HST REBATES – AND THE CASES JUST KEEP ON COMING

ALAN G. SILVERSTEIN[1]

Real estate lawyers are not expected to know the inner workings of every Harmonized Sales Tax ("HST") issue in the *Excise Tax Act*[2] (the "Act"), But more than a passing familiarity is needed about two HST issues closely associated with real estate conveyancing: (i) the HST New Housing Rebate[3] for qualified owner-occupant purchasers of new homes and new condominium units; and (ii) the HST New Residential Rental Property Rebate[4] (what I like to call the "HST investor rebate"), for qualified investors in new homes and new condominium units.

Part I of this paper examines the HST New Housing Rebate. The HST New Residential Rental Property Rebate is the focus in Part II.[5]

This paper has two purposes:

a) To highlight the creativity of purchasers seeking an HST rebate. The large number of cases across Canada recently[6] reflects the significant amounts involved[7].
b) To help conveyancing lawyers better understand the circumstances when the courts have approved / denied an HST rebate, to avoid allegations of providing incorrect (or no) information when clients ask about their entitlement to a rebate, or the Minister of National Revenue ("MNR") attempts to clawback a rebate received.

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[1] Barrister and Solicitor, Thornhill, Ontario. A list of articles I have written about the GST / HST for the Law Society of Upper Canada since 1998 appears at the end of this paper.
[2] *Excise Tax Act*, R.S.C., 1985, c. E-15
[3] Section 254 of the Act. For further information, see the booklet *GST / HST New Housing Rebate*, RC4028(E) Rev. 07/2013, available at http://www.cra-arc.gc.ca/E/pub/gp/rc4028/rc4028-07-13e.pdf
[4] Section 256.2 of the Act. For further information, see GST / HST Technical Information Bulletin B-087, *GST / HST New Residential Rental Property Rebate*, November 2001 available at http://www.cra-arc.gc.ca/E/pub/gm/b-087/b-087-e.pdf ; and the booklet *GST / HST New Residential Rental Property Rebate* RC4231 (E) Rev. 13, available at http://www.cra-arc.gc.ca/E/pub/gp/rc4231/rc4231-13e.pdf.
[5] Two topics not addressed in this paper are HST rebates (a) when property is substantially renovated; and (b) when an "owner-built home" is constructed.
[6] 18 HST Rebate cases were reported on the Tax Court of Canada website from January 1, 2014 to October 30, 2015
[7] The maximum federal component of the two rebates is $6,300 while the maximum Ontario component is $24,000

I – HST NEW HOUSING REBATE:

Key qualification requirements for the HST New Housing Rebate include:

- the purchaser is one or more individuals, and not a corporation[8]
- the property bought is new or substantially renovated
- HST was paid on the purchase price (either directly, or HST was included in the price)
- the purchase price satisfies the monetary thresholds[9]
- the property is not occupied between the time construction is substantially completed and possession is transferred to the first *bona fide* purchaser
- when the purchaser becomes liable under an Agreement of Purchase and Sale, "the particular individual is acquiring the complex or unit for use as the primary place of residence of the particular individual or a relation of the particular individual"[10]
- the first person to occupy the property is the purchaser (or a relation)
- ownership is transferred to the purchaser
- the application for the HST New Housing Rebate is filed within 2 years after the end of the month in which HST was first payable on the purchase; and
- only one rebate application can be filed.[11]

To be eligible for the HST New Housing Rebate, the three essential requirements are:

1) the intention of the purchaser to use the property as their primary place of residence[12] (or a relation) must be evident when the Agreement of Purchase and Sale was signed;[13]
2) **AND** the first person to occupy the property must be the purchaser (or a relation)

[8] Section 254(2)(b) of the Act
[9] $450,000 for the federal component, but unlimited for the Ontario component
[10] Section 254(2)(b) of the Act.
[11] Section 262(2) of the Act
[12] For further information, see "*Primary Place of Residence*" GST / HST Policy Statement P-228, March 30, 1999, available at http://www.cra-arc.gc.ca/E/pub/gl/p-228/p-228-e.pdf . The issue of primary place of residence was also addressed in my paper at the 2015 12th Annual Real Estate Summit *HST Leftovers – Still Fresh A Year Later"*
[13] According to Section 133 of the Act, a supply is made when an Agreement of Purchase and Sale is entered into,

3) **AND** ownership of the property must be transferred to the purchaser after construction is substantially completed. Note the importance difference in wording between (2) and (3). The first occupant of the property can be the purchaser or a relation, but ownership must be transferred to the purchaser only (and not a relation).

While post-closing use of the property does not establish or displace pre-contract intent, it can be relevant in establishing pre-contract intent.[14]

The HST New Housing Rebate is available to all qualified purchasers of a new home or new condominium unit; it is not limited to first-time purchasers

In many reported cases, on closing (i) the purchaser is credited by the builder with the amount of the HST New Housing Rebate, and (ii) the purchaser assigns it to the builder. Despite this, the MNR has always sued the purchaser seeking a return of the rebate. There are no reported cases where the MNR has pursued a builder in these circumstances.

Improperly sought HST rebates are a growing concern for lawyers representing both purchasers and builders. Under Section 165(1) of the Act, purchasers are *prima facie* responsible for paying the HST. But vendors are not off the hook, since Section 221(2) of the Act obligates them to collect and remit the HST, and pay the HST if the purchaser does not[15]. Also, Section 254(6) of the Act makes the purchaser and builder jointly and severally liable to repay the rebate if the builder provides the HST New Housing Rebate to a purchaser not entitled to receive it. As noted by Lem and Clark, the wording of the "safe harbour exclusions" in the Act and the *Income Tax Act* (Canada) differ greatly. "Section 116(5) of the Income Tax Act provides for purchaser

[14] "*Where the individual or a qualifying relative does not actually use the residential complex or residential unit as a primary place of residence, absent an intervening frustrating event, it can generally be concluded that the individual did not acquire, construct or substantially renovate the complex or unit for that use".* "*Primary Place of Residence*" GST / HST Policy Statement P-228, page 4, available at http://www.cra-arc.gc.ca/E/pub/gl/p-228/p-228-e.pdf . Cited in *Gagné v. The Queen*, 2007 TCC 175 (CanLII)

[15] In my paper prepared for the 2005 Six Minute Real Estate Lawyer, "*Vendor's Duties Regarding the Collection of GST - The Chilling Tax Court Case of Lee Hutton Kaye Maloff v. The Queen*", I described how the vendor of commercial real estate was forced to pay the GST when the purchaser in a self-assess situation provided a phony GST Registration Number.

liability "unless … *after reasonable inquiry* the purchase had no reason to believe that the non-resident person was not resident in Canada" [emphasis added]. In contrast, the actual wording of Section 221(2) of the Act has no similar "due diligence defence" language[16]."

That explains why builders of new homes and condominium units today retain the discretion in their Agreements of Purchase and Sale not to credit the purchaser with the HST New Housing Rebate on closing if the builder believes for any reason that the purchaser is ineligible. That forces the purchaser to pay an amount equal to the HST New Housing Rebate to the builder on closing in addition to the purchase price. After closing, the purchaser can apply directly to the Canada Revenue Agency (the "CRA") to recover the "lost" rebate.

