SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION (BRITISH COLUMBIA BRANCH)

TO THE

BC MINISTRY OF FINANCE

REGARDING THE

LAND OWNER TRANSPARENCY ACT WHITE PAPER

Issued By:

Canadian Bar Association
British Columbia Branch
Real Property Section
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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the "CBABC") is to:

- Enhance the professional and commercial interests of our members;
- Provide personal and professional development and support for our members;
- Protect the independence of the judiciary and the Bar;
- Promote access to justice;

- Promote fair justice systems and practical and effective law reform; and

- Promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 35,000 members and the British Columbia Branch itself has over 7,000 members. Our members practice law in many different areas. The CBABC has established 76 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

The CBABC Real Property Section is comprised of members of the CBABC who are concerned with law which establishes and regulates the rights and the wishes and regulates the rights and obligations of the owner, mortgagee, landlord and tenant in the use and disposition of land and interests in land and which provides the facilities for the public recording of ownership of interests in land. The CBABC Real Property Section's (the "Section") submissions reflect the views of some members of the Section only and do not necessarily reflect the views of the CBABC as a whole.

SUBMISSIONS

The Section is pleased to respond to the request for submissions from the Ministry of Finance.

In June 2018, the Ministry released its *Land Owner Transparency Act* White Paper: Draft Legislation with Annotations. The White Paper sets out policy recommendations for a proposed land owner transparency registry to end hidden ownership in real estate to prevent tax avoidance and evasion. The White Paper also includes an annotated copy of the draft legislation, the *Land Owner Transparency Act*.

On August 18, 2018, members of the Section met to consider submissions for the Ministry. These Section's submissions are a result of that meeting. The Section takes the position that is not the job of the Section to question the policy behind the LOTA, but rather to point out unforeseen consequences based on wording and/or effect of the LOTA in order to improve the efficiency effectiveness of the LOTA.

Where questions or issues set out in the LOTA and/or White Paper are not considered by the Section in these submissions, this does not mean that the Section either accepts or rejects these matters, but that the Section has no comment on these matters at this time.

Overview of the Land Owner Transparency Act

The stated purpose of the *Land Owner Transparency Act* (LOTA) is to identify those owing land in BC, and identify those holding a beneficial interest in land via trust, corporations or through a partnership.

There are three major aspects to the LOTA:

1. Nature of new disclosure.
2. Defining interest in land.
3. Timing of registration.

As a matter of policy, the Section has a question as to whether increasing filing fees, property transfer tax, transaction costs generally, work to undermine the reliability of the Torrens system by incentivizing off-register transactions and the proliferation of unregistered interests. If the aim of the LOTA is to address tax leakage, this could be achieved with something similar to the Ontario model, which does not necessitate the creation of a separate registry for beneficial ownership.[1]

Similarly, if the aim of the LOTA is to facilitate corporate transparency, the right to examine any BC corporation's CSR at its records office (which right was abolished by the introduction of the *Business Corporations Act*) would be a more straightforward approach.

Policy drivers and rationale for the legislation appear to be numerous and beyond the scope of the stated objective, but are ultimately unclear.

The requirement made by the LOTA to disclose interest holders, at the individual level, of all corporate structures, will be onerous for large-scale commercial transactions. It is predicted that such disclosure will increase transaction costs significantly, in addition to the cost increase resulting from additional tax burden, there will be increased deadweight costs resulting from additional practitioner time, due diligence, and formal/filing requirements.

[1] See section 5.0.1 of the *Land Transfer Tax Act*, R.S.O. 1990, c. L.6 (http://canlii.ca/t/5320r) and Prescribed Information for the Purposes of Section 5.0.1 (O. Reg. 120/17)(http://canlii.ca/t/52x81). See also Ontario Ministry of Finance's Non-Resident Speculation Tax Bulletin (https://www.fin.gov.on.ca/en/bulletins/nrst/)

As a matter of policy, the question is raised as to whether the additional transaction costs perceived to be endemic to the LOTA are ultimately counter-productive to the problem of housing affordability. The perceived irony is that the LOTA intended to strengthen an existing land title registry system and address housing affordability appears certain to generate additional costs of title insurance.

