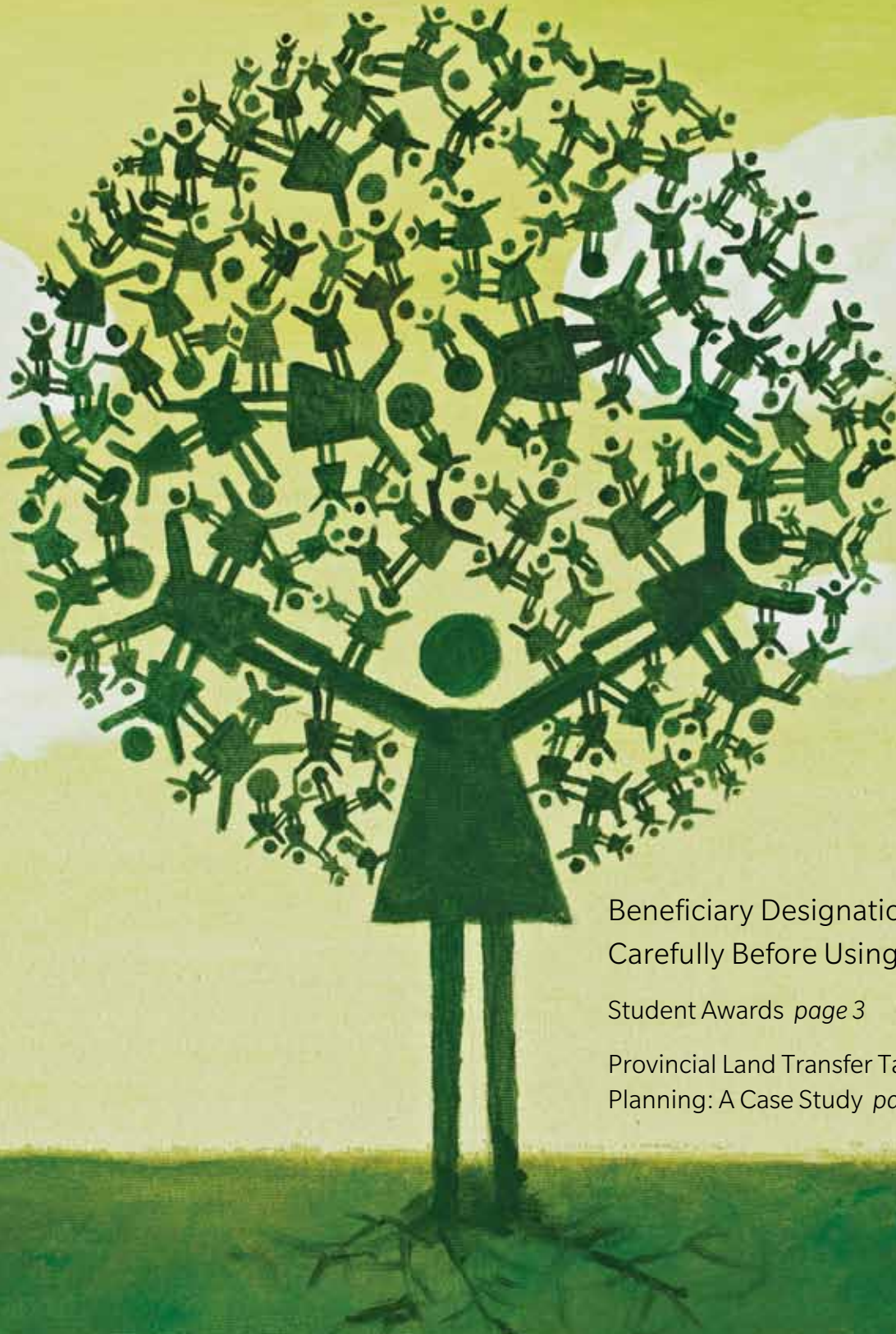


MAY 2017 ■ VOLUME 16 NO. 2

# STEP Inside

NEWSLETTER OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS (CANADA)



Beneficiary Designations: Think Carefully Before Using Them *page 5*

Student Awards *page 3*

Provincial Land Transfer Tax and Trust Planning: A Case Study *page 7*

# Provincial Land Transfer Tax and Trust Planning: A STEP Study

## Facts

**M** Mr. Zach Strange resides in British Columbia. He is 70 years old. His wife recently died, and he has two adult daughters, Andrea and Laura. Mr. Strange and his late wife have been estranged from Andrea for over 10 years. Mr. Strange is close to his younger daughter, Laura, who visits him frequently. Mr. and Mrs. Strange supported Andrea and Laura through university and bought them their first homes in British Columbia.