Then there is Section 262(3), a little-known provision of the Act with huge potential downside. When two or more parties acquire a new home or new condominium unit, entitlement to receive the HST New Housing Rebate is "all or nothing". Everyone must satisfy the eligibility criteria for the rebate. It must be the intention of every purchaser to use the property as everyone's primary place of residence (or a relation) when the Agreement of Purchase and Sale is signed; AND the first persons to occupy the property must be all the purchasers (or a relation); AND ownership of the property must be transferred to all the purchasers. Otherwise, no rebate. One group purchaser who does not intend at the contract stage to use the property as their primary place of residence; or one group purchaser who does not occupy the property; or one group purchaser who does not take title to the property, disqualifies the entire group from receiving the rebate. Rightly or wrongly, receipt of the HST New Housing Rebate is NOT proportionate to the percentage interest of those individuals who qualify for the rebate.

Here are synopses of some of the more informative recent HST rebate cases from the Tax Court of Canada. As a developing area of the law, it is full of confusing decisions. As each case appears to depend on its own fact situation, some decisions may be inconsistent, although many general principles can be extracted (appearing below).

[16] Jeffrey Lem & Brian Clark, *Annotation of Lee Hutton Kaye Maloff & Paul Henriksen v R*, 27 RPR (4th) 168.

I – HST NEW HOUSING REBATE

1) WHO IS A RELATION?

The term "relation" is actually defined in the *Income Tax Act*[17] and not the Act. A "relation" is another individual related by blood, marriage, common-law partnership[18] or adoption.

- "Blood relation" is limited to parents, children, or other descendants or siblings
- "Marriage relation" includes a spouse or a person who is connected to the spouse by blood or adoption.
- A relation can also be an individual's former spouse, or a former common-law partner.
- Clearly excluded are business colleagues, employers and friends.
- While many people may think of them as such, uncles, aunts, cousins and nephews are not "relations" for purposes of the HST New Housing Rebate

2) PRIMARY PLACE OF RESIDENCE

Yang v. The Queen, 2009 TCC 636 (CanLII),

Yang and Tam, two unrelated females, purchased a new condominium unit in late 2006 and took title in both names. Their intention was to live together. After closing, they gradually moved into the suite. Tam occasionally stayed overnight in an apartment elsewhere in the city occupied by her son. In her 2006 income tax return, Tam used her son's address as her mailing address. Neither party updated their drivers licences until 2008. Bank statements for the joint bank account were also sent to the son's address for some time after closing. Despite this, the court found that the condominium unit had been acquired by Yang and Tam as their joint primary place of residence.

[17] R.S.C., 1985, c. 1 (5th Supp.). Sections 254(1) and 2(2.2) of the Act import the definition of "relation" found in Sections 251 (2) to (6) of the *Income Tax Act.*

[18] In *Hamel v. The Queen*, 2004 TCC 315, the court had difficulty determining if two adults living at the same address were relations.

The court provided the following guidance in determining a primary place of residence:

"Many factors that assist in determining what constitutes a primary place of residence are found in previous decisions of this Court as well as in policies issued under the Goods and Services Tax/Harmonized Sales Tax legislation. Some of these factors are the following: the parties' intention with regard to the use of the housing unit as their primary residence; their length of stay at the new unit; the address they use for correspondence; when they moved in and when they moved their personal belongings, and if the move was delayed, what events occurred that caused the delay; details of the insurance coverage; what they did with their former residence or rental unit; and other factors that may be relevant depending on the facts of the case."

Sivakumar v. The Queen, 2013 TCC 325 (CanLII)

In just over 2 years, Sivakumar signed Agreements of Purchase and Sale to acquire 5 properties. HST New Housing Rebates were applied for and paid by the builder in all 5 transactions. The MNR denied Sivakumar the rebate for this property, arguing that it had not been purchased as his primary place of residence. Not surprisingly, Sivakumar's appeal was dismissed.

3) INTENTION OF THE PARTIES

Berkovich v. The Queen, 2014 TCC 268 (CanLII)

Berkovich is a prime example how the MNR will seek information from outside sources when crafting its case against paying an HST New Housing Rebate.

On April 18, 2005, Berkovich signed an Agreement of Purchase and Sale to purchase a condominium unit. Six days later an Amendment was signed, adding her common-law spouse of 17 years (Khaimsky) as co-purchaser. Interim closing was August 14, 2009, final closing on December 15, 2009. Just over 2 months later, the property was listed for sale. It sold for $140,000 more than the purchase price, the resale transaction closing in early July 2010.

The MNR refused the HST New Housing Rebate, arguing the property had not been bought for use as Berkovich's primary place of residence. The court agreed.

Factors indicating the property was acquired as an investment, not a primary place of residence:

- the condominium unit and another unit in the vicinity were bought within days
- Berkovich and Khaimsky resided in another condominium unit, both when the Agreement of Purchase and Sale was signed and at the time of the hearing
- low hydro usage in the suite
- little furniture was moved to the property, until it was "staged" for resale
- no change of address was ever filed with any government agencies
- her bank, credit card companies and car insurer were never notified about a change of address

Montemarano v. The Queen, 2015 TCC 151 (CanLII).

Looking for a case that underscores how HST New Housing Rebate decisions are fact specific? It's *Montemarano.*

In anticipation of getting engaged and married, Montemarano decided to buy a new home. He intended it to be his primary place of residence and later, his matrimonial home. Closing occurred on December 30, 2010.

Montemarano began to occupy the property in January 2011. Two months later Montemarano and his girlfriend broke up. The property was then sold. Montemarano challenged the denial of the HST New Housing Rebate:

What Montemarano did:

- he paid half the downpayment from his own resources
- he bought property insurance as of closing
- he occasionally played poker with his friends at the property
- he arranged for hydro bills to be sent to the property

What Montemarano did not do:

- he did not change his address with the CRA
- he did not change his address with the Ministry of Transportation for his driver's licence
- he did not change his address with the Ministry of Health for his health card.
- He did not buy much furniture for the home."His furniture consisted of a bed and dresser; a table and four chairs; and, dishes, glasses and cutlery"

Yet Montemarano was successful in his appeal, providing satisfactory evidence that (a) when the Agreement of Purchase and Sale was signed, the property was purchased with the intention that it become his primary place of residence after closing; (b) title was registered in his name; and (c) Montemarano resided at the property from January 2011 to July 2011.

4) CHANGE OF INTENTION

Wong v. The Queen, 2013 TCC 23 (CanLII)

When the Wongs signed the Agreement of Purchase and Sale to purchase a condominium unit, it was not intended to be their primary place of residence. When their application for the HST New Housing Rebate was refused, they began to use the property as their principal residence. Not good enough. Intention is determined when the Agreement of Purchase and Sale is signed. "The actual use of the Property by the Wongs is not relevant, in light of their own testimony that they did not intend to use the Property as their primary place of residence when they entered into the contract to purchase it." It was a "mistaken impression" to believe that by using the property after closing as

their primary place of residence, Wong would be entitled to the HST New Housing Rebate, as their intention was otherwise at the contract stage.

