CICA Commodity Tax Symposium 2010

HST and Real Estate

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Provincial sales taxes of Ontario and British Columbia did not apply to the sale or lease of real property, and generally did not apply to services related to real property. Introduction of the HST in Ontario and British Columbia more than doubled the rate of taxes applicable to supplies of real property and related services, affecting cash flow and income statements.

This paper explores the key aspects of most real estate transactions, starting with a discussion of what c real property.

WHAT IS REAL PROPERTY

"Real property" is defined in section 123[1] to include:

(a) in respect of property in the Province of Quebec, immovable property and every lease thereof[2],

(b) in respect of property in any other place in Canada, messuages, lands and tenements of every nature and description and every estate or interest in real property, whether legal or equitable, and

(c) a mobile home, a floating home and any leasehold or proprietary interest therein[3];

The definition is not exhaustive, in that it specifies only what real property includes. Therefore, what is real property under common law is real property for GST/HST purposes[4]. The question of whether something that was affixed to land or buildings had become part of the real property was a major issue under the previous provincial sales tax systems in Ontario and British Columbia.

A frequently cited seminal case dealing with when an article becomes part of real property is *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335 (Ont. Div. Ct.). In this case, the Ontario High Court of Justice set out the following five factors in determining whether an article had become part of real property:

1. Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land.
2. Articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to show that they were intended to continue as chattels.
3. The circumstances necessary to be shown to alter the *prima facie* character of the articles are circumstances which show the degree of annexation and object of such annexation.
4. The intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of annexation.
5. Even in the case of *tenants' fixtures* put in for the purposes of trade, they form part of the freehold with the right, however, to the tenant as between him and his landlord, to bring then back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

[1] References, unless otherwise noted, are to the *Excise Tax Act* [R.S.C. 1985 Chapter E-15 as amended].
[2] Because the focus of this paper is on the HST, the issue of what constitutes real property in Quebec will not be considered.
[3] For purposes of the place of supply rules in section 142 and Schedule IX and for export rules in Schedule VI, Part V a floating home and a mobile home that is not affixed to land are deemed to be tangible personal property and not real property. See subsection 142(5), section 2 of Part I of Schedule IX and section 24 of Part V of Schedule VI.
[4] Chief Justice Collier J. stated the following in the Federal Court –Trial Division decision of *Storrow v. the Queen* [1978 D.T.C. 6551 at 6553]:
Where a definition section uses the word "includes" as it does in subsec. 62(3) [of the Income Tax Act], then the expression said to be defined includes not only things declared to be included, but such other things as the word signifies according to its natural import.

Also noteworthy is the expansive nature of the definition, as least as far as property located in Canada is concerned[5]. The inclusion of any estate or interest in real property, along with the provisions of subsection 136(1),[6] means that the following are supplies of real property for GST/HST purposes:

- the granting of an option to purchase real property in Canada;
- a lease of real property in Canada; and
- an assignment of a lease or an agreement for the purchase and sale of real property located in Canada.

IMPORTANT DEFINITIONS

A number of definitions are important for purposes of these provisions, including those of "builder", "residential complex" and "substantial renovation"[7]. For the sake of brevity, these are not reproduced in full below, but relevant aspects are discussed.

Builder

The broad definition of a "builder" of a residential complex in the GST/HST legislation includes:

- a person who has an interest in the real property on which the complex is situated, and who carries on or engages another person to carry on the construction or substantial renovation of the complex (in the case of a residential condominium unit or an addition to a multiple unit residential complex the activity must involve construction),
- a person who acquires an interest in the residential complex while it is under construction or substantial renovation or in the case of an addition to a multiple unit residential complex, while the addition is under construction,
- a person who makes a supply of a mobile or floating home before it has been used or occupied by any individual as a place of residence,
- a person who acquires an interest in the complex before it has been occupied by an individual as a place of residence or lodging (and in the case of a condominium complex or residential condominium unit before the complex is registered as a condominium) for the primary purpose of resale, or for the primary purpose of supplying the complex by way of a lease, licence or similar arrangement to persons other than individuals who are acquiring the complex essentially for their own personal use[8], and
- a person who appropriates real property for use as a residential complex[9].

The Tax Court of Canada ruled that a manufacturer of mobile homes was a builder by virtue of its holding a construction lien on the land on which the modular home was placed as a result of the installation of footings and a foundation[10]. This constituted an interest in the real property under (a) above resulting in the manufacturer's being a builder for GST/HST purposes and thus entitling the purchaser to claim the new housing rebate.

The second bullet point above could apply to a lender who seizes an unoccupied residential complex from a builder who has defaulted on a financial instrument (e.g., a mortgage).

Perhaps surprisingly, a builder does not include someone who carries on or engages someone else to carry on the substantial renovation of a residential condominium unit[11]. However, a person that carries on, or engages someone else to

[5] For property outside Canada, the common-law definition would prevail. Therefore, an option to purchase real property or a lease of real property located outside Canada may be an intangible personal property for GST/HST purposes.
[6] This subsection deems a supply by way of lease, licence or similar arrangement of the right to use real property to be a supply of real property.
[7] The definitions of these terms can be found in subsection 123(1).
[8] The actual legislation refers to individuals who are acquiring the complex or parts thereof otherwise than in the course of a business or an adventure or concern in the nature of trade. Therefore, a person building a condominium unit for the purpose of resale would come within the definition of a builder.
[9] Subsection 190(1).
[10] *Superior Modular Homes v. the Queen* [1998] 2810 ETC.
[11] This conclusion flows from the fact that (a)(iii) refers to any other case [meaning other than an addition to a multiple unit residential complex (a)(i) and a residential condominium unit (a)(ii)].

carry on, the construction of the condominium complex in which the unit is located can become a builder of a residential condominium unit.

For example, suppose a person purchases a mixed-use building in which the lower floors consist of commercial office space and the top two floors are a residential penthouse. The owner converts two of the office floors below the penthouse into residential condominium units and adds seven floors on top of the penthouse that will also be sold as condominium units. The penthouse is renovated to prepare it for sale as a condominium unit. Would the sale of the penthouse unit be exempt?

The analysis first looks at whether the person is a builder of the penthouse unit, because this would affect which exemption provision in Schedule I should be considered. In this example, the person is a builder of the penthouse unit because the person constructs the condominium complex in which the penthouse unit is located.

A builder does not include an individual who carries on the construction or substantial renovation or engages someone else to do so otherwise than in the course of a business or an adventure or concern in the nature of trade[12]. However, a number of court decisions found individuals who built homes, moved in and resold them in a short period of time to be builders for GST/HST purposes on the grounds that they were either carrying on a business or an adventure or concern in the nature of trade[13].

A person is deemed to be a builder if that person begins to use real property as a residential complex and immediately before that time the property was not a residential complex, even if the person did not engage in the construction or substantial renovation of the complex. In this case, the person is deemed to have substantially renovated the complex and to be a builder of the complex. An exception applies if the person is an individual or a personal trust and acquires the property for exclusive use as a place of residence by him, a relation or former spouse or common-law partner (or, in the case of a personal trust, for the use as a place of residence of a beneficiary of the trust).

Residential complex

Real property that is a residential complex is given special GST/HST treatment. Unlike most other real property, as a general rule, a residential complex is taxed only once, when it is new. In addition, when a supply of real property includes a residential complex or land, a building or part of a building that forms or is reasonably expected to form part of a residential complex and other real property, the two pieces are deemed to be separate supplies for GST/HST purposes and neither is incidental to the other[14].

Therefore, the following definition of a residential complex is important for GST/HST purposes:

(a) that part of a building in which one or more residential units are located, together with

(i) that part of any common areas and other appurtenances to the building and the land immediately contiguous to the building that is reasonably necessary for the use and enjoyment of the building as a place of residence for individuals, and

(ii) that proportion of the land subjacent to the building that that part of the building is of the whole building,

(b) that part of a building that is

(i) the whole or part of a semi-detached house, rowhouse unit, residential condominium unit or other similar premises that is, or is intended to be, a separate parcel or other division of real property owned, or intended to be owned, apart from any other unit in the building, and

(ii) a residential unit,

[12] Part (f) of the definition of a builder in subsection 123(1).
[13] See for example *Brown (C.G) v Canada* [1995] G.S.T.C. 38 (TCC), *Lacina v. Canada* [1996] G.S.T.C. 11 (TCC), [1997] G.S.T.C. (FCA), *Strumecki (J.) v Canada* [1996] G.S.T.C. 23 (TCC).
[14] Subsection 136(2).

together with that proportion of any common areas and other appurtenances to the building and the land subjacent or immediately contiguous to the building that is attributable to the unit and that is reasonably necessary for its use and enjoyment as a place of residence for individuals,

(c) the whole of a building described in paragraph (a), or the whole of a premises described in subparagraph (b)(i), that is owned by or has been supplied by way of sale to an individual and that is used primarily as a place of residence of the individual, an individual related to the individual or a former spouse or common-law partner of the individual, together with

(i) in the case of a building described in paragraph (a), any appurtenances to the building, the land subjacent to the building and that part of the land immediately contiguous to the building, that are reasonably necessary for the use and enjoyment of the building, and

(ii) in the case of a premises described in subparagraph (b)(i), that part of any common areas and other appurtenances to the building and the land subjacent or immediately contiguous to the building that is attributable to the unit and that is reasonably necessary for the use and enjoyment of the unit,

(d) a mobile home, together with any appurtenances to the home and, where the home is affixed to land (other than a site in a residential trailer park) for the purpose of its use and enjoyment as a place of residence for individuals, the land subjacent or immediately contiguous to the home that is attributable to the home and is reasonably necessary for that purpose, and

(e) a floating home,

but does not include a building, or that part of a building, that is a hotel, a motel, an inn, a boarding house, a lodging house or other similar premises, or the land and appurtenances attributable to the building or part, where the building is not described in paragraph (c) and all or substantially all of the leases, licences or similar arrangements, under which residential units in the building or part are supplied, provide, or are expected to provide, for periods of continuous possession or use of less than sixty days[15]*;*

As this definition shows, a residential complex includes single family homes, duplexes, residential condominium units and mobile homes. It also includes the land that is under the residential complex and the land that surrounds the residential complex that is reasonably necessary for the use and enjoyment of the building as a place of residence. The Canada Revenue Agency (CRA) generally interprets this to include up to one-half hectare of land[16]. Any additional land generally is not considered to form part of the residential complex unless it is can shown that it is reasonably necessary for the use and enjoyment of the building as a place of residence.