Mr. Strange's assets include the following real property:

1. his principal residence in Vancouver, with an approximate fair market value (FMV) of \$4 million;
2. an apartment building in Vancouver, which is composed of 15 rental units and has an approximate FMV of \$8 million;
3. a warehouse strata lot in Toronto, with an approximate FMV of \$2 million; and
4. a vacation property in Quebec, with an approximate FMV of \$900,000.

Mr. Strange wishes to leave his assets, which consist of his real property, his investment portfolio worth approximately \$4 million, and bank accounts, to Laura. When he visited his lawyer, Ms. Wise, to update his will, Ms. Wise told him that Andrea could challenge his will if he left nothing in it to her.

With the exception of his principal residence, Mr. Strange does not intend to sell any of his real estate and wishes it to be held within the family after his

death. Ms. Wise has advised him to set up an alter ego trust and transfer all of his assets, including his real estate, to the trust. Laura and her children are to be the beneficiaries of the alter ego trust after he dies.

Ms. Wise has also advised him that he will be required to pay land transfer tax if he transfers his real property to the alter ego trust in some provinces. After discussing various possibilities, Mr. Strange and Ms. Wise have decided to explore the following options:

1. transferring the real property into an alter ego trust with Mr. Strange and Laura as the named trustees, and
2. transferring the registered title to the real property to a separate British Columbia company to act as bare trustee for the trustees of the alter ego trust.

Mr. Strange is prepared to pay land transfer tax to avoid a challenge to his will; however, he would like to know what the costs are and whether there are ways to minimize this tax.

### **Mr. Strange's Principal Residence and Apartment Building in British Columbia**

*Joyce Lee, TEP  
Member, STEP Vancouver  
Deloitte Tax Law LLP*

In British Columbia, there is an exemption from land transfer tax when a principal residence is transferred to a trust; however, no such exemption exists when an apartment building is so transferred.

Property transfer tax is payable under the *Property Transfer Tax Act* (PTTA) at the following rates in respect of a "taxable transaction":

1. 1 percent of the taxable transaction's FMV that does not exceed \$200,000;
2. 2 percent of the FMV that exceeds \$200,000 but does not exceed \$2 million; and
3. 3 percent of the FMV that exceeds \$2 million.

In general, a "taxable transaction" refers to the transfer of an indefeasible title that is registered at the Land Title Office. Accordingly, if a transfer is not registered at the Land Title Office, no property transfer tax is payable.

The transfer of a principal residence from a parent to a child (being a transfer between "related individuals" who are permanent residents of Canada or Canadian citizens) is exempt from property transfer tax under PTTA section 14(3)(b), provided that either the parent or the child has resided at the principal residence for a continuous period of six months immediately before the transfer. This exemption may be extended to the transfer of a principal residence to the trustee of an alter ego trust by first having Mr. Strange transfer registered title to the property to Laura "in trust" pursuant to section 14(3)(b). Thereafter, because Mr. Strange wishes to be the co-trustee of the alter ego trust, a further registration is effected to change the trustee from Laura "in trust" to Laura and Mr. Strange "in trust" on an exempt basis pursuant to PTTA section 14(4)(q)

(which concerns changes in trustees without changes in beneficiaries).

In the case of the apartment building, there is no exemption from property transfer tax on registration of the property in the names of the trustees of the alter ego trust, regardless of the identity of the trustees. Because Mr. Strange wishes to continue to hold the property on a long-term basis so that Laura and her children can benefit from it, one option is to transfer the apartment building into joint tenancy between Mr. Strange and a bare trust company that holds the building as bare trustee for the alter ego trust. On Mr. Strange's death, the bare trust company becomes the registered owner by operation of law. On the basis of an FMV of \$8 million, property transfer tax of \$96,000 will be payable on the transfer of 50 percent of the apartment building into joint tenancy ((1 percent x \$200,000) + (2 percent x \$2 million) + (3 percent x \$1.8 million)). Paying the property transfer tax on the transfer avoids the probate process.

When advising Mr. Strange, Ms. Wise should take note of two additional considerations:

eral manner and made subject to a further deed of appointment. Amendments to a trust deed do not need to be filed with the Land Title Office.

2. The transfer of a beneficial interest is not currently subject to property transfer tax in British Columbia; however, there is a private member's bill (Bill M 210 *Property Transfer Tax Fairness Act*, 2016) that passed first reading on March 17, 2016.