Mendes v. The Queen, 2015 TCC 11 (CanLII)

Mrs. Mendes signed an Agreement of Purchase and Sale to buy a new home. She signed an Agreement of Purchase and Sale with her husband six months later to buy a second new home. When Property 2 closed four months before Property 1, the HST New Housing Rebate was received when Property 2 closed. The court acknowledged that the rebate criteria would have been satisfied if Mrs. Mendes could prove that she intended to use Property 1 as her primary place of residence when the contract for Property 1 was signed, but her intention changed when the Agreement of Purchase and Sale for Property 2 was signed. For lack of sufficient evidence, Mrs. Mendes' claim to the HST New Housing Rebate for Property 1 was denied.

5) FRUSTRATED INTENTIONS

Intervening events over which an individual has little or no control can be a mitigating factor frustrating their original intention that a new home or new condominium unit become their primary place of residence. Unforeseeable events, judges have ruled, should not negate the purpose for which a property had been purchased.

Intervening events listed in reported cases include:

- Inability to obtain a job in a new jurisdiction[19]
- Illness[20]
- Job loss
- Death
- Necessary employment relocation[21]

[19] *Boucher v. The Queen*, [2002] G.S.T.C. 84 (T.C.C.)
[20] *Gagné v. The Queen*, 2007 TCC 175 (CanLII)

- Family integration issues[22] (not every blended family meshes like the Brady Bunch)
- But not the inability to sell a currently owned property[23]

6) MULTIPLE PURCHASERS, OCCUPANCY AND OWNERSHIP

More HST New Housing Rebate cases deal with these issues than any other. With one exception, the cases involve non-relation purchasers, since a contractual purchaser can intend that a relation use the property as their primary place of residence, and a relation can be the first person to occupy that property after closing (but a relation cannot be the transferee; see below).

Courts have considered seven questions in deciding entitlement to the HST New Housing Rebate: (a) who signed the Agreement of Purchase and Sale (and any amendments); (b) were all contractual purchasers related; (c) did all contractual purchasers intend to use the property as their primary place of residence (or a relation) after closing; (d) who took title to the property; (e) were all transferees related; (f) were all contractual purchasers (or a relation) the first persons to occupy the property; and (g) was ownership transferred to all contractual purchasers.

In the first group of cases, payment of the HST New Housing Rebate was denied. Two cases follow where the rebate was paid.

Davidson v. The Queen, 2002 CanLII 872 (TCC)[24]

Davidson and Ms Waterhouse, two unrelated parties, signed an Agreement of Purchase and Sale to purchase a new duplex. Although title was registered to both Davidson and Ms Waterhouse, only Davidson resided in one of the units. Ms Waterhouse did not. While the MNR conceded that Ms Waterhouse was not a beneficial owner and was joined as an owner for mortgage purposes only, Davidson's application for the HST New Housing Rebate was denied. *"As Ms.*

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[21] *Sivakumar v. The Queen*, 2013 TCC 325 (CanLII)
[22] *Hamel v. The Queen*, 2004 TCC 315 (CanLII)
[23] *Kandiah v. The Queen*, 2014 TCC 276 (CanLII),
[24] For further information about the Davidson case, see my paper *"Oops!! How Clients Can Accidentally Lose The HST New Housing Rebate";* Six Minute Real Estate Lawyer 2013; Law Society of Upper Canada

Waterhouse did not enter into liability with the intention of acquiring the complex for use as her primary place of residence, and is not a relative of the Appellant, the conditions of section 254 have not been met. The Appellant is therefore not eligible to claim the new housing rebate."

Davidson highlights how everyone must meet the requirements of subsection 254(2) of the Act where a new home or new condominium unit is bought by a group. It also underscores how legal title should govern payment of the HST New Housing Rebate, not equitable title.

Goyer v. The Queen, 2010 TCC 511 (CanLII),

Ms Goyer bought a vacant lot in October 2005 with two friends, Miserany and his spouse, on which a new home was built. Title was registered in all three names. All three parties appeared on the documents for the construction mortgage, the construction permit, the insurance policy, and the HST New Housing Rebate application. However, all construction costs were paid by Ms Goyer, along with all ownership expenses after the home was constructed. Miserany and his spouse never intended that the property be their primary place of residence, and never lived there. Ms Goyer called Miserany and his spouse *prête-noms*[25] for the financing costs.

Relying on the unambiguous wording of the statute, the court denied Ms Goyer the HST New Housing Rebate. As in *Davidson*, the court was not prepared to "pierce" the legal title of the property to consider any beneficial interests.

Sharp v. The Queen, 2014 TCC 323 (CanLII)

Sharp and an unrelated business associate Da Silva signed an Agreement of Purchase and Sale for a brand new home. Prior to closing, Sharp's parents were added to the Agreement of Purchase and Sale by amendment – but Da Silva's name was not removed. Sharp had no intention of moving into the property. Neither did Da Silva, who never even became a registered owner. Instead, before closing Da Silva directed that title be registered in favour of Sharp and her

[25] "one who lends his name to another to use". Merriam Webster online dictionary.

parents. After closing, only Sharp's parents occupied the property. Despite arguments that Da Silva was simply a bare trustee for Sharp and / or her parents, Sharp's application for the HST New Housing Rebate was denied. Another important point: the HST New Housing Rebate application stated Sharp, Da Silva and her parents were the owners of the property.

Henao v. The Queen, 2015 TCC 81 (CanLII)

Henao signed a new home contract. Her uncle (Restrepo) was added by amendment. Henao and Restrepo became the registered owners of the property as joint tenants. However, only Henao occupied the property. Her uncle never intended to occupy the property, and never did.

Henao's application for the HST New Housing Rebate was denied. Citing *Sharp*, the judge said: "every person who becomes liable or assumes liability under an agreement of purchase and sale must intend to live in the new home (or have a qualified relation live in it)". Signing the amendment resulted "in a supply of the House being made to Mr. Restrepo, but because he did not intend to acquire the House for use as his primary place of residence, the requirements in paragraph 254(2)(*b*) have not been satisfied and Henao is not eligible to the Rebate."

Malik v. The Queen, 2015 TCC 83 (CanLII)

Soon after Malik signed an Agreement of Purchase and Sale for a new home, he faced problems arranging financing. Before closing, an amendment was signed, adding his wife's uncle Sheikh to the contract as co-purchaser. Yet only Sheikh took title to the property on closing. Malik and his family moved into the property. Sheikh never did, and never intended to live there. Malik's claim to the HST New Housing Rebate was rejected, both by the MNR and the court.

The parties to the Agreement of Purchase and Sale were Malik and Sheikh. As Sheikh (the registered owner) did not intend to reside in the home, Malik was not entitled to the rebate.

Kandiah v. The Queen, 2014 TCC 276 (CanLII)

Kandiah signed an Agreement of Purchase and Sale for a new home. On closing in September 2010, title was registered to Mrs. Kandiah only, as she had a better credit rating. Kandiah was granted the HST New Housing Rebate by his builder on closing. The MNR objected.

Despite claims that he "occupied" the property, Kandiah sought tenants for the property within a month of closing, and listed it for sale. The listing stated "brand new never lived in."

Kandiah was chastised by the court for claiming the property was his primary place of residence. "Taking a few belongings (mattresses and towel for example), leaving behind virtually all of your other belongings and furnishings in the family home, does not constitute actual use of (the property) as the primary place of residence for the family. At best, I would describe Mr. Kandiah's and his daughter's arrangement as camping, not residing – certainly not residing as a primary place of residence." Kandiah had to repay the $24,000 HST New Housing Rebate.