The last part of the definition excludes any building or part of a building if 90% or more of the leases, licences or similar arrangements for the residential units in the building are supplied for periods of continuous possession or use of less than 60 days.

Substantial renovation

The definition of a substantial renovation is important, because it plays a part in determining whether a person is a builder for GST/HST purposes. A substantial renovation is defined to mean

the renovation or alteration of a building to such an extent that all or substantially all of the building that existed immediately before the renovation or alteration was begun, other than the foundation, external walls, interior supporting walls, floors, roof and staircases, has been removed or replaced where, after completion of the renovation or alteration, the building is, or forms part of, a residential complex.

[15] In the case of Yakabuski et al v. the Queen [2008 TCC 27], the Tax Court of Canada ruled that the purchase of a severely fire-damaged house was not the purchase of a residential complex on the basis that the home was not habitable. Similarly, in Leowski v. the Queen [1996 ETC 2869] the purchase of vacant land on which a house had been located but which had been demolished was ruled by the Tax Court of Canada not to be the purchase of a residential complex. Finally, in the case of Ko v. the Queen [2003 G.T.C. 532], the Tax Court held that the definition of a residential complex does not include partially completed buildings.

[16] Paragraph 8 of GST/HST Memoranda Chapter 19.2.1.

The various court cases that have considered the meaning of this phrase set a high threshold. Essentially, the entire interior of the complex must be replaced, apart from supporting walls, floors, roof or staircases. In the case of a condominium unit, the courts have held that any restrictions that the condominium corporation places on changes that can be made to the unit should be taken into account in determining whether a substantial renovation has occurred[17].

An addition to a building is not caught within the definition of a substantial renovation. However, if an addition is so large in relation to the existing structure that essentially a different residential complex is created, that complex will be treated as a new residential property[18].

TAXABLE SUPPLIES OF REAL PROPERTY

A "taxable supply[19]" is defined to be a supply that is made in the course of a commercial activity. A "commercial activity[19]" includes the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply. Therefore every supply of real property is a taxable supply unless it can be found in the listing of exempt supplies in Schedule V to the Excise Tax Act.

This means that vendors of real property may have GST/HST collection responsibilities even if they are not registered for the tax[20].

Example: the sale of vacant land in Canada by a corporation is taxable even if the corporation is not registered for the GST/HST.

Place of supply

A supply of real property, or of a service in relation to real property, is deemed to be made in Canada if the real property is situated in Canada[21]. A supply of real property is deemed to be made in a province if the property is situated in the province[22].

A supply of a service in relation to real property is deemed to be made in a province if

(a) in a participating province if the real property that is situated in Canada is situated primarily in participating provinces and

i. an equal or greater proportion of the real property is not situated in another participating province, or

ii. if subparagraph (i) does not apply, the tax rate for the participating province is the highest among the participating provinces for which no greater proportion of the real property is situated in another participating province; and

(b) in a non-participating province if the real property that is situated in Canada is not situated primarily in participating provinces[23].

As previously noted in footnote #3, for purposes of these place of supply rules, a floating home and a mobile home that is not affixed to land are deemed to be tangible personal property and not real property.

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[17] *Shotlander v. R.* [2005] G.S.T.C. 170 (TCC).
[18] The CRA's comments in GST/HST Technical Information Bulletin B-092 state that there are circumstances in which an addition to an existing residential complex together with renovation of that complex will result in eligibility for the new housing rebate. See, also *Erickson v. R.* [2001] G.S.T.C. 19 (TCC), where the individual built an addition to his home and tried to claim the GST new housing rebate on the premise that a new home had been created. The Tax Court ruled that the addition was not sufficient to result in the creation of a new home.
[19] Section 123.
[20] Subsection 221(2) states that every person [not just a registrant] who makes a taxable supply shall collect the tax payable by the recipient. The exceptions from these collection responsibilities found in subsection 221(2) are discussed later in this paper.
[21] Subsection 142(1).
[22] Section 1 of Part IV to Schedule IX.
[23] Section 14 of the *New Harmonized Value-added Tax System Regulations.* If the real property is situated primarily in HST provinces and no one HST province contains more of the real property than another and the tax rates for those provinces are the same, section 18 of the *New Harmonized Value-added Tax System Regulations* deems the supply to be in the province where the business address of the supplier that is most closely connected with the supply is located.

Timing of supply and liability for tax

Section 133 deems the entering into an agreement to provide a property to be the supply of the property at that time and any subsequent provision of the property pursuant to that agreement to be part of the supply and not a separate supply. This means that in the context of real estate transactions, the time that a purchase and sale agreement is entered into is the time when the supply is made.

However, GST/HST is generally payable on taxable sale of real property

(a) in the case of a supply of a residential condominium unit where possession of the unit is transferred, before the condominium complex in which the unit is situated is registered as a condominium, to the recipient on the earlier of the day ownership is transferred to the recipient and the day that is 60 days after such registration; and

(b) in any other case, on the earlier of the day ownership is transferred or possession is given to the recipient under the agreement for sale[24].

If any portion of the value of the consideration is not ascertainable at that time, the GST/HST in respect of that portion is not payable until that value becomes ascertainable[25]. Finally, GST/HST is not payable on any deposit on the supply of real property until the deposit is applied as consideration for the supply[26].

In the case of a supply of real property by way of a lease, licence or similar arrangement under a written agreement, GST/HST is payable on the earlier of the date that payment of the consideration is made and the date that payment is required under the agreement[27].

Collection and remittance of GST/HST

As previously indicated, a vendor of a taxable supply of real property is generally required to collect the GST/HST even if it is not registered for the tax.

However, a vendor is not required to collect GST/HST on a taxable supply of real property by way of sale in the following circumstances

(a) the supplier is a non-resident person or is resident in Canada by reason only of subsection 132(2);

(b) the recipient is registered under Subdivision d and, in the case of a recipient who is an individual, the property is neither a residential complex nor supplied as a cemetery plot or place of burial, entombment or deposit of human remains or ashes;

(c) the supplier and the recipient have made an election under section 2 of Part I of Schedule V in respect of the supply[28].

In this situation, the recipient is required to self-assess for the GST/HST either in its normal GST/HST return if it is registered and the property was acquired for use or supply primarily in commercial activities or in a special return in any other situation[29].

Rebates for residential housing

Federal GST rebate

The federal government has a rebate program for taxable sales of new residential housing purchased from a builder. The rebate is 36% of the federal GST for any home with a consideration of $ 350,000 or less. The rebate is phased out at the

[24] Subsection 168(5).
[25] Subsection 168(6).
[26] Subsection 168(9).
[27] Subsections 168(1) and (2) and subsection 152(2).
[28] Subsection 221(2).
[29] Subsection 228(4).

rate of 6.3 cents per dollar of consideration in excess of $ 350,000 and disappears entirely when the consideration reaches $ 450,000[30].

The federal GST rebate is subject to the following conditions:

(a) the sale is by a builder
(b) the purchaser is an individual[31]
(c) that individual is acquiring a single unit residential complex[32] or a residential condominium unit
(d) the complex or unit is being acquired for use as the primary place of residence of the individual or a relation of that individual[33]
(e) the total consideration is less than $ 450,000
(f) the individual has paid all of the tax
(g) ownership of the complex or unit is transferred to the purchaser after the construction or substantial renovation is substantially completed[34]
(h) after the construction or substantial renovation is complete and before possession is given to the individual, the complex or unit was not occupied by any individual as a place of residence or lodging (in the case of a residential condominium unit, an individual or a relation of an individual, who was at the time of that occupancy a purchaser of the unit under an agreement of purchase and sale can occupy the unit as a place of residence)
(i) either
    a. the first individual to occupy the complex or unit as a place of residence after substantial completion or renovation is
        i. in the case of a single unit residential complex, the purchaser or a relation, and
        ii. in the case of a residential condominium unit, an individual, or a relation of the individual, who was at the time a purchaser of the unit under an agreement of purchase and sale of the unit; or
    b. the purchaser makes an exempt supply by way of sale of the complex or unit and ownership is transferred to the recipient of the supply before it is occupied by any individual as a place of residence or lodging[35].