The Section also predicts that there will be significant impacts on the viability and attractiveness of British Columbia as an investment destination, as a result of this level of disclosure required by the LOTA. For example, owners at the shareholder level of multi-tenant residential buildings may have a legitimate interest in not being publicly identifiable by every individual tenant.

The Section is concerned that the Torrens system is undermined as a de-facto result of a beneficial ownership registry. Further questions are raised as to impacts on the ability of real property practitioners to provide opinion as to good and marketable title, or as to all necessary registrations, going forward.

This raises a recurring uncertainty as to whether the LOTA is intended to convey what real property practitioners would understand as a “beneficial interest” in land to shareholders, partners of partnerships, or whether these “beneficial interests” are merely described as such for the purpose of imposing disclosure and tax obligations on such persons. In other words, is a shareholder of 25% or more of a corporate registered a “beneficial owner” of the property, such that a properly advised lender would seek a beneficial mortgage from such person, or are they merely being catalogued as a “beneficial owner” for the purposes of imposing *Property Transfer Tax Act* and disclosure obligations?

The Section has concerned raised regarding current commercial transactions in BC: How do real estate practitioners give title opinions on good and marketable title?

LOTA: Part by Part

The LOTA has 8 Parts:

- Part 1 – Definitions, Interpretation And Application;
- Part 2 –Transparency Declarations And Disclosure Reports;
- Part 3 – Access To Information Provided In Disclosure Reports;
- Part 4 – Administration And Enforcement;
- Part 5 – General;
- Part 6 – Offences;
- Part 7 – Regulations;
- Part 8 – Consequential Amendments.

The Section has made comments on some, but not all of the LOTA's Parts.

Part 1 – Definitions, Interpretation And Application

The Section raised a question regarding the statute's implementation date. A member of the Section raised the point that much of the information will already be required by new *Property Transfer Tax Act* changes. Effective September 17, 2018, the Information Collection Regulation (B.C. Reg. 166/2018) under the *Property Transfer Tax Act* requires specified types of trustees and corporations that acquire property to identify all individuals as specified with a significant interest in the corporation or trust on the property transfer tax return.

The *Property Transfer Tax Act* required information is:

a. Individual or legal names;

b. Contact information;

c. Date of birth;

d. Relevant social insurance number or tax number;

e. Date of birth; and

f. Country of citizenship.

A member of the Section also noted that beneficial interest is very broad, so that beneficiaries of discretionary trust and contingent interests may be captured. Schedule 2 to LOTA lists exemptions. These exemptions do not capture these trusts – query as to whether LOTA drafters intentionally meant to exclude these trusts.

There appears to be inconsistency between the definitions and scope of beneficial ownership in LOTA and the parallel provisions in sections 2 and 12.13 of the of the *Property Transfer Tax* Act. The Section recommends that definitions between the LOTA and the *Property Transfer Tax* Act be amended so they are harmonized. The amending legislation should clearly state the rationale as to why there is a difference.

Regarding the definition of "corporate interest holder" in section 1 (inter alia, a person holding "25% or more of value of equity") of LOTA, how is "the equity of that corporation" in section 3(1)(a)(i) determined? Is it determined by preferred shares? Voting shares?

Similarly, under section 3(1)(a)(ii) of the LOTA, what is the value of “equity” or “voting rights”?

Part 2 –Transparency Declarations And Disclosure Reports

Regarding Part 2’s transparency declarations, there is a question as to what are “reasonable efforts” required to be made to determine that an individual has not previously been declared incapable will be? The Section recommends that the Ministry review the recent decision *Kau v. The Queen*, 2018 TCC 156 (CanLII) in this regard.[2]

[2] See http://canlii.ca/t/htc4n

The Section notes that the content of required disclosure reports is detailed and this will result in considerable time and money necessary to put these materials together.

As with *Property Transfer Tax Act*'s declarations, the "settlors" of trusts appear to be captured, which, in many personal estate-planning contexts, is an 'unrelated' individual (e.g. a family friend) "providing a coin". The Section questions the usefulness of this inclusion.