The *obiter* comments in *Kandiah* are very troubling (although on a strict reading of the Act, they may be correct).

Section 254 (2)(b) refers to a new home or new condominium unit being acquired "for use as the primary place of residence of <u>the particular individual or a relation of the particular individual</u>". However, Section 254(2)(e) only speaks of "ownership" being "transferred <u>to the particular individual</u>" i.e. the person who signed the Agreement of Purchase and Sale. The purchaser remains eligible for the HST New Housing Rebate if a relation is the first person to occupy the property after closing, but not if ownership is transferred to a relation on closing.

While Kandiah signed the Agreement of Purchase and Sale, Mrs. Kandiah was the transferee. As Mrs. Kandiah was not the "particular individual" who signed the Agreement of Purchase and Sale, the court in *obiter* said that would have been fatal to Kandiah keeping the HST New Housing Rebate – even though the Kandiahs were spouses of one another!!

Noted tax commentator David Sherman said the following about *Kandiah*: "There is no indication that the CRA is currently examining all new housing rebate applications to the level of detail of checking title against the agreement of purchase and sale. However, this could happen; and if the CRA is auditing the rebate for any other reason, it will request the closing documents and this issue will come up".[26]

Pending further judicial consideration, the importance of the *Kandiah* obiter cannot be ignored. If it is good law, payment of the rebate could be in jeopardy when the transferee was not the contractual purchaser, but rather the spouse of the contractual purchaser. To prevent this from happening, ensure that the spouse who takes title on closing is the spouse who signed the Agreement of Purchase and Sale. If not, get an Amendment signed to that effect before closing.

Ho v. The Queen, 2015 TCC 10 (CanLII)

In the *Ho* case, Tony signed the Agreement of Purchase and Sale. By Amendment, his cousin Kwinson and Kwinson's spouse were added to the Agreement of Purchase and Sale as purchasers. On closing, title was registered to those three persons. However, only Kwinson, his spouse, and his mother resided in the property. Tony never did. On closing, Tony applied for the HST New Housing Rebate on behalf of the three purchasers .

What makes Ho interesting are the seven conditions outlined by the court, a checklist of criteria to qualify for the HST New Housing Rebate[27].

1) a builder (as defined in the Act) of a single-unit residential complex makes a taxable supply to all individuals as a group – SATISFIED
2) when each group purchaser assumed liability under the Agreement of Purchase and Sale, each intended to use it as their primary place of residence (or a relation) – SATISFIED
3) the purchase price meets the monetary threshold for the rebate – SATISFIED

[26] http://www.cba.org/cba/newsletters-enews/2015-articles/2015-06-gst.aspx
[27] The court also analyzes how the federal and provincial components of the HST New Housing Rebate are linked.

4) HST was paid on the purchase price – SATISFIED
5) Title was transferred to the group after substantial completion – SATISFIED
6) the property was not occupied before they were given possession – SATISFIED
7) "Clause 254(2)(g)(i)(A) contains the following requirement: the first individual to occupy the complex as a place of residence at any time after substantial completion of the construction must be the particular individual or a relation of the particular individual. After the application of subsection 262(3) to clause 254(2)(g)(i)(A), the condition reads as follows: the first individual to occupy the complex as a place of residence at any time after substantial completion of the construction must be all of the individuals as a group or a relation of all of the individuals as a group." – NOT SATISFIED

Despite Tony's earlier intention to reside in the property as his primary place of residence, despite the fact Tony signed the Agreement of Purchase and Sale, and despite the fact Tony became a registered owner, Tony never lived at the property. Only Kwinson, his spouse, and his mother did. More importantly, Kwinson, his spouse and his mother were not Tony's relation. That disqualified everyone from receiving the HST New Housing Rebate[28]

However, in two recent cases the HST New Housing Rebate was paid.

Rochefort v. The Queen, 2014 TCC 34 (CanLII)

Rochefort and his wife signed an Agreement of Purchase and Sale to buy a new home as their primary place of residence. As Rochefort could not arrange a mortgage, his nephew Fontaine (a non-relation) agreed to become one of the registered owners on closing along with Rochefort (while omitting Mrs. Rochefort). As the Agreement of Purchase and Sale was never amended to add Fontaine (and remove Rochefort's wife), Fontaine was a non-contractual party on closing.

[28] Compare *Ho* with *Hamel v. The Queen*; 2004 TCC 315, where the court said both purchasers intended that the property be their primary place of residence, and the parties were relations. The HST New Housing Rebate was paid

The MNR argued Rochefort was not entitled to receive the HST New Housing Rebate. While the taxable supply was made to Rochefort and his wife (being the parties who signed the Agreement of Purchase and Sale), title was registered to Rochefort and Fontaine. To qualify for the rebate, Section 254(2)(e) of the Act requires that "ownership" be transferred to the "particular individual" who signed the Agreement of Purchase and Sale i.e. Rochefort and Mrs. Rochefort.

Did Mrs. Rochefort acquire sufficient rights to constitute ownership, entitling Rochefort to receive the rebate? All the circumstances of Fontaine's involvement with the property were considered, including the fact Fontaine never paid the mortgage, taxes or property bills. All parties believed that Fontaine had no right to any gain from the property. Fontaine "did not appreciate he was going on title as an owner; he was simply doing the Rocheforts a favour". Furthermore, Rochefort believed that he could require Fontaine to transfer title to the Rochefort's at any time.

Fontaine never became a party to the Agreement of Purchase and Sale, he never intended to live at the property, and he never did. Yet in somewhat tortured reasoning, the court still found that Rochefort was entitled to receive the HST New Housing Rebate, as Mrs. Rochefort had a beneficial interest in the property sufficient to qualify for the rebate. After all, she "signed an agreement to become the owner, she provided deposit monies to become the owner, she acted as owner in making decisions amending the Purchase and Sale Agreement, she was liable for the HST, she took possession of the property with her husband and in every way she behaved as an owner by using and enjoying the property." Therefore, Fontaine held legal title in trust for Mrs. Rochefort. "*Mr. Fontaine agreed to hold title solely for the benefit of the Rocheforts, and, as a trustee of the property, was required to convey title to the Rocheforts on demand, or to any third party at their request. That, I find, was the deal and satisfies me Mrs. Rochefort was a beneficial owner.*"

Rejecting the *Davidson* line of cases, *Rochefort* appears to stand for the proposition that "ownership" in Section 254(2)(e) of the Act means beneficial ownership rather than legal title.

<u>Javaid v. The Queen, 2015 TCC 94 (CanLII)</u>

The most recent HST New Housing Rebate case is *Javaid* (April 2015). Unlike *Rochefort*, *Javaid* adopted a different approach in supporting payment of the HST New Housing Rebate.

Javaid signed a contract to buy a new home. To finance it, Javaid needed a "guarantor" to sign the Agreement of Purchase and Sale and become a co-owner. Abbas (a relation of Javaid) agreed, and an amendment was signed adding Abbas as a purchaser. When Abbas backed out before closing, he was replaced by Zia, a friend of Javaid. An amendment was signed, replacing Abbas with Zia, making Javaid and Zia the contractual purchasers. Before closing Zia also backed out, Riaz (another friend) being his replacement. But no amendment was ever signed replacing Zia with Riaz. So Javaid and Zia remained the contractual purchasers at closing.