### **Mr. Strange's Warehouse Strata Lot in Ontario**

*Susannah B. Roth, TEP  
Member, STEP Toronto  
O'Sullivan Estate Lawyers*

In Ontario, Mr. Strange can currently implement either of the planning options that Ms. Wise has suggested in relation to his warehouse strata lot in Toronto without incurring land transfer tax. It is also likely that with either of these planning options his estate trustee(s) can avoid the general requirement to probate or reseal his will in Ontario, thus avoiding both the

Land transfer tax is levied in Ontario pursuant to the *Land Transfer Tax Act*. No Ontario land transfer tax is payable on a transfer for no consideration because the tax is payable on the "value of the consideration" for the conveyance (as defined in the *Land Transfer Tax Act*, which is usually the sale price of the property), and not on the FMV of the property. (However, the Ontario government is currently considering a change in its valuation basis from the value of the consideration to FMV.) Either of the planning methods suggested by Ms. Wise could therefore be implemented without incurring land transfer tax. The outstanding balance owing on a registered mortgage or charge that is not discharged as part of the transaction may fall within the definition of the "value of the consideration" for purposes of the *Land Transfer Tax Act*.

Ontario land transfer tax is levied on commercial or industrial property, as well as any other property that is not a one- or two-single-family residence property, at the following rates:

1. 0.5 percent of the value of the consideration of the conveyance

Land transfer tax is levied in Ontario pursuant to the *Land Transfer Tax Act*. No Ontario land transfer tax is payable on a transfer for no consideration because the tax is payable on the "value of the consideration" for the conveyance ... and not on the FMV of the property.

1. When title is registered in the name of a trustee "in trust," the trust deed must be submitted to the Land Title Office, and a third party can request a copy of the trust deed. In most cases, privacy is an issue; therefore, it is recommended that the distribution clause be drafted in a general manner and made subject to a further deed of appointment. Amendments to a trust deed do not need to be filed with the Land Title Office.
  2. The transfer of a beneficial interest is not currently subject to property transfer tax in British Columbia; however, there is a private member's bill (Bill M 210 *Property Transfer Tax Fairness Act*, 2016) that passed first reading on March 17, 2016.
  3. When title is registered in the name of a trustee "in trust," the trust deed must be submitted to the Land Title Office, and a third party can request a copy of the trust deed. In most cases, privacy is an issue; therefore, it is recommended that the distribution clause be drafted in a general manner and made subject to a further deed of appointment. Amendments to a trust deed do not need to be filed with the Land Title Office.
  4. The transfer of a beneficial interest is not currently subject to property transfer tax in British Columbia; however, there is a private member's bill (Bill M 210 *Property Transfer Tax Fairness Act*, 2016) that passed first reading on March 17, 2016.
- up to and including \$55,000;
2. 1 percent of the value of the consideration over \$55,000 and up to and including \$250,000;
  3. 1.5 percent of the value of the consideration over \$250,000 and up to and including \$400,000; and
  4. 2 percent of the value of the consideration over \$400,000.

This last rate came into effect on January 1, 2017. The increased rate for consideration over \$400,000 was already applicable to properties with one or two single-family residences on them. The January 1, 2017 changes to the Ontario land transfer tax also added an increased rate of 2.5 percent for one- or two-single-family residence properties on consideration for the transfer which exceeds \$2 million.

Pursuant to the *City of Toronto Act, 2006*, an additional Toronto land transfer tax at rates equivalent to the provincial rates is levied. The city increased the Toronto land transfer tax rates to match the new provincial rates effective March 1, 2017, which effectively doubles the land transfer tax payable on any conveyance of real property located within the City of Toronto.

To convey legal ownership of the Toronto warehouse strata lot to Mr. Strange and Laura as trustees of the alter ego trust or to Mr. Strange's holding company as a bare trustee for himself, the transfer must be registered on title. All conveyances in Ontario must be electronically registered because the land registry offices no longer accept paper deeds.

The electronic registration system includes "trustee" as a possible category for transferees. However, land registry offices appear to have a policy of rejecting this category for registration (although the policy is not consistently enforced). In the event that registration is rejected, the trustees can instead be registered on title as joint tenants with the right of survivorship, which should achieve the same result from a practical perspective.

The registration of a property in the name of a corporation should present no title registration problems. However, if Mr. Strange were to transfer his Toronto warehouse strata lot to his

holding company as a bare trustee, the corporation would hold it for him personally as the continuing beneficial owner, and not for the trustees of the alter ego trust. Beneficial ownership would therefore pass to Mr. Strange's estate after his death. This result may not address all of his planning concerns in the circumstances.

Regardless of which of the two planning methods Mr. Strange decides to implement, the transfer of the Toronto warehouse strata lot back to Mr. Strange from either the corporation or the alter ego trust, or to the beneficiaries of the alter ego trust or Mr. Strange's estate after his death, can also currently be completed without land transfer tax. Although a sale of the property would trigger the payment of this tax, it is the purchaser or transferee who would bear the tax obligation.

### **Mr. Strange's Vacation Property in Quebec**

*Daniel Frajman, TEP  
Chair, STEP Montreal  
Spiegel Sohmer Attorneys*

There is a relatively straightforward exemption from land transfer tax for Mr. Strange's vacation property in Quebec, and the property may be registered on title in the name of the trust.

