

May 2020

Court Dismisses Interim Relief Sought by Homeowners Currently Challenging the *Speculation and Vacancy Tax Act*

Background

In November 2018, British Columbia's provincial government introduced the *Speculation and Vacancy Tax Act*¹ (the "**Act**"). The goal of the Act is to address housing affordability by discouraging property owners from leaving residential properties vacant in British Columbia's major urban centers. The Act does so through the use of an annual tax (the "**Tax**") levied against property owners based on occupancy status in designated regions of the province. These regions include municipalities within the Metro Vancouver Regional District (excluding Bowen Island, Lions Bay, and the University Endowment Lands), municipalities within the Capital Regional District (excluding the Salt Spring Island, Juan de Fuca and Southern Gulf Islands), Abbotsford, Mission, Chilliwack, Kelowna, West Kelowna, Nanaimo and Lantzville.

The Tax applies to residential property that remains vacant for over 6 months in a calendar year. The Tax applies to all residential property owners in the taxable regions, including individuals, corporations, trustees, and partners. Currently, if the Tax is payable, it is calculated at a rate of:

¹ *Speculation and Vacancy Tax Act* (Bill 45-2018)

- 0.5% for B.C. residents and Canadians citizens or Canadian permanent residents outside B.C. (who are not untaxed worldwide earners); and
- 2% per cent for foreign owners or individuals (or spousal units) who are untaxed worldwide earners.

There are a number of exemptions to the Tax that are available under the Act. One of those exemptions is the principal residence exemption. This exemption applies where the subject property is located in one of the aforementioned designated areas, and is the property owner's principal residence. Corporations, partnerships and trusts are also eligible for the principal residence exemption where their corporate interest holders, partnership interest holders and beneficial owners, respectively, qualify for the exemption as individuals. Other exemptions include construction related exemptions, whereby owners of land under construction are exempt from the Tax if reasonable steps are being taken without undue delay to develop or renovate the subject property. All property owners are required to file an annual declaration even if they qualify for an exemption. Details regarding these exemptions, and other exemptions available, are further described in the Act.

The Tax was designed to turn empty homes into housing for British Columbians, and ensure foreign owners and those with primarily foreign income contribute fairly to B.C.'s tax system.² However, it appears that the Tax has adversely affected B.C. residents and Canadian citizens whose specific circumstances make them ineligible for an exemption under Act,³ and are therefore required to pay 2% of their real property's assessed value under the Tax. Accordingly, in 2019, a petition (the "**Petition**") was filed by nine homeowners (the "**Homeowners**") seeking certification as a class action alleging that the Act is unconstitutional and infringes section 6, 7, and 15 of the Canadian Charter Rights and Freedoms (the "**Charter**"). The Petition has not yet been granted.

² *How the Speculation and Vacancy Tax Works*

³ *Ibid* at Part 3

As the Petition remains on-going, the Homeowners filed an interlocutory application (the “**Application**”) seeking injunctive relief to restrain the provincial government from enforcing the Tax while the Petition is being decided. This bulletin will comment on the B.C. [Supreme Court decision](#)⁴ issued on April 16, 2020 (the “**Decision**”) denying the injunctive relief sought under the Application.

Injunction

The Application was filed pursuant to the Homeowner’s argument that enforcing the Tax would cause irreparable harm to the Homeowners, and that as the Petition remains undetermined, such irreparable harm is potentially being caused by an unconstitutional legislation which infringes on the Homeowners’ *Charter* rights. The Decision notes that each of the Homeowners’ circumstances are different. However, each of the Homeowners claims to be adversely affected by both the Act and the potential consequences of the application of the Tax. For example, one Homeowner’s claim showcases a circumstance where a registered owner’s American spouse’s retirement income was higher than her own Canadian retirement income. Consequently, the couple was treated as a satellite family, making: (i) the couple ineligible for the principal residence exemption, and (ii) the Tax payable on the subject property. In this circumstance, affordability of the Tax is noted as being an issue. Accordingly, the couple is claiming that they are being forced to contemplate selling, or renting a portion of, their property to pay the Tax. Other consequences of the Tax noted by the Homeowners include potential separating and uprooting of families, restructuring estate planning decisions, adjusting career and retirement plans, and psychological harm caused by such decision-making.⁵

In response, the Minister of Finance’s (the “**Minister**”) submission noted, among other things, that suspension of the Tax would:

⁴ *Bacon v. British Columbia (Minister of Finance)*, 2020 BCSC 578 (CanLII) [*Bacon v. BC*]

⁵ *Ibid*, at par. 97

- be wasteful and destructive,
- cause the government to lose a \$185-million revenue stream dedicated to housing projects;
- forego financial and human resources invested in administration of the Tax; and
- erode positive developments in the real estate and rental markets, and exacerbate the housing affordability crisis in British Columbia.⁶

The Minister's response also noted that the Homeowners have misconstrued the analytical framework of each of the Charter arguments alleged.⁷

Decision

The court agreed with the Minister's submissions, indicating that: (i) the Homeowners' Charter analysis is flawed,⁸ and (ii) the harms to the government and the public interest are concrete, tangible and compelling.⁹

Additionally, the court indicated that it will be for the trial judge under the Petition to determine, on a full record, whether the Homeowners' Charter rights are sufficiently engaged to warrant a finding that the Act, and correspondingly the Tax, is unconstitutional.¹⁰

Ultimately, the court dismissed the Application on the basis that the Homeowners did not establish that injunctive relief was appropriate.¹¹ The court based such dismissal on the basis that payment of the Tax does not constitute irreparable harm because it

⁶ *Ibid*, at par. 123

⁷ *Ibid*, at par. 82

⁸ *Ibid*, at par. 93

⁹ *Ibid*, at par. 124

¹⁰ *Ibid*, at par. 128

¹¹ *Ibid*, at par. 129

is both quantifiable and curable. The court also noted that the Homeowners may avoid any of the consequential harms noted by the Homeowners by paying the Tax and subsequently pursuing their statutory appeal rights to the court when they receive their notices of assessment. Thereafter, if such appeal is successful, the Homeowner would be entitled to a refund with interest.¹²

The practical effect of the Decision is that while the ultimate issue of constitutionality is being determined, individual circumstances do not shift the burden of the Tax away from the Homeowners and other property owners in similar circumstances.

If you wish to obtain further particulars of the Act and its proposed implications, we recommend seeking legal advice.

by [Damon Chisholm](#), [Dharam Dhillon](#) and
[Douglas Zorrilla](#)

For more information on this topic, please contact:

Vancouver	Damon Chisholm	604.691.7464	damon.chisholm@mcmillan.ca
Vancouver	Dharam Dhillon	604.691.7485	dharampreet.dhillon@mcmillan.ca
Vancouver	Douglas Zorrilla	604.893.7637	douglas.zorrilla@mcmillan.ca

[a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2020

¹² *Ibid*, at par. 112