For closing, Javaid and Zia signed Directions, stating that title should be registered to Javaid and Riaz. Both Zia and Riaz also signed Declarations of Trust and Undertakings in favour of Javaid. Neither Zia nor Riaz acquired the Property with the intention that it be their primary place of residence (or a relation). At no time after closing did Zia or Riaz, or a relation, occupy the property as their primary place of residence.[29]

On the surface, the case appeared to be a slam-dunk. Zia was a "recipient" of the "supply" when he signed the Amendment, becoming liable under the Agreement of Purchase and Sale. It did not matter that Zia backed out of the deal before closing. Following *Davidson*, Zia had to satisfy the rebate conditions, or Javaid would be ineligible for the HST New Housing Rebate.

Yet the court rejected this argument. Based on the Declarations of Trust and Undertakings, the court stated that Zia "was only acting in the capacity as an **agent** in signing the Agreement of Purchase and Sale". As an agent, Zia was not the recipient of the supply. According to Section 69 of GST / HST Memoranda Series 8.1 (General Eligibility Rules)[30]:

[29] Presumably Javaid intended to reside in the house and did so, but that point is unclear. The Crown attempted to question that intention for the first time just before the hearing, but the court refused to allow it.
[30] Available at http://www.cra-arc.gc.ca/E/pub/gm/8-1/8-1-e.pdf . For more information about agency relationships, see Policy Statement P-182R *Agency*, available at *http://www.cra-arc.gc.ca/E/pub/gl/p-182r/p-182r-03e.pdf*

> **69**. Even though the agent may appear to be the recipient of the supply as the agent is identified on the invoice as the customer, it is the principal who is ultimately liable to pay the consideration thereby making the principal the recipient of the supply.

In obiter, the court said "it is not clear to me that rebate conditions apply to someone who signs an agreement of purchase and sale and never becomes an owner of the property. At the end of the day, Mr. Zia backed out of the deal...I have trouble with the notion that an individual must comply with rebate conditions if they back out of the arrangement prior to closing."[31]. Will *Javaid* lead to a new line of cases, where an agency relationship is relied upon rather than a trust arrangement, to qualify for the HST New Housing Rebate?

Unfortunately, these conflicting cases make it virtually impossible to properly advise clients on their entitlement to a HST New Housing Rebate if one of the contractual purchasers / one of the transferees is a non-relation, if one of the contractual purchasers did not intend to use the property as their primary place of residence after closing, if ownership will not be transferred to all contractual purchasers, and if one of the contractual purchasers (or a relation) will not be the first persons to occupy the property. Also unclear: which line of reasoning will prevail in the future: those involving legal title (*Davidson*) or equitable title (*Rochefort*).

The following chart attempts to reconcile these recent cases dealing with Multiple Purchasers, Occupancy, Ownership, and the HST New Housing Rebate.

[31] For some unknown reason, the court never discusses the consequences of Riaz taking title to the Property although he was not a contractual party, and the property not being his primary place of residence.

A) CASES WHERE THE HST NEW HOUSING REBATE WAS NOT PAID

Who were the contractual purchasers	Were all contractual purchasers relations?	Did all contractual purchasers intend to use the property as their primary place of residence (or a relation) after closing?	Title was registered to:	Were all transferees relations?	Were all contractual purchasers (or a relation) the first persons to occupy the property?	Was ownership of the property transferred to all contractual purchasers?
Davidson - February 2002						
Man	No	Yes	Man	No	Yes	Yes
Woman		No	Woman		No	Yes
Goyer - November 2010						
Woman	No	Yes	Woman	No	Yes	Yes
Friend		No	Friend		No	Yes
Friend's wife		No	Friend's wife		No	Yes
Sharp – April 2014						
Woman	No	No	Woman	Yes	No	Yes
Man		No	No		No	No
Woman's parents		Yes	Woman's parents		Yes	Yes
Kandiah – September 2014						
Husband	Yes	No	Wife	Yes	Yes	No
Ho – January 2015						
Man	No	Yes	Man	No	No	Yes
Cousin		Yes	Cousin		Yes	Yes
Cousin's wife		Yes	Cousin's wife		Yes	Yes

Henao – March 2015						
Woman	No	Yes	Woman	No	Yes	Yes
Uncle		No	Uncle		No	No
Malik – April 2015						
Man	No	Yes	No	No	Yes	No
Uncle		No	Uncle		No	Yes

No The reason why payment of the HST New Housing Rebate was denied

B) CASES WHERE THE HST NEW HOUSING REBATE WAS PAID

Who were the contractual purchasers	**Were all contractual purchasers related?**	**Did all contractual purchasers intend to use the property as their primary place of residence (or a relation) after closing?**	**Title was registered to**	**Were all transferees related?**	**Were all contractual purchasers (or a relation) the first persons to occupy the property?**	**Was ownership of the property transferred to all contractual purchasers?**
Rochefort – January 2014						
Husband	Yes	Yes	Husband	No	Yes	Yes
Wife		Yes	No		Yes	No
			Nephew			
Javaid – April 2015						
Man	No	Yes	Man	No	Yes	Yes
Friend 1		No	No		No	No
			Friend 2			

7) TRUST DECLARATIONS[32]

[32] For guidance on what information should appear in a Declaration of Trust, see the provincial Land Transfer Tax "*Guide to the Requirements to Evidence NIL Value of Consideration for Conveyances Involving Trusts - Land Transfer Tax Act*", available at http://www.fin.gov.on.ca/en/guides/ltt/0693.html

In recent years mortgage lenders have increasingly insisted that a potential guarantor become one of the registered owners of a new home or new condominium unit. A term has even been created: an "accommodation party". Sometimes this third-party is a relation, sometimes not. When an accommodation party "lends their name" to a transaction this way, the following process has evolved: (a) the third party becomes the registered owner of a 1% interest in the property[33] (sometimes less); and (b) a written Declaration of Trust is signed by all parties, stating that the accommodation party is holding their 1% registered interest in trust for the "true" purchaser of the property i.e. its beneficial owner[34].

Receiving the HST New Housing Rebate has a greater chance of success when a Declaration of Trust is signed, if the "true" purchaser and the accommodation party are relations. After all, (a) the accommodation party likely intended that the property be used as the primary place of residence of a relation (i.e. the "true" purchaser) and (b) a relation of the accommodation party (i.e. the "true" purchaser) likely would be the first person to occupy the property.

If the accommodation party is not a relation, the likelihood of receiving the HST New Housing Rebate is significantly impaired, as (a) it is unlikely the accommodation party intended that the property be used as their primary place of residence (or a relation); and (b) neither the accommodation party nor a relation likely would be the first person to occupy the property.

Adding a non-relation to the Agreement of Purchase and Sale (or to the Transfer on closing), even as a 1% registered owner with a Declaration of Trust, has not met success in the courts in trying to claim the HST New Housing Rebate.