Separate rebate provisions are in place for the following situations: the sale of a building along with a lease of the land[36], the purchase of shares in a cooperative housing corporation entitling the purchaser to the use of a unit in the cooperative housing complex as a primary place of residence[37], owner-built homes[38] and landlords of new residential rental properties[39].

The federal government also provides for a rebate of the 5% GST to the owner or lessee of land that makes an exempt supply of land to a person that either re-supplies the land under an exempt sub-lease or uses the land for the purpose of making other exempt supplies[40]. The purpose of this rebate is to avoid double taxation when the person who re-supplies land or uses the land to make other exempt supplies is required to self-assess the GST as a result of using the land for residential purposes.

Ontario and British Columbia rebates for provincial portion of the HST

Ontario and British Columbia announced partial rebates of the provincial portion of the HST for certain supplies of residential housing. These rebates are intended to keep the sales tax content on new homes below a certain threshold

[30] Section 254.
[31] If a corporation signs the agreement of purchase and sale as a bare trustee, nominee or agent of an individual the rebate may still be available.
[32] For the purposes of the federal rebate, a "single unit residential complex" is defined in section 254 to include a multiple unit residential complex that does not contain more than two residential units (i.e., a duplex) and any other multiple unit residential complex that is owned by an individual and that is used primarily as a place of residence of the individual, an individual related to him or a former spouse or common-law partner (e.g., bed and breakfast establishments).
[33] A "relation" is defined in section 254 to mean another individual that is related to the particular individual or who is a former spouse or common-law partner of the particular individual. If two or more individuals purchase the home, all must acquire it for use as a primary place of residence. If this is not the case, the rebate will not be payable (see *Davidson v the Queen [2002] G.S.T.C. 25*).
[34] As pointed out by David Sherman in his commentary on section 254, if ownership is transferred while construction is underway, the purchaser may be able to claim a rebate under section 256 for an owner-built home.
[35] The federal rebate would still be payable to the purchaser if he sold the completed home before moving in. The 1990 Technical Notes to this section indicate that this might occur if the purchaser were relocated before he had a chance to move in.
[36] Section 254.1.
[37] Section 255.
[38] Section 256.
[39] Section 256.2
[40] Section 256.1

amount approximately the same as was in place under their previous sales tax systems. The estimated sales tax content under those previous tax regimes (RST in Ontario and PST in British Columbia) was 2% of the selling price. Therefore, the housing rebate programs reduce the provincial rate of their HST to this percentage for the consideration below a certain threshold: $ 400,000 in Ontario and $ 525,000 in British Columbia[41].

The rebates in Ontario and British Columbia have the same requirements as the federal GST rebate and are available only if the purchaser is entitled to that federal rebate (or would be but for the fact that the consideration is $ 450,000 or more). Accordingly, the provincial rebates are restricted to situations in which the housing unit is acquired for use as the primary place of residence of the individual or of a relation of the individual. Unlike the federal rebate, the Ontario and British Columbia rebates are not phased out as consideration increases, so even expensive homes benefit from the lower provincial rate on the portion of the consideration below the threshold amounts.

The provincial rebate for a single unit residential complex (which for the purposes of the rebate includes a duplex[42]) or a residential condominium unit can be transferred to the builder in the same manner and under the same conditions as the federal GST rebate. This is expected to occur in most situations.

Separate rebate calculations apply to landlord rebates for new residential rental property[43] and to purchases of:

- a housing unit on leased land;[44]
- co-operative housing;[45] and
- owner-built homes.[46]

If a public service body, such as a charity, is eligible to claim a provincial public service body rebate on the purchase of a residential rental property, it will have to decide whether to claim that rebate or the provincial new residential rental property rebate[47]. In the case of Ontario, this decision will relatively easy, because the public service body rebates are higher than the new residential rental property rebates. In British Columbia, however, some of the prescribed rates for provincial public service body rebates are less than the 71.43% new residential rental rebate.

Finally, both Ontario and British Columbia will provide a rebate for part of the provincial portion of the HST to the owner or lessee of land that is leased for residential purposes. In Ontario, the rebate is 75% of the provincial portion of the HST paid on the land up (maximum $ 7,920 rebate) and in British Columbia the rebate is 71.43% of the provincial portion of the HST (maximum $ 8,663[48] rebate). The purpose, like that of the new residential rental property rebate provided to landlords of rental housing, is to reduce the provincial portion of the HST on land leased for residential purposes (e.g., pads in residential trailer parks) to a level comparable to that of new residential rental housing.

Nova Scotia rebate for the provincial portion of the HST

Nova Scotia has a rebate program for its provincial portion of the HST. To be eligible, purchasers must satisfy the same requirements as the federal GST rebate and neither the individual nor his or her spouse or common-law partner can have

[41] Section 41 of the *New Harmonized Value-added Tax System Regulations, No. 2 [P.C. 2010-790, June 17, 2010]*.
[42] A duplex includes a multiple unit residential complex that does not contain more than two residential units but does not include a complex that consists of two residential condominium units. Subsection 123(1) defines a residential condominium unit for GST/HST purposes.
[43] Section 47 of the *New Harmonized Value-added Tax System Regulations, No. 2.* In the case of landlord rebates, if the residential complex is a multiple unit residential complex, the total provincial tax paid for the complex must be allocated to each unit based on square footage for purposes of determining whether the amount of the rebate.
[44] Section 42 of the *New Harmonized Value-added Tax System Regulations, No. 2.* The rebate in Ontario would be 5.31% of the price of the price paid for the building portion of the complex up to a maximum rebate of $ 24,000 and the rebate in British Columbia would be 4.47% of the price paid for the building portion of the complex up to a maximum rebated of $ 26,250.
[45] Section 44 of the *New Harmonized Value-added Tax System Regulations, No. 2.* The rebate in Ontario would be 5.31% of the price paid for the qualifying share of the cooperative housing corporation up to a maximum rebate of $ 24,000 and the rebate in British Columbia would be 4.47% of the price paid for the share up to a maximum rebate of $ 26,250.
[46] Section 46 of the *New Harmonized Value-added Tax System Regulations, No. 2.* In the case of an owner-built home, the rebate will depend upon whether the individual paid the provincial portion of the HST on the purchase of the land. If this is the case, then the rebate amounts would be the same as for homes purchased from a builder. However, if the individual did not pay the provincial portion of the HST on the purchase of the land, the rebate in Ontario would be limited to 75% of the provincial portion of the tax paid up to a maximum of $ 16,080 and the rebate in British Columbia would be limited to 71.43% of the provincial portion of the tax paid up to a maximum of $ 17,588. These maximums reflect an assumption that 1/3 of the value of a residential complex is attributable to the land.
[47] Paragraph 47(12)(d) of the *New Harmonized Value-added Tax System Regulations, No. 2* will deny the new residential rental property rebate for any tax included in the public sector body rebate. Similarly, the definition of "provincial qualifying amount" for purposes of the public sector rebate is defined in section 5 of the *Regulations Amending Various GST/HST Regulations* to exclude any provincial portion of the HST that the person has obtained or is entitled to obtain a rebate, refund or remission of under any other provision of the Act other than section 259.
[48] Subsection 47(9) and (10) of the *New Harmonized Value-added Tax System Regulations, No. 2.*

owned and occupied a residential unit in a residential complex anywhere in Canada in the previous five years[49]. An exception to this five-year rule is available if that residential unit was destroyed, other than voluntarily by the individual or the spouse or common-law partner.

If the individual is acquiring the residential unit for use as the primary place of residence of a relation and not for the use as the primary place of residence of the individual or their spouse or common-law partner, that relation cannot have owned and occupied a residential unit anywhere in Canada in the previous five years.

The rebate amount is equal to the lesser of $ 1,500 and 18.75% of the provincial portion of the HST.

Administration of the Nova Scotia new housing rebate shifts from the CRA to Service Nova Scotia and Municipal Relations if the agreement of purchase and sale for the housing was entered into after April 6, 2010 and ownership and possession of the housing are transferred after June 2010.