In Quebec, the land transfer tax is commonly referred to as a "land transfer duty" and a "mutations tax" as a result of the French-language version of the legislation. For simplicity, however, it is referred to here as a "land transfer tax."

Under *An Act Respecting Duties on Transfers of Immovables* (also known as the Land Transfer Tax Act or LTTA), graduated rates apply. One set of rates applies throughout Quebec (the top rate is 1.5 percent), except that a higher set of rates applies in the City

of Montreal (where the top rate is 2.5 percent). The rates are not affected by the use made of a property.

If no exemption were available and Mr. Strange were paying tax on the fair market value (FMV) of his Quebec vacation property on the basis of the graduated rates, the land transfer tax would be \$14,000 if the property were located in the City of Montreal and \$12,000 if it were located elsewhere in the province.

In Quebec, the land transfer tax is commonly referred to as a "land transfer duty" and a "mutations tax" as a result of the French-language version of the legislation. For simplicity, however, it is referred to here as a "land transfer tax."

Section 6 of the LTTA indicates the time when the tax is triggered. Formerly, only registered transfers were subject to the tax. However, a major change took place on March 18, 2016, when unregistered transfers also became subject to the tax. The LTTA stipulates exemptions from the tax in certain circumstances, which are the same for both registered and unregistered transfers (see LTTA sections 17 to 20).

The property value used to calculate the land transfer tax is not its FMV for income tax purposes. Rather, it is generally the greater of any sale price or other consideration given for the

transfer (in Mr. Strange's case nil) and the municipality's assessed value for the property, which is generally set every three years and appears on the municipal tax role (LTTA sections 1.1 and 2). In Mr. Strange's case, if an exemption were not available, the land transfer tax would have been based on the property's municipal value.

from an individual to a trust when the transferor and the beneficiaries of the trust are either the same person, or in relation to each other are close family members (ascendants or descendants in the direct line, spouses or common-law spouses, and certain others) under LTTA section 20(e). Most commentators feel that the exemption would be

The transfer of the Quebec vacation property to the trust is exempt from land transfer tax. It falls within the exemption concerning transfers from an individual to a trust when the transferor and the beneficiaries of the trust are either the same person, or in relation to each other are close family members.

Because the land transfer tax (and the applicable exemptions) are the same regardless of whether or not the transfer is registered, the transfer of the vacation property to the alter ego trust should be registered. If the trust held ownership without registering title, a third party to the transfer such as Andrea, the estranged daughter, could use the simulated agreements rules in an attempt to claim, for example, that a nominee agreement between a registered title holder and the trust as true and beneficial owner is unopposable or void in relation to herself. (See *Miracle Mile Industrial Park Corporation v. City of Montreal*, [1987] RDI 239 (QCA), as nuanced by articles 1451-2 of the *Civil Code of Québec* (CCQ) which came into force later, in 1994.)

The transfer of the Quebec vacation property to the trust is exempt from land transfer tax. It falls within the exemption concerning transfers

lost if one of the potential present or future trust beneficiaries is a non-family member, such as a corporation. If later the property is transferred from the trust to one or more of the above-mentioned trust beneficiaries, this transfer should also be exempt from the tax (LTTA section 20 (e.1)).

The following brief points are also useful to note:

1. The land registry office accepts registration either in the name of the trust or in the names of the trustees on behalf of the trust, and there is no practical difference between these two modes of registration.
2. A copy of the trust deed is not registered and is not given to the land registry office. However, if a municipality reviews the transaction after the transfer, it may ask to see the trust deed to verify whether the exemption conditions apply.

3. In addition to the exemption for certain trusts referred to above, exemptions are available for transfers among certain close family members, transfers involving closely related corporations in which 90 percent of the voting shares are held at the time of the transfer and for 24 subsequent months, corporate amalgamations without a hold period, transfers among charities, and other stated situations. In the context of estate planning, an exemption can often (but not always) be found.

4. Because under Quebec private law partnerships essentially have a distinct personality (akin to a trust patrimony), changes in partners (unlike changes in co-owners) should not give rise to land transfer tax (*9197-6837 Quebec Inc. v. City of Terrebonne*, 2015 QCCA 1492). However, there are no tax exemptions for transfers of property into or out of the partnership.

5. Under CCQ article 1275, Quebec private law requires every trust, including alter ego trusts, to have at least one independent trustee who is neither the settlor nor a present or future beneficiary. Although Mr. Strange's alter ego trust does not seem to comply with this requirement, the rule is presumably inapplicable because under the terms of Mr. Strange's trust BC law governs and the trust has significant ties to British Columbia (CCQ article 3107). ■