<u>Al-Hossain v. The Queen, 2014 TCC 379 (CanLII)</u>

[33] To ensure compliance with Section 254(2)(e) of the Act, and to avoid the consequences in *Sharp*, the accommodating party should also sign the Agreement of Purchase and Sale (either directly, or by amendment)
[34] For a review of the issues lawyers should consider when asked to prepared a Declaration of Trust in these circumstances, see the paper by Steven Pearlstein, *Adding A Parent to Title*, Six-Minute Real Estate Lawyer 2013

On May 13, 2010, Al-Hossain signed an Agreement of Purchase and Sale to buy a new home. Closing was scheduled for July 12, 2010. As Al-Hossain faced difficulties obtaining mortgage financing, his friend (Khandaker) agreed to become a co-owner of the property. An Amendment was signed on June 22, 2010, adding Khandaker as a purchaser.

Several days before closing, both parties signed a Statutory Declaration and a Trust Acknowledgment prepared by their lawyer. Both documents stated that the property was being acquired as the primary place of residence for Al-Hossain who was the 100% beneficial owner of the property. Khandaker held his 0.01% interest in the property in trust for Al-Hossain to accommodate lender requirements.

Al-Hossain was denied the HST New Housing Rebate. In reaching its decision, the court followed the reasoning in *Davidson* and distinguished *Rochefort*. When the Amendment was signed, it was not Khandaker's intention to reside in the property as his primary place of residence. As Khandaker, one of the contractual purchasers, failed to satisfy the criteria for the HST New Housing Rebate, Al-Hossain was disqualified from receiving it.

What about the Trust Acknowledgment, stating that Al-Hossain was the beneficial owner of the property, and that Khandaker was a bare trustee holding that 0.01% legal interest in trust for Al-Hossain? The court rejected this argument, too. "Neither the Acknowledgement nor the Statutory Declaration existed before the Agreement or the amended Agreement. The creation of a trust must be properly documented containing the requisite elements of a trust, dated, signed and in existence prior to or contemporaneous with the matter that is the subject of the trust arrangement. Based on the evidence, I find that no trust arrangement was in existence at the relevant time", i.e. when the Agreement of Purchase and Sale (or an Amendment) was signed.

<u>Canpar Developments Inc. v. The Queen, 2011 TCC 353 (CanLII)</u>

While not an HST rebate case, *Canpar* examines using Declarations of Trust. Based on *Canpar*, the efficacy of Trust Declarations in HST New Housing Rebate cases is greatly diminished.

Canning and Parmar each held 50% of the issued common shares of Canpar. To obtain mortgage financing, Canpar transferred title in a property it owned to Canning and Parmar as tenants in common. No written Declaration of Trust was ever created. In fact, the court inferred that neither Parmar nor Canning even thought about creating a trust when the property was transferred.

Could the parties still argue it was their intention to create a trust?

"Three criteria must be met in order to establish a valid trust. These are certainty of intention, certainty of subject matter and certainty of objects. It must be clear that the settlor of a trust intended that the property transferred to the trustee be held in trust as a binding obligation. The property that is the subject of the trust and the beneficiaries of the trust must be identifiable, and the interest the beneficiaries in the trust property must be defined."

The following factors negated the establishment of a trust:

- The lender required that the property be held by the two shareholders personally as a condition of obtaining the necessary financing. "It is illogical, in my view, that (the lender) would have accepted that the property still be beneficially owned by (Canpar) after the transfer when (the lender) was advancing funds on the basis that the property was registered in the names of the shareholders."
- there was no evidence that either Parmar or Canning ever advised the lender about a trust. "Where a person transfers property to someone else by a deed or conveyance that on its face is absolute and does so to achieve a purpose that is premised upon a transfer on beneficial ownership, that would require very cogent evidence to establish that the transferor had no intention of doing what the documentation unequivocally shows that it did do and that intended to withhold from the grantee beneficial title to the property[35]"

[35] Erb *v. The Queen*, 2000 D.T.C. 1401

Be on guard when a lender insists that a third party become a registered owner of the property in order to obtain mortgage financing. When two or more people are taking title to a new home or new condominium unit, learn as early as possible (a) if they are "relations" as defined in the Act and (b) if they all intend to reside in the property as their primary place of residence after closing. "No" and "no" will likely kill any entitlement to the HST New Housing Rebate.

8) ONLY ONE HST NEW HOUSING REBATE APPLICATION, PLEASE

Horvath v. The Queen, 2009 TCC 634 (CanLII)

Horvath purchased a new home. Before closing, the builder allowed him to install kitchen cupboards, bathroom vanities, floors and subfloors, and closet shelving. On closing Horvath received the HST New Housing Rebate from the builder based on the purchase price in the Agreement of Purchase and Sale. After closing Horvath submitted a rebate application for $783.50 regarding the work and materials supplied by him. Horvath's claim was denied. "Unfortunately for (Horvath), once he claimed the rebate in respect of the amounts paid to (the builder), he was prevented by Subsection 262(2) from claiming a second rebate in respect of the amounts paid personally by him to third party suppliers."

9) NO DOUBLE DIPPING

Hagos v. The Queen, 2014 TCC 65 (CanLII)

Hagos signed an Agreement of Purchase and Sale to purchase a new home in 2010. His intention: the property would be his primary place of residence. Before closing, he decided that it would be as a rental property instead. As Hagos did not disclose this change of intention prior to closing, he received the HST New Housing Rebate when closing the purchase in 2011.

Several months later Hagos also applied for the HST New Residential Rental Property Rebate ("NRRP"). That application was denied. *"Clearly, the appellant has applied for two new housing*

rebates with respect to the same property, one a New Housing Rebate for Home Purchased from a Builder and a second rebate, a New Residential Rental Property Rebate. Subsection 262(2) of the Act is found in Division VI of the Act. It provides that only one application may be made for a rebate with respect to any matter."

10) POST-CLOSING FLIPS[36]

In a post-closing flip, the purchaser buys a new home or new condominium unit, closes the purchase, and quickly resells the unit without it ever being occupied.

Chandna v. The Queen, 2009 TCC 230 (CanLII)

Chandna bought a residential condominium unit from Nagata and Bosch in early 2007, HST included. While Nagata and Bosch had bought the unit from the builder, Chandna was its first occupant. Yet Chandna's application for the HST New Housing Rebate was denied. Why?

Chandna's entitlement to the HST New Housing Rebate depended on proving that the original purchasers were "builders"[37] of the property for HST purposes. In other words, Chandna had to establish that Nagata and Bosch (the original purchasers) had acquired the property with the intention of reselling it, and not with the intention of using it as the primary place of residence for themselves or a relation. As Chandna failed to prove that the unit had been acquired from "a builder", the application for the HST New Housing Rebate was denied.