TRANSITIONAL RULES FOR ONTARIO AND BRITISH COLUMBIA HST

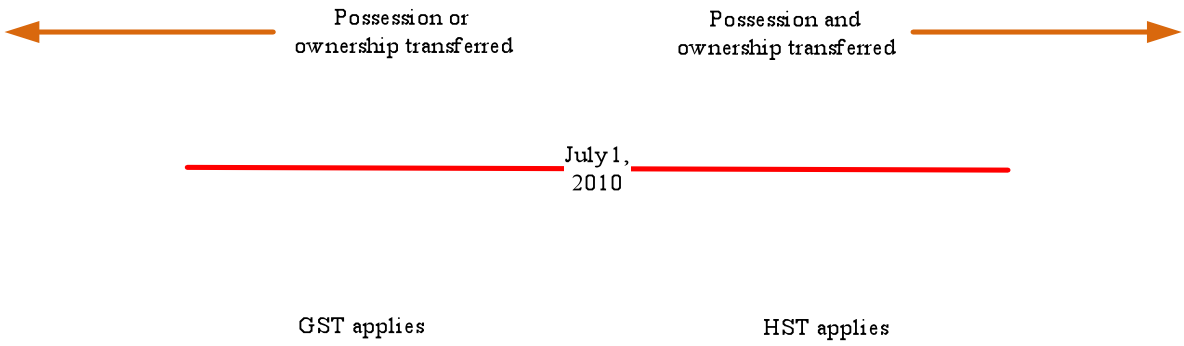
Taxable supplies of non-residential property by way of sale

Under the transitional rules for the taxable supply of real property by way of sale (other than residential housing) the HST in Ontario and British Columbia would generally apply to:

(a) any supply of real property made on or after July 1, 2010[50]; and

(b) any supply made before July 1, 2010 if both ownership and possession of the property were transferred to the recipient on or after July 1, 2010[51].

These general rules are summarized in the following diagram below:



Taxable supplies of residential housing by way of sale

The transitional rules for residential housing are considerably more complex than for other supplies of real property. The tables attached to this presentation summarize the rules for Ontario and British Columbia.

If ownership or possession of the new residential housing was transferred to the purchaser before July 1, 2010 only the 5% GST applied. Grandfathering provisions were available for sales of single unit residential complexes (other than a floating or mobile home), residential condominium units and condominium complexes under certain conditions described in more detail below if the sale of such units took place pursuant to an agreement in writing that was entered into before June 19, 2009 in the case of Ontario and November 19, 2009 in the case of British Columbia[52]. Grandfathering was not applicable to the sale of apartment buildings, duplexes or mobile or floating homes or the sale of houses together with the lease of land.

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[49] Subsection 254(2.1).
[50] Paragraph 49(1)(a) of the *New Harmonized Value-added Tax System Regulations, No. 2.* As previously mentioned, a supply of real property by way of sale is made when the agreement of purchase and sale is concluded.
[51] Paragraph 49(1)(b) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[52] Subsections 51, 52 and 53 of the *New Harmonized Value-added Tax System Regulations, No. 2.*

Grandfathering provisions for single unit residential complexes

Grandfathering of these units was only available if the sale was to an individual[53].

Grandfathering was available on the written purchase and sale agreement between the original vendor and the purchaser and to subsequent assignments of that agreement to an individual under the following conditions:

1. the written purchase and sale agreement was entered into before June 19, 2009 in the case of Ontario and November 19, 2009 in the case of British Columbia;
2. neither ownership nor possession of the unit was transferred to any individual under the agreement before July 1, 2010;
3. possession of the unit was transferred to the individual under the agreement on or after July 1, 2010; and
4. in the case of each assignment the following conditions were met:
   a) no novation of the agreement occurred;
   b) the original vendor and the individual who assigns the agreement deal at arm's length[54] and are not associated with each other; and
   c) neither the original vendor nor any non-arm's length or associated person acquires an interest in the complex[55].

Requirements 4(b) and (c) above are intended to prevent a builder from asserting that written purchase and sale agreements were entered into before June 19, 2009 in the case of Ontario and before November 19, 2009 in the case of British Columbia to crystallize grandfathering status when an arm's length purchaser had not come forth with a genuine intent to purchase the property before those dates.

Relief from the provincial portion of the HST is also applicable on re-sales of grandfathered units purchased from the original vendor, effectively extending grandfathering to subsequent purchasers, under the following conditions:

1. the reseller does not pay HST on its purchase;
2. the reseller acquires the unit primarily for resale;
3. possession of the unit is transferred to the first reseller after the construction or substantial renovation of the unit is substantially completed;
4. the original vendor and the reseller deal with each other at arm's length and are not associated with each other;
5. neither the original vendor nor any non-arm's length or associated person acquires an interest in the complex;
6. the reseller acquires an interest in the unit before anyone lived in it (or in the case of a residential condominium unit, either before the complex is registered as a condominium or before anyone lived in it); and
7. any construction or renovation that is completed by the reseller is less than 10% of the total amount done at the time of resale by the reseller[56].

Requirement 7 above is intended to ensure that a sufficient portion of the construction or substantial renovation of the grandfathered unit occurred in the pre-HST period to avoid a windfall to the reseller (i.e., if the reseller is able to claim ITCs for the provincial portion the HST on construction inputs and is still able to resell the housing without charging HST).

Subsequent re-sales of grandfathered units also qualify for relief from provincial portion of the HST if all the above conditions are met[57]. Both the original (first) re-seller and any subsequent re-sellers are required to provide in writing to the purchaser the name of the original vendor and that they acquired the unit without paying HST[58].

The original vendor of a grandfathered single unit residential complex is required to pay a transitional tax based on the percentage of completion[59] of the unit immediately after June 30, 2010 (or as of July 1, 2010). This transitional tax was

[53] Subsection 51 of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[54] For the purposes of the grandfathering rules, an individual is deemed not to deal at arm's length with an aunt, uncle, nephew or niece by virtue of subsection 48(2) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[55] Subsections 51(1) and (2) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[56] Subsection 51(3) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[57] Subsection 51(6) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[58] Subsections 51(4) and (7) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[59] The CRA has published some guidelines on how to determine the percentage of completion for purposes of the transitional tax and the transitional PST rebate in GST/HST Info Sheet GI-105 July 2010. The publication states that the determination of the percentage of completion does not take into consideration the cost of the land and for a condominium project where the housing is located in more than one building, the percentage of completion

intended to approximate the amount of provincial sales taxes that would have been paid had the construction or substantial renovation of the unit been completed before July 1, 2010 and was calculated as follows:

Percentage of completion immediately after June 30, 2010	Transitional tax (percentage of the greater of selling price or fair market value)
Less than 10%	2.0%
10% or more and less than 25%	1.5%
25% or more and less than 50%	1.0%
50% or more and less than 75%	0.5%
75% or more and less than 90%	0.2%
90% or more	Nil

Generally, this is 2% of the consideration. Fair market value is used is only if the consideration is less than the fair market value of the complex at the time the purchase and sale agreement is entered into had the construction or substantial renovation of the complex been substantially complete at that time.

If an individual resells a single unit residential complex (other than a floating or mobile home) on which HST is payable and that individual acquired the unit from the builder without paying HST, for the purpose of determining an input tax credit he or she is deemed to have paid tax equal to 2% of the consideration paid on the purchase[60]. If the individual is not a registrant, an application for a rebate of the deemed tax could be made[61].

Finally, if a particular individual purchases a single unit residential complex from another individual on which HST is payable only because the original vendor or any non-arm's length or associated person acquired an interest in the unit, the other individual who is a reseller is not required to collect the provincial portion of the HST. Instead, the particular individual is required to self-assess that tax[62].

Grandfathering provisions for residential condominium units

Unlike the case with single unit residential complexes, the grandfathering provisions for residential condominium units (RCU) are not limited to sales to individuals. Grandfathering is available on the written purchase and sale agreement between the original vendor and the purchaser and subsequent assignments of that agreement if:

1. the written purchase and sale agreement for the RCU was entered into before June 19, 2009 (for Ontario) and November 19, 2009 (for British Columbia);
2. neither ownership nor possession of the RCU was transferred to any person under the agreement before July 1, 2010;
3. possession of the RCU is transferred to the purchaser on or after July 1, 2010;
4. in the case of each assignment:
   a) no novation of the agreement occurred;
   b) the original vendor and the person who assigns the agreement deal at arm's length and are not associated with each other; and
   c) neither the original vendor nor any non-arm's length or associated person acquires an interest in the complex[63].

Relief from the provincial portion of the HST is also applicable on re-sales of grandfathered residential condominium units purchased from the original vendor if:

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should generally be determined on a building by building basis. The six methods outlined in that publication are (1) capital and operating costs, (2) interior floor space, (3) total floor space, (4) fair market value, (5) progress billings and (6) certified report prepared by an engineer, architect or other professional.

[60] Subsection 51(5) of the *New Harmonized Value-added Tax System Regulations, No. 2.*

[61] Section 54 of the *New Harmonized Value-added Tax System Regulations, No. 2.*

[62] Subsection 51(9) of the *New Harmonized Value-added Tax System Regulations, No. 2.*

[63] Subsections 52(1) and (2) of the *New Harmonized Value-added Tax System Regulations, No. 2.*

1. the reseller does not pay HST on its purchase; HST is not payable;
2. the reseller acquires the unit primarily for the purpose of resale;
3. possession of the unit is transferred to the first reseller after the construction or substantial renovation of the unit is substantially completed;
4. the original vendor and the reseller deal with each other at arm's length and are not associated with each other;
5. neither the original vendor nor any non-arm's length or associated person acquires an interest in the complex;
6. the reseller acquires an interest in the unit before the complex in which the unit is situated is registered as a condominium or before anyone lived in it; and
7. any construction or renovation that is completed by the reseller is less than 10% of the total amount done at the time of resale by the reseller [64].

