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Ministry's 'clarification' a tax grab

Significant *de facto* increase in land transfer tax

Did the Ontario government increase the land transfer tax in March, or did it simply clarify the interpretation of the Land Transfer Tax Act so that buyers of new homes will be paying more tax on closing?

Two weeks ago in this column, I reported that officials in the Ontario finance ministry "have come out with an edict to increase the land transfer tax paid on every new home and condominium in Ontario."

Someone in the office of Finance Minister Dwight Duncan complained to the *Star* that I had accused the government of quietly raising the land transfer tax, and said that "this is simply not true."

The email to the *Star* says: "We have not increased the land transfer tax. Purchasers of newly built homes have been required to pay for land transfer tax on the full value of homes, including extras and upgrades, for decades."

"The information contained in the tax bulletin referenced in Mr. Aaron's article is neither new, nor an indication of a new tax. It is a clarification of existing policy."

"This bulletin is part of our response to the provincial auditor's 2004 annual report, which called for further educational materials on avoiding errors in reporting the total taxable purchase price of a home."

The ministry asked for a correction stating that the information in my column was wrong.

My colleague Larry Ginsler practises real estate law for developers at Baker Schneider Ruggiero LLP in Toronto. He also wrote to say that the column was wrong and suggested that I clarify my comments on the new tax bulletin to avoid "the anticipated anger and grief" that new home purchasers will experience, thinking that they are "getting hit with increased, and new taxes."

Another development industry lawyer came in on the other side of the fence.

"I wholeheartedly agree with your position that the ministry's 'clarification' of the breadth and depth of the phrase 'value of consideration' (purchase price) has taken the real estate bar and home builders by surprise, and has the effect (if not the purpose) of attracting payment of more tax," he wrote.

"While extras and upgrades may have been included in the land transfer tax calculation, I doubt whether any of the major law firms, let alone smaller firms or sole practitioners, ever included increases in development charges, meter installation charges and the Tarion enrolment fees into their calculation of land transfer tax, let alone driveway paving, tree planting and other similar charges or assumed liabilities."

"The only curious matter," he added, "is why the ministry waited so long to issue this clarification bulletin!"

I agree with this last letter and I stand by what I wrote when I said that the new edict will increase the tax paid by purchasers of new homes. I also agree, and should clarify, that no new taxes were imposed and the rate of the land transfer tax has not been changed.

What *did* change was that the ministry has "clarified" that the value upon which land transfer tax is supposed to be paid was always supposed to include but didn't a host of extras that builders add on to the base purchase price of houses and condominiums.

It has always been customary for builders' lawyers to insert, on every deed to purchasers, the net price without extras. In more than 30 years of practising law, I have never seen a purchaser pay transfer tax on the extras in a builder purchase agreement.

Although the ministry announcement was not new law or a new tax, its "clarification" of the existing law in March amounted to a significant *de facto* increase in the amount of land transfer tax being paid by each purchaser of a new home.

To my knowledge, this is the first time the ministry has ever "clarified" how the tax is to be calculated, particularly when it presumably knew that the tax was not being calculated "properly" over many decades.

I find it difficult to believe that the ministry did not know that tax was being calculated "incorrectly" over several decades in hundreds of thousands of new home purchases. Yet it took until March to clarify how transfer tax should be calculated.

The small community of very sophisticated development industry lawyers is now trying to amend policies to figure out how to comply with the "clarification." If the lawyers were aware they were doing it "wrong," I am certain they would have amended their practices years, or even decades, ago.

To say that the new interpretation is not an increase in the amount of tax being collected is simply disingenuous. Perhaps the ministry is just unhappy that I called the finance minister a grinch as a result of the tax grab, but I stand by that, too.