Two important corollaries flow from *Chandna*:

[36] For a review of the entitlement to HST New Housing Rebates in pre-closing flip situations, see my paper "*HST Leftovers – Still Fresh A Year Later",* 12th Annual Real Estate Summit, April 2015, Law Society of Upper Canada

[37] According to Section 123(d) of the Act, the definition of "builder" includes a person who 'acquires an interest in the residential complex for the primary purpose of selling the complex…at a time when (i) in the case of a condominium complex or residential condominium unit, it is not yet registered as a condominium, or (ii) in any case, it has not yet been occupied by an individual as a place of residence or lodging". In other words, in a post-closing flip situation, there can be two builders: (a) the party that constructed the new home or new condominium unit; and (b) the party selling the property in the post-closing flip.

a) Assume Chandna could have established that (a) Nagata and Bosch (the original purchasers) had acquired the new condominium unit in order to resell it, and (b) the unit was never occupied before the closing of the second transaction. Chandna as the ultimate purchaser should have been able to claim the HST New Housing Rebate.

b) Assume Darryl buys a new home or new condominium unit in Ottawa, intending it to be his primary place of residence after closing. Before closing, Darryl is transferred from Ottawa to Winnipeg. Darryl closes the purchase with the builder, never occupies the property, and resells it to Amy. Darryl could have received the HST New Housing Rebate on closing the first transaction. If not received it at that time, and if the property was never occupied before the sale to Amy closed, Darryl should still be eligible to claim the HST New Housing Rebate after closing under Section 254(2)(g)(ii) of the Act[38]. As Darryl is entitled to receive the HST New Housing Rebate, Amy is not.

Bottom line: if a client is purchasing a new home or condominium unit on a post-closing flip, and your "ultimate purchaser" client wants to receive the HST New Housing Rebate, clear and convincing evidence is needed from the original purchaser (a) that the intention of the original purchaser when buying the new home or new condominium unit was to resell the property, and (b) that the property has never been occupied. At a minimum, a Statutory Declaration is needed. Further details from the original purchaser would be extremely helpful, elaborating on the contents of the Statutory Declaration. Additional items to receive (if possible) include: an indemnity from the original purchaser, agreeing to indemnify and save harmless the ultimate purchaser if the HST New Housing Rebate is denied; and an undertaking from the original purchaser, to co-operate with the ultimate purchaser in dealing with the CRA, if necessary.

Hopefully the ultimate purchaser retained a real estate lawyer <u>before</u> the terms of the second contract are finalized, so these concerns can be properly addressed.

[38] See my paper *Refresher on New Housing Rebates*, 11th Annual Real Estate Summit, April 2014; Law Society of Upper Canada, pages 33-34

PRINCIPLES FROM THE CASES

- Courts will thoroughly examine the *bona fides* of the party applying for an HST New Housing Rebate. Expect the MNR to seek evidence from impartial, outside sources in preparing its case – *Berkovich*.
- To receive the HST New Housing Rebate, contractual purchasers must truly intend to occupy the property as their primary place of residence, have title transferred to them, and reside there post-closing. – *most cases*
- Anyone claiming an HST New Housing Rebate should be able to show the normal attributes of a change in residence if intention to use a new property as a primary place of residence is challenged. The more and stronger the attributes, the better - *Montemarano*
- The intention of a purchaser to use the property as their primary place of residence (or that of a defined relation) must be evident when the Agreement of Purchase and Sale (or an Amendment) was signed, and at no later time. If this is not the case, it is usually fatal to the purchaser receiving the HST New Housing Rebate – *Wong*
- If a contractual purchaser did not intend to live in the property, that generally results in a denial of the HST New Housing Rebate – *Davidson, Goyer, Sharp, Henao* and *Malik*
- If a contractual purchaser was not the first person to occupy the property, no HST New Housing Rebate is payable – *Davidson, Goyer, Sharp, Ho, Henao* and *Malik*
- If a contractual purchaser does not take title to the property, receipt of the HST New Housing Rebate is in jeopardy – *Sharp, Kandiah, Henao* and *Malik*
- Courts consider post-Agreement of Purchase and Sale use of the property in establishing pre-contractual intent – *Berkovich* and *Mendes*
- Uncles, aunts, cousins and nephews are not relations – *Ho, Henao* and *Malik*
- If one of multiple purchasers did not intend at the contract stage to use the property as their primary place of residence, no HST New Housing Rebate is payable to anyone – *Davidson, Goyer, Sharp, Kandiah, Henao and Malik*
- If one of multiple purchasers does not take title to the property, no HST New Housing Rebate for anyone – *Sharp, Henao and Malik*

- If one of multiple purchasers does not occupy the property, it's game over for the entire group. No HST New Housing Rebate – *Davidson, Goyer, Sharp, Ho, Henao and Malik*
- A change of intention after the Agreement of Purchase and Sale is signed is not relevant. Intention is only determined when the contract is signed – *Mendes* and *Wong*
- Intention can be frustrated. Unforeseeable events can be a mitigating factor enabling a purchaser to still receive the HST New Housing Rebate *(see the cases in the paper)*
- If the contractual purchasers are not related, that is usually fatal to a HST New Housing Rebate claim – *Davidson, Goyer, Ho, Henao* and *Malik*
- Who signed the Agreement of Purchase and Sale (and any amendment) is more important that who takes title to the property - *Kandiah*
- Adding a relation to the Agreement of Purchase and Sale as an "accommodation party" to satisfy lender requirements should not impact the "true" purchaser receiving the HST New Housing Rebate
- Adding a non-relation to the Agreement of Purchase and Sale as an "accommodation party" to satisfy lender requirements will jeopardize receipt of the HST New Housing Rebate, as the accommodation party likely cannot satisfy the other eligibility criteria – *Al-Hossain*
- Title should only be registered in the names of the contractual purchasers. Even directing title into the name of a spouse who was not a party to the Agreement of Purchase and Sale could be fatal – *Kandiah*
- In most of the cases, the courts only consider legal title, not equitable title, in determining eligibility for the HST New Housing Rebate (especially *Davidson* and *Goyer*)
- In the one reported case where the "beneficial interest" in a property was sufficient to qualify for the HST New Housing Rebate (*Rochefort*), both spouses had signed the Agreement of Purchase and Sale, and both spouses resided in the property after closing (although only one of the spouses took title with a third party)
- In the other reported case (*Javaid*), a contractual non-relation who did not become a transferee was found to be an "agent" in signing the Agreement of Purchase and Sale. To the court, only the principal (i.e. the transferee) was the recipient of the supply
- For a Declaration of Trust to have any hope of success, it must be properly documented and signed when the Agreement of Purchase and Sale (or an Amendment) is signed, and

no later. Creation of a Declaration of Trust at any time afterwards (i.e. just before closing) may be inadequate to establish that a registered owner is holding legal title in trust for the beneficial owner – *Al-Hossain*

- If an accommodation party becomes one of the registered owners of a property to help the beneficial owner obtain mortgage financing, the Declaration of Trust may not stand if the lender is not advised about the creation of the trust, and / or the lender's consent is not obtained – *Canpar*
- Special care and attention is needed on post-closing flips, regardless whether the original purchaser or the ultimate purchaser is being represented. The circumstances in which each may be entitled to receive the HST New Housing Rebate are far from obvious. For example, if your "ultimate purchaser" client wants to receive the HST New Housing Rebate, evidence is needed from the original purchaser that their intention when buying the property was to resell it – *Chandna*

Finally, be smart and protect your privilege to practice law. Never commission a Statutory Declaration where the purchaser states they intend the property to be their primary place of residence after closing, if you know or ought to know that the contents of the declaration are false. Plain and simple, you are being used by that client to obtain the HST New Housing Rebate dishonestly. Commissioning that declaration could land you in hot water with the Law Society[39]. No client is more important than your reputation and your privilege to practice law.

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II – HST NEW RESIDENTIAL RENTAL PROPERTY REBATE

What are the key criteria for investors to qualify for the HST New Residential Rental Property Rebate?