Subsequent re-sales of grandfathered units also qualify for relief from the provincial portion of the HST if all seven conditions are met[65]. Both the original (first) re-seller and any subsequent re-sellers are required to provide in writing to the purchaser the name of the original vendor and that they acquired the unit without paying HST[66].

The original vendor of a sale of a grandfathered residential condominium unit is required to pay a transitional tax of 2% of the greater of the selling price and fair market value of the unit at the time the agreement of purchase and sale was entered into. [67] This tax is deemed to have collected at the earlier of the time ownership of the unit and possession of the unit is transferred to the person under the agreement.

If the first reseller resells a residential condominium unit on which HST is payable and that person acquired the unit from the original builder without paying HST, for the purpose of determining an input tax credit the first reseller is deemed to have paid tax equal to 2% of the consideration paid on the purchase[68]. If the first reseller is not a registrant, an application for a rebate of the deemed tax can be made[61].

Finally, if a particular person purchases a residential condominium unit from another person on which HST is payable only because the original vendor or any non-arm's length or associated person acquired an interest in the unit, the other person is not required to collect the provincial portion of the HST. Instead, the particular person is required to self-assess that tax.

Grandfathering provisions for condominium complexes

The grandfathering provisions for condominium complexes are not limited to sales to individuals.

Grandfathering is available on the written purchase and sale agreement between the original vendor and the purchaser and subsequent assignments of that agreement under the following conditions:

1. the written purchase and sale agreement for the condominium complex was entered into before June 19, 2009 in the case of Ontario and November 19, 2009 in the case of British Columbia;
2. neither ownership nor possession of the complex was transferred to any person under the agreement before July 1, 2010;
3. at any other time on or after July 1, 2010 ownership of the complex is transferred to the purchaser or the complex is registered as a condominium;
4. in the case of each assignment the following conditions were met
   a. no novation of the agreement occurred;
   b. the original vendor and the person who assigns the agreement deal at arm's length and are not associated with each other; and
   c. neither the original vendor nor any non-arm's length or associated person acquires an interest in the complex[69].

Relief from the provincial portion of the HST is also applicable on re-sales of the grandfathered condominium complex, and a sale of a residential condominium unit located in such a complex, under the following conditions:

[64] Subsection 52(3) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[65] Subsection 52(6) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[66] Subsections 52(4) and (7) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[67] Paragraphs 52(1)(e) and (f) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[68] Subsection 52(5) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[69] Subsections 53(1) and (2) of the *New Harmonized Value-added Tax System Regulations, No. 2.*

1. the reseller does not pay HST on the purchase of the complex;
2. the reseller acquires the complex primarily for the purpose of making a taxable sale of the complex or a unit located in the complex;
3. possession of the complex is transferred to the first reseller after the construction or substantial renovation of the unit is substantially completed;
4. the original vendor of the complex and the reseller deal with each other at arm's length and are not associated with each other;
5. neither the original vendor nor any non-arm's length or associated person acquires an interest in the complex;
6. the reseller acquires an interest in the complex or unit before the complex is registered as a condominium or before it was occupied by an individual as a place of residence or lodging, for the primary purpose of re-sale; and
7. any construction or renovation of the complex or unit, depending on what is sold, that is completed by the reseller is less than 10% of the total amount done at the time of resale by the reseller [70].

Subsequent re-sales of a grandfathered complex, or of a residential condominium unit in such a complex, also qualify for relief from the provincial portion of the HST if all the conditions above are met[71]. Both the original (first) re-seller and any subsequent re-sellers are required to provide in writing to the purchaser the name of the original vendor and that they acquired the unit without paying HST[72].

The original vendor of a sale of a grandfathered condominium complex is required to pay a transitional tax of 2% of the greater of the selling price and fair market value of the complex at the time the agreement of purchase and sale was entered into.[73]

If the first reseller resells a condominium complex, or a residential condominium unit located in such a complex, on which HST is payable and that first reseller acquired the unit from the builder without paying HST, for the purpose of determining an input tax credit the first reseller is deemed to have paid tax equal to 2% of the consideration paid on the purchase of the complex[74]. In the case of a resale of a residential condominium unit, the tax deemed paid is equal to 2% of the consideration paid on the purchase of the complex multiplied by the percentage of the total floor space of the unit. If the first reseller is not a registrant, an application for a rebate of the deemed tax could be made[61].

Finally, if a particular person purchases a condominium complex or unit from another person on which HST is payable only because the original vendor or any non-arm's length or associated person acquired an interest in the complex or unit, the other person is not required to collect the provincial portion of the HST. Instead, the particular person is required to self-assess that tax and, for the purposes of determining an input tax credit, if the other person is the first reseller, that person is deemed to have paid tax equal to 2% of the consideration for the supply made by the original vendor[74]. In the case of a residential condominium unit, the tax deemed paid is equal to 2% of the consideration paid on the purchase of the complex multiplied by the percentage of the total floor space of the unit.

Effect of upgrades on grandfathering

The CRA has stated that upgrades to a house will generally result in modifications to the existing agreement such that they form part of that written agreement[75]. In these situations, if the written agreement is grandfathered then the upgrades would also be grandfathered.

However, if the upgrades are sufficiently significant in relation to the original purchase that they materially alter the original agreement to such an extent that it results in a new agreement, grandfathering may be lost[76].

The CRA has indicated that if a purchase and sale agreement is renegotiated to have the house built on a different lot, the parties are considered to have entered into a new agreement. If the new agreement is entered into after June 18, 2009 in the case of Ontario and November 18, 2009 in the case of British Columbia, grandfathering will be lost[77].

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[70] Subsection 53(3) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[71] Subsection 53(6) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[72] Subsections 53(4) and (7) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[73] Paragraphs 53(1)(e) and (f) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[74] Subsection 53(5) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[75] See example 14 in GST/HST Notice No. 244 December 2009.
[76] See comments in GST/PST Policy Statement P-249, Agreements and Novation. In this policy statement, the CRA states that in circumstances where no new party is introduced, the obligation to be performed by either party to the novation contract must be significantly different to require altering the original agreement. For instance, varying the form, terms and conditions of an agreement to such an extent that a fresh undertaking is being concluded and agreed upon between the same parties would usually result in a novation.

Transitional RST/PST new housing rebates

Single unit residential complexes

A transitional RST/PST rebate is available if a builder makes a taxable sale of a single unit residential complex (other than a floating or mobile home) located in British Columbia or Ontario to an individual, or is deemed to have made a taxable sale of such a complex as a consequence of giving possession or use to a person under a lease, licence or similar arrangement or occupying it as a place of residence, on which HST is payable and possession or use is given on or after July 1, 2010 and before July 1, 2014 and at least 10% of the construction or substantial renovation of the complex was completed before July 1, 2010[78]. The rebate amount is based on either:

a) 2% of the consideration paid multiplied by the percentages below based on the degree of completion of the construction or substantial renovation immediately after June 30, 2010 as indicated in the table below; or

b) $ 45 per square metre for Ontario and $ 60 per square metre for British Columbia of the interior floor space of the complex[79].

Percentage of completion immediately after June 30, 2010	**RST rebate** (percentage of estimated RST content)
Less than 10%	0%
10% or more and less than 25%	25%
25% or more and less than 50%	50%
50% or more and less than 75%	75%
75% or more and less than 90%	90%
90% or more	100%

In the case of an actual sale of the single unit residential complex to an individual[80], that individual is the person to whom the rebate is payable although he or she can transfer that rebate to the builder[81]. In the case of a deemed sale by the builder, the rebate is payable to the builder[82]. If an individual assigns the rebate application to the builder, or the builder is entitled to claim the rebate, the builder is required to attach a valid provincial certificate (letter of good standing) to the rebate application when the builder first submits such an application to the CRA[83]. This letter of good standing issued by the province will be sufficient for subsequent rebate applications submitted by the builder provided that the letter of good standing remains valid.

An application for the transitional RST/PST rebate must be filed before July 1, 2014[84].

No rebate is payable to a builder unless the Minister is satisfied that the builder is in good standing with respect to the payment of all taxes and fees relating to the construction activities of the builder that are imposed under the provincial laws of Ontario or British Columbia as the case may be[85].

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[77] See example 14.1 in GST/HST Notice No. 244 December 2009.
[78] The purpose of this transitional PST rebate is to refund the approximate amount of PST included in the consideration to prevent double taxation since HST applies on the sale or deemed sale. The rebate is available to duplexes because of the extended definition of a "specified single unit residential complex" in section 55 of the *New Harmonized Value-added Tax System Regulations, No. 2* which refers to the definition of a single unit residential complex in subsection 254(1) of the Act.
[79] Section 55(1) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[80] Paragraph 56(2)(b) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[81] Subsection 56(3) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[82] Paragraph 56(2)(a) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[83] See questions 22 and 24 in GST/HST Notice 244 December 2009.
[84] Subsection 58(1) of the *New Harmonized Value-added Tax System Regulations, No. 2.* The CRA has stated that where a builder is unable to file the rebate application by July 1, 2014 due to extenuating circumstances (such as a delay in completing the sale of the housing), the builder would be able to file a request for an extension of the time to file the rebate application. Such a request would have to be filed in writing before July 1, 2014. See question 33 in GST/HST Notice 244 December 2009.
[85] Subsection 58(2) of the *New Harmonized Value-added Tax System Regulations, No. 2.*

Multiple unit residential complexes and residential condominium units

In the case of a multiple unit residential complex (such as an apartment building), or a residential condominium unit, a transitional RST/PST rebate is available to the builder provided that the builder did not transfer ownership or possession of the complex or unit before July 1, 2010 to any person who is not a builder of the complex or unit and at least 10% of the construction or substantial renovation of the complex or unit was completed before July 1, 2010[86]. The rebate is available on both a sale and a deemed sale of the complex or unit provided that the provincial portion of the HST is payable on that sale.