Regarding the updated disclosure report required in section 15, the Section questions whether two months is enough time to get affairs in order? The Section questions as to what is the onus/liability on lawyers to advise clients to file.

The Section is concerned that the LOTA's required information is not necessarily going to be consistent with the *Property Transfer Tax* Form.[3]

From a real property practitioner's practice point: If you act for a lender, will you ask to see this form before you file?

Part 2 imposes large record keeping requirements on corporations, trustees and partners. The Section questions how would a real property practitioner properly comply with these record keeping requirements? While the Law Society of British Columbia has provided some recent guidance, the LOTA is silent on the "how to" comply with this record keeping.[4]

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[3] See https://ltsa.ca/news/ministry-finance-updated-property-transfer-tax-return-version-31-now-available

[4] See "Notice to the Profession: New property transfer tax return requirements in effect September 17, 2018" https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2018/new-property-transfer-tax-return%c2%a0requirements-in-e/ (September 7, 2018).

Regarding reference to trustees in Division 3, the information provided includes settlors of trust (even though often little to deal with).

In Division 3, section 19 requires that, for the purpose of preparing a disclosure report, a reporting body must make reasonable efforts to identify whether any of the interest holders are individuals in respect of whom a court or qualified professional has determined that the individual is incapable of managing that interest holder's financial affairs. The Section questions how, regarding the determination of incapacity, how do you do reasonable diligence on adult guardianship applications?

Further, the Section asks: What is a reasonable effort to determine whether these individuals are incapable?

Similarly, the LOTA refers to "qualified professional" twice. Once in section 19(1) where a qualified professional has determined that the individual is incapable of managing that interest holder's financial affairs. The second time is in section 37(1)(b) where the administrator must omit information from being publicly accessible where a qualified professional has determined that the individual is incapable of managing that interest holder's financial affairs. The LOTA does not define "qualified professional". The Section asks, given that a qualified professional could span various legal and health professionals, what professional(s) qualify as "qualified professional" mean?

Regarding Divisions 3 (Reasonable Efforts Requirements for Reporting Bodies) and Division 4 (Content of Disclosure Reports in the references to "reasonable efforts", the Section notes there is a general issue in the case law with "reasonableness". Courts often get into technical analyses on the subject of reasonableness. Further, regarding reasonable efforts regarding "influence or control" (as part of the definition of "corporate interest holder" in section 3(1)(c) of the LOTA, what does one have to do to make "reasonable efforts"?

Part 3 – Access To Information Provided In Disclosure Reports

The LOTA contemplates a two-tiered database for providing access to information. One database is public-facing containing names and addresses as provided for in section 35. The second database is only accessible by law enforcement and government as set out in sections 29, 30 and 31: this second database would disclose personal information of individuals like Dates of Birth and Social Insurance Numbers.

The question is raised as to the usefulness of this secondary registry and whether this is reflective of public or government mistrust toward lawyers as responsible gatekeepers for identifying money-laundering and criminal behaviour?

Another question is raised as to whether the 2 month filing window to correct a no-longer accurate disclosure declaration will result in a de-facto transaction freeze. See our Section's discussion above as to whether lenders need to be concerned with beneficial interest holders as owners capable of undermining the borrower's (and subsequently, the lender's title. A logistics concern that was raised is that this registry may always be stale and thus information not updated, and not something that can be relied upon by lawyers, lenders and other stakeholders.

A member of the Section commented that it appears contrary to the stated and apparent goals of the LOTA for the Land Title and Survey Authority of British Columbia to have recently revised its database to no longer display a registered owner's name on a PID search (without payment for each individual title).

CONCLUSION

As a Section, we would be pleased to discuss our submissions further with the Ministry, either in person or in writing, in order to provide any clarification or additional information that may be of assistance to the Ministry.

All of which is respectfully submitted.

SARAVAN VEYLAN
Co-chair, CBABC Real Property Section
Tel.: (604) 608-4570
Email:sveylan@mltaikins.com