a false affidavit to this effect). While the matter is not yet settled, this colleague advised us that the position of the auditors is that they can – and may – impose penalties on a lawyer for participation in the making of a false affidavit, return, etc., regardless of the due diligence. This suggests that our concern is not a theoretical one, but one that is very much alive and will be of great concern to any lawyer closing a deal as soon as Monday, April 24th. We believe many lawyers will simply refuse to close transactions until many of these questions are satisfied.

We believe, to avoid confusion and chaos on Monday and in the following weeks, the Ministry of Finance should act as soon as possible to assure lawyers they will be shielded from liability when they undertake reasonable due diligence and are provided with inaccurate or misleading information.

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We believe this assurance can come in two forms:

1. A comfort letter from the Ministry of Finance that it will not prosecute solicitors under the LTT Act where they have, in good faith, submitted information provided by their client that proves to be false or misleading; and,
2. An amendment to the LTT Act, with retroactive effect, at the earliest possible opportunity (perhaps as part of the Budget 2017 Act), deeming same not to be an offence under the LTT Act.

On the process side, many of our members across Ontario object to the notion that they should become statistical enumerators, but we recognize the policy imperative that you are facing to collect data in order to implement some of the measures you have proposed. We believe the Bar should have been consulted on these measures and would hope for a more collaborative relationship on matters such as this going forward. You should also know that many solicitors have already stated to their clients that they will be forced to raise their fees – and therefore the costs associated with purchasing or selling real estate – because of these new forms and associated extra liability.

With specific reference to the process questions and our concerns:

- 1) The form required to provide the information prescribed in section 5.0.1 of the *Land Transfer Tax Act* will not be available until Saturday, April 22, 2017. However, all Transfers registered on or after April 24 require this form to have been completed. Without access to this form, lawyers are uncertain as to the evidence required to be obtained, yet they are required to have such evidence as of April 24, 2017 to complete transactions contractually obliged to be completed as of April 24, 2017.

(We note that a clarification on this matter was issued today to say that previously signed documents can be registered “as is” through the transition period. This clarification is welcome, but still does not help solicitors understand precisely what information will be required for any transactions coming in on Monday.)

- 2) Nowhere do the Land Transfer Tax or Teranet materials state how long it will take to get a confirmation number. Nor do they indicate if the request will be processed electronically or manually. From a work-flow point of view, a solicitor will have to leave Teraview, access Teranet Express and then re-enter Teraview which will take some time. If processing is handled electronically, hopefully the amount of wait time will be negligible. However, if the data inserted via Teranet Express will be processed manually, that could take hours, especially on busy days. We believe there will be numerous cases of deals that will not close by 5 pm due to a delay in obtaining that number. Expect many upset home buyers starting on Monday.

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- 3) Teranet has not updated the Teraview software to accommodate the new information required regarding the NRST. However, as of today, lawyers are required to insert information into every Transfer to confirm whether or not the new tax is applicable and if it is, this tax must be pre-paid to the Ministry office in Oshawa and once received, the Ministry will issue a receipt number which can be inserted into the Transfer. We understand that the process of paying land transfer tax directly to the Ministry now takes a minimum of two to three weeks. With an increased number of pre-payments, we assume this time will be longer. How are lawyers to deal with applicable transfers that are contractually obliged to be completed in the last week of April and early May?

We understand that many of the new forms and clarifications about how this will be rolled out will be provided this weekend. We strongly suggest and request that these new changes be delayed a few days to give the Ministry of Finance, Teranet and solicitors across Ontario the time needed to understand the new rules and to prepare their systems. If not, we predict chaos in solicitors' offices across Ontario in the last week of April and in the following weeks.

We appreciate your timely attention to this matter.

Sincerely,

Eldon Horner
Chair,
Federation of Ontario Law Associations

Merredith MacLennan
Real Estate Committee Chair,
Federation of Ontario Law Associations

- cc. The Honourable Yasir Naqvi, Attorney General
The Honourable Tracy McCharles, Minister of Government & Consumer Services
Scott Thompson, Deputy Minister, Ministry of Finance
Paul Schabas, Treasurer, Law Society of Upper Canada