In the case of a sale of a residential condominium unit, the transitional RST/PST rebate is also payable if the builder was subject to the 2% transitional tax (i.e., the sale of the condominium complex or a residential condominium unit by the builder was grandfathered)[87].

The 10% threshold test for a residential condominium unit depends on whether the condominium complex in which the unit is located is being constructed or substantially renovated[88]. If the condominium complex is being constructed or substantially renovated, the 10% threshold test looked to the entire complex[89]. If this was not the case, (i.e., a residential condominium unit is being substantially renovated without substantially renovating the condominium complex in which the unit is situated) then the 10% threshold test looked to the degree of substantial renovation of the residential condominium unit[90].

The rebate amount is calculated by either a similar floor space method as indicated above for single unit residential complexes or as 2% of the consideration (in the case of an actual sale) or 2% of the fair market value (in the case of a deemed sale) multiplied by the same percentages in the table above for single unit residential complexes, based on the degree of completion of the construction or substantial renovation immediately after June 30, 2010.

In the case of a residential condominium unit, the degree of completion depends on whether the condominium complex in which the unit is located is being constructed or substantially renovated. If the condominium complex is being constructed or substantially renovated, the degree of completion looks to the entire complex[91]. If this is not the case, (i.e., a residential condominium unit is being substantially renovated without substantially renovating the condominium complex in which the unit is situated) then the degree of completion is based on the degree of substantial renovation of the residential condominium unit[92].

An application for the transitional RST/PST rebate must be filed before July 1, 2014[84] and must be based on the square footage approach if the application is filed before tax becomes payable in respect of a supply of the residential complex[93].

No rebate is payable to a builder unless the Minister is satisfied that the builder is in good standing with respect to the payment of all taxes and fees relating to the construction activities of the builder that are imposed under the provincial laws of Ontario or British Columbia as the case may be[85].

Disclosure requirements for pre-July 1, 2010 purchase and sale agreements of residential complexes

If a builder makes a taxable sale of a residential complex under a written purchase and sale agreement entered into after June 18, 2009 in the case of Ontario and November 18, 2009 in the case of British Columbia and before July 1, 2010, and HST is payable in respect of that supply, if the agreement does not indicate clearly in writing the total tax payable and whether that amount takes into account the federal or provincial new housing rebates or the total of the rates at which tax is payable (i.e., 5% for the GST or federal component of the HST and 8% in Ontario or 7% in British Columbia for the provincial component of the HST), the consideration for the supply is deemed to include the provincial component of the

[86] Section 57 of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[87] This conclusion flows from the definition of "estimated provincial levy," specifically parts (ii) and (iii) of the definition of A, in paragraph 55(1)(b) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[88] In Cragg & Cragg Design Group [1994] G.S.T.C. 53, the taxpayer successfully argued that the percentage of completion of the condominium complex looked to the entire complex, which was composed of several buildings and not just the one that the particular unit was located in for purposes of the federal sales tax inventory rebate. The wording of the rebate provisions here are slightly different and therefore the same conclusion may not be valid.
[89] Paragraph 57(1)(e) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[90] Paragraph 57(1)(d) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[91] Paragraph 57(4)(c) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[92] Paragraph 57(4)(b) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[93] Subsection 58(3) of the *New Harmonized Value-added Tax System Regulations, No. 2.*

HST[94]. In the case of Nova Scotia, a similar disclosure requirement applies for a taxable sale of a residential complex under a written agreement entered into after April 6, 2010 and before July 1, 2010[95].

If the purchaser is entitled to claim the federal (GST new housing) rebate and the builder paid or credited that rebate to the purchaser, the builder is deemed to have credited the provincial new housing rebate to the purchaser on the earlier of the day ownership and possession of the complex is transferred to the purchaser.

Disclosure requirements, and the consequences for failure to comply, also apply to any resellers of single unit residential complexes, residential condominium units or condominium complexes when HST is not payable on the resale or no HST would have been payable except for the fact that the purchaser is the original vendor or a specified related party[96]. In the case of resellers, the HST regulations do not limit the application of these disclosure requirements to pre-July 1, 2010 agreements of purchase and sale.

Rebates for provincial sales tax paid on construction materials

The provinces of Ontario[97] and British Columbia[98] will provide a rebate of the PST paid on construction materials purchased by a contractor and that is held in inventory at the end of the day on June 30, 2010 that is used is a residential real property contracts that are subject to the HST. According to a Tax Tip prepared by the Ontario Ministry of Revenue, the rebate will be provided on any construction materials that are used in a repair or improvement of residential premises on or after July 1, 2010 and before January 1, 2011[99]. British Columbia has provided some guidance on this rebate in its bulletin on the general PST transitional rules[100].

Contracts for rental housing, condominium and apartment buildings and long-term residential care facilities may qualify for this rebate. However, this rebate will not be available when the materials are used in the construction of substantial renovation of a building if new housing rebate or an RST transitional new housing rebate is applicable (these rebates are in respect of sales or leases of new housing whereas the rebate for PST paid on construction materials are in respect of repairs or improvements to used housing).

Contractors in Ontario will have to file a General Application for Refund of Retail Sales Tax form along with supporting documentation with the Ontario Ministry of Revenue on or before December 31, 2010. Contractors in British Columbia will have to file an Application for Refund of Social Service Tax or Hotel Room Tax (FIN 413) along with supporting documentation on or before February 28, 2011.

Taxable supplies of real property by way of lease, licence or similar arrangement

Lessors are generally required to collect the HST on a taxable supply of real property by way of lease, licence or similar arrangement in the provinces of Ontario and British Columbia for the portion of the lease interval that occurs on or after July 1, 2010 if the consideration for that period became due, or was paid without having become due, on or after May 1, 2010[101]. The provincial portion of the HST that was charged before July 2010 is to be reported on the HST return for the period covering July 1, 2010 and not the reporting period in which that portion of the tax was billed. A numerical example (based on one in a CRA publication[102]) illustrates.

The operator of a campground in Ontario leases a site to an individual for a period of six months from May 1, 2010 to October 31, 2010. The lease payment is $ 1,000 and is due on May 1, 2010. The individual pays consideration of $ 500 on April 1, 2010 and the remaining $ 500 on May 1, 2010. Only the 5% GST applies to the payment made on April 1, 2010, because it was paid before May 2010. For the payment made on May 1, 2010, the operator was required to collect GST of 5% on the portion of the payment that relates to the period before July 2010 (i.e., two months) and HST of 13% on the portion of the portion that relates to the period after June 2010 (i.e., four months). In its return for the reporting period that

[94] Section 50 of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[95] Section 13 of the *Nova Scotia Regulations, 2010.*
[96] Subsections 51(8), 52(8) and 53(10) of the *New Harmonized Value-added Tax System Regulations, No. 2.*
[97] Subsection 52(2) of the *Retail Sales Tax Act, R.S.O. 1990, c.R.31.* This subsection provides the legislative support for a regulation to be drafted prescribing the conditions that must be satisfied for the rebate to be paid. At the date of the preparation of this paper, the actual regulation does not appear to have yet been drafted.
[98] See British Columbia Ministry of Finance Information Notice # 8 July 2010.
[99] Tax Tip # 16 – Retail Sales Tax Transitional Inventory Rebate July 2010.
[100] See comments on page 17 of HST Notice # 8 Revised July 2010.
[101] Paragraphs 49(1)(c) and (d) and 49(2) of the *New Harmonized Value-added Tax System Regulations, No. 2* and subsections 42(3) of the *New Harmonized Value-added Tax System Regulations [P.C. 2010-117, May 31, 2010].*
[102] Example 16 in GST/HST Info Sheet GI-092 [July 2010].

includes April 1, 2010, the operator would remit $ 25 (the federal 5% rate on the $ 500 collected). For the payment made on May 1, 2010, the GST of $8.33 (5% x $500 x 2/6) and the federal portion of the HST of $16.67 (5% x $500 x 4/6) collected in respect of the payment must be included in the return for the reporting period that includes May 1, 2010. The provincial portion of the HST collected of $ 26.67 (8% x $ 500 x 4/6) in respect of the May 1, 2010 payment would be included in the return for the reporting period that includes July 1, 2010.

As an exception to the general pro-rata rule, HST does not apply if the lease interval began before July 1, 2010 and ended before July 31, 2010, even if payment occurs after July 1, 2010[103].

The term "lease interval" is a period during which the lessee has a right under a lease, licence or similar arrangement to possess or use property, including real property, and to which a payment under the lease is attributable[104]. In most cases, this will be readily ascertainable. For example, if a tenant in a mall is required to make monthly payments in respect of a lease of its premises, each month will constitute a lease interval.