[39] Rule 3.2-7.1 of the *Rules of Professional Conduct* states: "A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or any other person to facilitate dishonesty, fraud, crime or illegal conduct.

- the purchaser paid HST on closing, but did not receive the HST New Housing Rebate
- the property bought is new or substantially renovated
- the purchase price satisfies the different monetary thresholds discussed earlier
- The property purchased is a "qualifying residential unit". Criteria include "the nature of the unit itself; the purpose for which (the) person supplies the unit; the nature of its occupancy; and the duration of the first occupancy".[40]
- It is "reasonably expected" that the first use of the property will be a tenant occupying it as their primary place of residence for at least one year[41]
- The purchaser owns the new home or new condominium unit for at least one full calendar year, unless the property is sold within that first year to an individual who acquires it for use as their own primary place of residence (or a relation)
- the application for the HST New Residential Rental Property Rebate must be filed within 2 years after the end of the month in which HST was first payable on the purchase
- only one rebate application can be filed

Effectively this means there are two separate one-year rules to qualify for the HST New Residential Rental Property Rebate: (a) rent the property for a year after closing and (b) own the property for a year after closing. The rebates run concurrently, not consecutively. To the CRA, the line in the sand between investors and speculators is one year. Anyone who buys a new home or new condominium unit and re-sells it soon after closing, or who rents the property on a short-term basis, will be denied the HST Investor Rebate.

It is not necessary to wait until the end of the first year of ownership to apply for the HST New Residential Rental Property Rebate. The application form (GST524) can be filed right after closing, subject to clawback (plus interest at the prescribed rate) if the criteria are not met.

[40] GST / HST Technical Information Bulletin B-087
[41] To satisfy this requirement, a written lease with an initial term of at least one year is strongly recommended, rather than a verbal lease or any month-to-month arrangement This should protect the investor in a new home or new condominium if the tenant breaks the lease before the end of the first year

Unlike the HST New Housing Rebate, the HST New Residential Rental Property Rebate is not limited to individuals. It can also be paid to corporations[42].

It also appears that non-residents can qualify for the HST New Residential Rental Property Rebate, since nothing in Section 256.2 of the Act limits the rebate to Canadian residents

Only a handful of cases have examined the HST New Residential Rental Property Rebate:

1) "REASONABLE EXPECTATION" TEST

Melinte v. The Queen, 2008 TCC 185 (CanLII)

Melinte bought a new condominium unit where interim closing was in late December 2004 and final closing was March 1, 2015. Melinte leased the unit to a financial institution to be occupied by one of its employees. While it was Melinte's understanding that the suite would be occupied for several years, the written lease only ran from January 28, 2005 to December 28, 2005 (the corporate tenant's policy did not allow longer-term leases). In December 2005, Melinte was advised that the lease would not be renewed. Due to cutbacks, the financial institution forced the occupant to find a smaller, cheaper premises. Melinte hired a leasing company that found a tenant who occupied the unit from January 3, 2006 to June 24, 2007. Melinte successfully challenged the denial of the HST New Residential Rental Property Rebate.

Three interesting takeaways from *Melinte*:

a) The court focused on the "reasonable expectation" of Melinte in reaching its decision
b) The "reasonable expectation" leasing requirement started on final closing (March 1, 2005) and not interim closing (December 2004), as HST was only payable at final closing

[42] See Section 256.2(3) of the Act, which talks about the HST Investor Rebate being paid to "persons", compared with Section 254(2)(a) [the HST New Housing Rebate], which mentions only "individuals".

c) While strongly recommended, it is not essential that the initial lease be for a full one-year term. Technical Notes associated with the HST New Residential Rental Property Rebate and mentioned in the case refer to a series of one month leases.

Tsenkova v. The Queen, 2013 TCC 321 (CanLII)

Tsenkova became the owner of a new condominium suite on December 3, 2010, and paid HST at that time. On December 30, 2010, Tsenkova leased the unit to a leasing company for the term from January 15, 2011 to January 14, 2012. A clause in the leasing agreement said "Landlord agrees that the intention of the Tenant is to sub-let the premises to corporate executives for the purpose of providing temporary accommodation". Tsenkova's claim for the HST New Residential Rental Property Rebate was denied, the MNR claiming that the first use of the unit was a "temporary accommodation" and not a "primary place of residence" occupied by a sub-lessee for one year. Tsenkova appealed the decision – successfully.

"Acting as the Appellant's agent, (the leasing company) secured a tenant who agreed to use the Unit continuously as his/her primary place of residence for at least one year….I am satisfied that at the time the HST was paid, it was the Appellant's reasonable expectation under the (lease agreement), an individual would use the unit throughout a period of at least one year as his/her primary place of residence."

If clients decide to lease the unit to a leasing company, that lease must have a term of at least one year. Also, avoid expressions such as "temporary accommodations," if possible.

2) OUT OF TIME

Napoli v. The Queen, 2013 TCC 307 (CanLII)

Napoli closed his purchase of a new home on October 31, 2007. As neither Napoli nor any of his relations occupied the property before a tenant moved in on November 17, 2007, Napoli's claim to

the HST New Housing Rebate was denied. When Napoli filed his appeal, he claimed in the alternative that if denied the HST New Housing Rebate, he should be allowed to claim the HST New Residential Rental Property Rebate. Nice try, but no cigar.

The deadline to apply for the HST New Residential Rental Property Rebate is two years after the end of the month in which HST was first payable.[43] As HST was paid on October 31, 2007, the last date to apply for the rebate was October 31, 2009. But Napoli only filed the HST New Residential Rental Property Rebate application in 2011 after his HST New Housing Rebate claim was denied, meaning the second application was out of time[44]. A classic case of falling through the cracks.

3) INTER-CORPORATE TRANSFERS

Construction Bergeroy inc. v. The Queen, 2007 TCC 198 (CanLII)

Bergeroy built several residential condominium buildings in 2003 and 2004, and received the HST New Residential Rental Property Rebate. Once the units were rented to tenants, the buildings were sold to a corporation controlled by the same shareholders as Bergeroy. To Bergeroy's chagrin, the HST New Residential Rental Property Rebates had to be repaid. Bergeroy initially was entitled to receive the rebates, but the units were not sold to an individual "for use as the primary place of residence of the purchaser or of a relation of the purchaser". That inter-corporate transfer resulted in a clawback of the HST New Residential Rental Property Rebate.

To properly advise a client about their entitlement to one of the HST rebates, their situation and their intended use of the property must be fully understood. Insist that clients be candid and honest. If necessary, reduce the information provided to writing. With so many factors to consider, it's little wonder why HST rebates can be a minefield for the unwary.

[43] Section 254(3) of the Act

[44] Failure to satisfy the two year limitation period also cost the purchaser the HST New Housing Rebate in *Doerksen v. The Queen*, 2009 TCC 350 (CanLII) and *Brar v. The Queen*, 2014 TCC 76 (CanLII).

ARTICLES WRITTEN BY ALAN G. SILVERSTEIN ABOUT THE HST FOR LAW SOCIETY PROGRAMS:

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The GST Rebate – For Buyers, and Investors?
3rd Annual Real Estate for Law Clerks; April 2004

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12th Annual Real Estate Summit; April 2015