In some cases, it may be more difficult to determine the portion of the lease interval that occurs after July 1, 2010. The CRA illustrates this difficulty when it discusses its views on the sale of multi-pack green fees that are sold for the 2010 golf season for a golf course in Ontario or British Columbia, and an individual pays the amount on May 1, 2010[105]. The green fees are for the use of real property (i.e., the golf course). However, the multi-pack green fees can be used at any time in the 2010 golf season. The CRA states that for the purposes of determining the amount on which the HST should be collected, it would look to when the golf season would normally end. If the golf season normally ended on October 31, 2010, HST would have to be collected on 67% of the consideration (four months out of a total of six the multi-pack green fees can be used). However, if the individual paid on June 1, 2010, HST would have to be collected on 80% of the consideration (four months out of a possible five).

This issue also arose with respect to the sales of interment rights by cemetery operators. An interment right entitles the purchaser to the use of a burial plot (i.e., a supply of real property). A generous grandfathering right was announced early on for funeral and cemetery services that were supplied under an agreement in writing that was entered into before July 2010[106]. However, the CRA has always maintained that a supply of an interment right was a separate and distinct supply from a supply of funeral and cemetery services[107]. This distinction was not well known to cemetery operators and most were of the view that the supply of an interment right under an agreement in writing entered into before July 2010 was grandfathered.

However, in discussions the CRA has indicated that the supply of an interment right was a supply of real property by way of lease, licence or similar arrangement and therefore the transitional rules for leases applied. Difficulties with determining the "lease interval" arose in this situation since the bulk of the lease or licence period would be after July 2010. In addition, the CRA was of the view that the lease or licence period did not start until payment was made in full for the interment right and a certificate of interment was then issued to the purchaser. In many cases, the purchaser made payments for the interment right over time which would result in the lease or licence period not starting until payment was made in full. Fortunately, the Department of Finance was made aware of this issue and announced proposed changes on June 30, 2010 to the treatment of interment rights[108]. Under these proposed rules, which have yet to be enacted, only the GST will apply to interment rights that are supplied under an agreement in writing entered into before July 2010. If the cemetery operator collected HST before the proposed announcement was made, the person acquiring the rights can seek a refund of the provincial portion of the HST from the supplier or from the CRA.

Finally, when the consideration for a taxable supply of real property made by way of lease, licence or similar arrangement becomes due or is paid without having become due after October 14, 2009 and before May 2010, to the extent that the consideration relates to a period that occurs on or after July 1, 2010, a lessee may be required to self-assess the provincial part of the HST. A self-assessment of the provincial portion of the HST is required if the lessee is a non-consumer that:

- acquires the real property for consumption, use or supply otherwise than exclusively in its commercial activities;

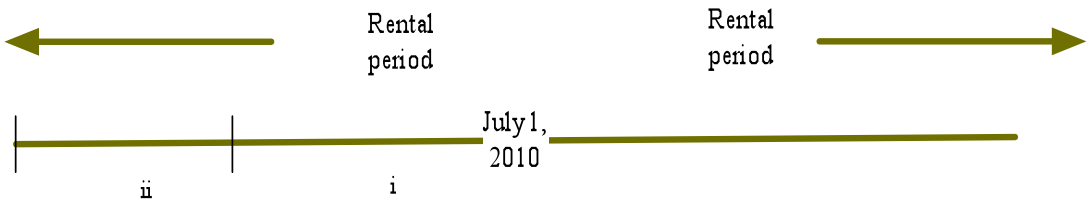
[103] Paragraph 42(9) of the *New Harmonized Value-added Tax System Regulations*.
[104] Subsection 136.1(1).
[105] See example 17 in GST/HST Info Sheet GI-092 July 2010.
[106] This rule was enacted in section 47 of the *New Harmonized Value-added Tax System Regulations*.
[107] See for example the CRA's comments in GST/HST Technical Information Bulletin B-093R [November 2008] where under the heading Single and Multiple supplies, it states that "Where a cemetery operator supplies interment rights and cemetery products or services together, the operator is regarded as having made multiple supplies for GST/HST purposes. Furthermore, none of the supplies is considered to be incidental to any of the others".
[108] News Release 2010-062 announced on June 30, 2010.

- uses a simplified accounting method to calculate its net tax;
- is a charity that uses the net tax calculation for charities; or
- a selected listed financial institution.

The lessee must account for the provincial portion of the HST:

- on line 405 of its GST/HST return for the reporting period that includes July 1, 2010 if the due date for that return is before November 2010; or
- in any other case, by completing and filing Form GST489, *Return for Self-Assessment for the Provincial Part of Harmonized Sales Tax (HST)* and paying the amount before November 2010.

This diagram illustrates the application of these rules:



1. **Basic Rule:** portion of rental period post June 2010 is subject to the HST

2. **Special Rule:** no HST if period starts before July 2010 and ends before July 31, 2010

3. **Prepayments:**

   i. Vendor charges HST on consideration due or paid on or after May 1, 2010 for any period or portion thereof after June 2010

   ii. After October 14, 2009 and before May 1, 2010: Provincial portion of HST self-assessment required by non-consumers who are SLFIs, charities that use the net tax calculation for charities, if the property is not acquired for exclusive use in commercial activities, or a simplified accounting method is used to calculate ITCs

Taxable services in relation to real property (other than contracts to construct, renovate, alter or repair real property)

The transitional rules for most taxable services in relation to real property are identical to those for services in general. Special rules that apply to progress payments under a contract to construct, renovate, alter or repair real property are discussed later in this paper.

The basic transitional rule for services focused on when the services are performed. In general, only the federal GST applied to any services that were provided before July 2010[109]. HST applies to any services that are performed after June 30, 2010. However, if 90% or more of the services were performed before July 2010, only the GST applied.[110]

Service providers are required to collect HST on any portion of the consideration that became due, or was paid without becoming due, on or after May 1, 2010 and before July 2010 that applies to services to be provided after June 2010 (subject to the previous exception if less than 10% of the services are to be performed after June 2010). However, the service providers are required to remit the provincial portion of the HST in their return for the period covering July 1, 2010[111]. Similarly, their customers, if entitled to an input tax credit for the provincial portion of the HST on such supplies, are allowed to claim the input tax credit in their returns for the period covering July 1, 2010[111].

[109] Subsections 43(1) and (2) of the *New Harmonized Value-added Tax System Regulations.*
[110] Subsections 43(10) and (11) of the *New Harmonized Value-added Tax System Regulations.*
[111] Subsections 43(4) and (5) of the *New Harmonized Value-added Tax System Regulations.* This result was accomplished by deeming the provincial amount of the HST to be become due on July 1, 2010 and not to have been paid before that date.

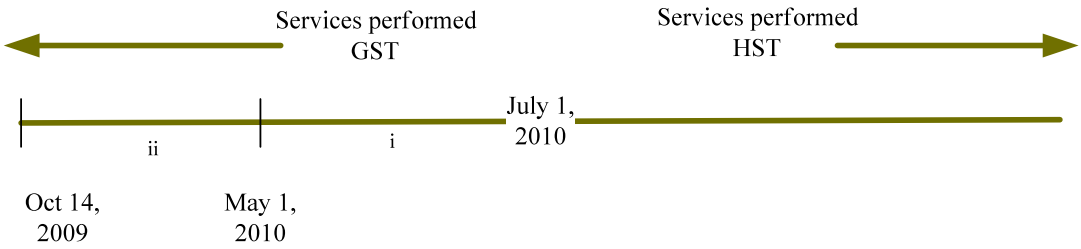
Finally, if any consideration that became due, or was paid without becoming due, after October 14, 2009 and before May 1, 2010 by a purchaser other than a consumer for services to be performed after June 2010, the purchaser generally is required to self-assess the provincial portion of the HST[112]. A self-assessment of the provincial portion of the HST is required if the purchaser is a non-consumer that:

- acquires the service for consumption, use or supply otherwise than exclusively in its commercial activities;
- uses a simplified accounting method to calculate its net tax;
- is purchasing a service that is subject to input tax credit recapture;
- is a charity that uses the net tax calculation for charities; or
- is a selected listed financial institution.

The purchaser must account for the provincial portion of the HST:

- on line 405 of its GST/HST return for the reporting period that includes July 1, 2010, if the due date for that return is before November 2010; or
- in any other case, by completing and filing Form GST489, *Return for Self-Assessment for the Provincial Part of Harmonized Sales Tax (HST)* and paying the amount before November 2010.

These transitional rules are summarized in the diagram below.



1) **Basic Rule:** focus on when services are performed

2) **Special Rule:** if at least 90% performed before July 2010, no HST

3) **Prepayments:**

   i. Vendor charges HST on consideration billed or paid on or after May 1, 2010 for any services performed after June 2010

   ii. After October 14, 2009 and before May 1, 2010: Provincial portion of HST self-assessment required by non-consumers who are SLFIs, charities that use the net tax calculation for charities, if the service is not acquired for exclusive use in commercial activities, if ITCs in respect of the service are restricted or a simplified accounting method is used to calculate ITCs

Taxable supplies under a contract to construct, renovate, alter or repair real property

The basic transitional rule for progress payments that became due, or were paid without becoming due, after October 14, 2009 and before July 1, 2010 states that HST is not payable on the portion that is reasonably attributable to property delivered or services performed before July 1, 2010[113].

For purposes of the override rule, if the work was substantially completed before June 2010, the construction is deemed to be substantially complete on June 1, 2010, triggering HST payable on July 31, 2010 for any amount that was not due or paid on or before that date (other than any holdback amount)[114].

The treatment of the GST/HST to holdbacks follows the application to the progress payment from which it is withheld. The following example is taken from a CRA bulletin[115].

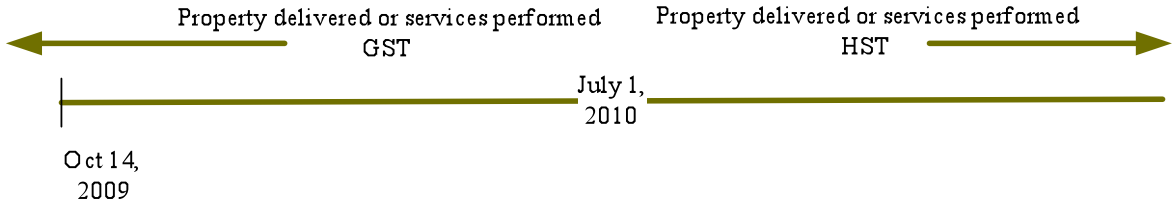
[112] Subsections 43(6) and (7) of the *New Harmonized Value-added Tax System Regulations.*
[113] Subsections 51(a) and (b) of the *New Harmonized Value-added Tax System Regulations.*
[114] Subsection 51(c) of the *New Harmonized Value-added Tax System Regulations.*

Example

On August 1, 2010, a final progress payment of $ 25,000 less a holdback is due for the construction of a house on land owned by an individual. 70% of this progress payment relates to work done after June 2010. The individual pays $ 5,000 on that date and holds back $ 20,000 (10% of entire contract).

HST would apply to 70% of the $ 5,000 progress payment on August 1, 2010 and to 70% of the holdback amount of $ 20,000 on the earlier of the date it was paid and when the holdback period expired.

The application of the transitional rules to these payments is summarized in the diagram below



1) **Basic Rule:** No HST on any part of progress payments that become due, or are paid without becoming due, after October 14, 2009 and before July 1, 2010 that are reasonably attributable to property delivered and services performed before July 1, 2010

2) **Override Rule:** If the work is substantially completed before June 2010, but a progress payment is paid after July 31, 2010 and has not become due on or before that day, a portion of which relates to work after June 2010, the work is deemed to be substantially completed on June 1, 2010 triggering HST payable on the post June 2010 work by July 31, 2010 (other than any holdback)

3) **Holdback Rule:** The application of GST/HST to holdbacks follows the application of GST/HST of the progress payment from which it was withheld.

GST/HST electronic filing requirements for builders

Registrant builders affected by the transitional housing measures will be required to file their GST/HST returns for reporting periods ending on or after July 1, 2010 electronically, using GST/HST NETFILE. These situations will involve the following:

1. if the transitional tax applies;
2. if there is a sale of grandfathered housing when the purchaser was not entitled to claim a GST new housing rebate or GST new residential rental property rebate;
3. if a first reseller makes a sale of housing that is subject to the HST when the first reseller purchased it on a grandfathered basis; and
4. if the builder is reporting in its return for the reporting period a provincial transitional new housing rebate (either a rebate that the builder is entitled to claim or a rebate that is assigned to the builder by a purchaser who is entitled to claim the rebate)[116].

Builders of new residential housing in Ontario and British Columbia who find themselves in one of the above situations have to complete Schedule A to the GST/HST NETFILE return. Builders who fail to file electronically when they are required to do so will face penalties. These penalties will be $ 100 per return for the first failure and $ 250 per return for

[115] GST/HST Notice 244 December 2009.
[116] Section 2 of the *Electronic Filing and Provision of Information (GST/HST) Regulations.* Non-registrant builders continue to file paper returns. They must attach a letter to the paper return to report any of the following information: the number of grandfathered housing units sold if the purchaser was not entitled to claim a GST/HST new housing rebate or GST/HST new residential rental property rebate; if the non-registrant builder is a first reseller, the number of newly constructed or substantially renovated housing units sold that are subject to the HST in Ontario, British Columbia and the higher rate of tax in Nova Scotia if the units were previously purchased on a grandfathered basis and the total purchase prices for those units; the transitional tax adjustment; and the amount of all provincial transitional new housing rebates (including those assigned to it) that it is reporting in that paper return.

subsequent failures[117]. Other penalties apply for failing to provide the correct transitional housing information in the prescribed manner[118].

Builders and non-builders may also have to use GST/HST NETFILE if, for example, they are subject to the provincial input tax credit recapture provisions. However, these situations are not discussed in this paper because they are not limited to the real estate sector.

NON-TAXABLE SUPPLIES OF REAL PROPERTY

Certain supplies of real property are deemed not to be supplies for GST/HST purposes. Any transfer of real property by way of an amalgamation, or on the wind-up of 90% or more owned corporation into its parent, is deemed not to be a supply for GST/HST purposes[119].

In addition, any transfer of an interest in real property under an agreement entered into in respect of a debt or obligation for the purpose of securing payment of the debt or obligation is deemed not to be a supply for GST/HST purposes[120]. Therefore, the granting of a mortgage on a real estate property does not constitute a supply of the real property.

Finally, a supply of the following items (some of which would otherwise be a supply of real property) is deemed not to be a supply for GST/HST purposes:

a) a right to explore for or exploit a mineral deposit, a peat bog or deposit of peat or a forestry, water or fishery resource;

b) a right of entry or user relating to a right referred to in paragraph (a);

c) a right to an amount computed by reference to the production (including profit) from, or to the value of production from, any such deposit, bog or resource; or

d) a right to enter or use land to generate, or evaluate the feasibility of generating, electricity from the sun or wind[121].

DEEMED SUPPLIES OF REAL PROPERTY

The GST/HST legislation contains a number of provisions that deem a supply of real property by way of sale to have been made.

Self-supply by builders of residential complexes provided by way of lease, licence or similar arrangement

The most common of these provisions are designed to remove a potential tax advantage a builder may have in constructing or substantially renovating a residential complex and then offering it for rent or taking it for the builder's own use[122].

As mentioned earlier, a person is deemed to be a builder if it begins to use real property as a residential complex and immediately before that time the property was not a residential complex, even if the person did not engage in the construction or substantial renovation of the complex. This last rule ensures that a person who is engaged in the business of buying used business or commercial properties and converting them to residential complexes is subject to the same rules as if the complexes were newly constructed. It does not apply when an individual converts the property for use exclusively as a place of residence for himself or herself, a relation or a former spouse or common-law partner or when a

[117] Section 3 of the *Electronic Filing and Provision of Information (GST/HST) Regulations.*
[118] Section 7 of the *Electronic Filing and Provision of Information (GST/HST) Regulations.*
[119] Sections 271 and 272.
[120] Section 134.
[121] Subsection 162(2).
[122] In the absence of these self-supply rules, a builder would not pay GST/HST on its labour or financing costs or its profits, whereas a person who was not a builder would have to pay GST/HST on the purchase of a residential complex, which would include these items.

personal trust acquires the property for use exclusively as place of residence of an individual who is a beneficiary of the trust[123].

These provisions generally apply when a builder of a residential complex, after its construction or substantial renovation is substantially completed[124], gives possession or use of the complex or a unit in the complex under a lease, licence or similar arrangement to a person for the purpose of its occupancy by an individual as a place of residence[125]. A person who makes a supply of a mobile home or a floating home before it has been used or occupied by any individual as a place of residence or lodging is deemed to have engaged in the construction of the home and if the supply is made in the course of a business the person will be a builder for GST/HST purposes[126]. A substantial renovation of a mobile or floating home results in it being treated as new construction[127].

These provisions deem the builder to have sold and repurchased the property at its fair market value. In the case of a multiple unit residential complex, this deemed sale takes place when the first unit in the building is rented. A similar result occurs if the builder is an individual who occupies the complex or a unit in the complex as his or her own place of residence.

A self-supply rule also applies if the builder gives possession or use of the residential complex or a residential unit in a multi-unit residential complex to a person under an agreement for the sale of the building or part thereof and a supply by way of lease of the land forming part of the complex.

In the case of a residential condominium unit, if the builder gives possession of the unit to a person who is a purchaser under an agreement of purchase and sale before the condominium complex is registered as a condominium, and that person or a tenant is the first person to occupy the unit as a pace of residence after substantial completion, and the agreement of purchase and sale is any time terminated and another agreement between the builder and the same person is not entered into, the builder is subject to a self-supply rule for that unit[128].

Finally, the self-supply rule applies in the case of an addition to a multiple unit residential complex. In this case, the self-supply applies only to the addition[129].

Some exceptions are made to the self-supply rule for builders of a residential complex, or an addition thereto, in the following situations:

- if the builder is an individual and the complex is used primarily as a place of residence of the individual, a relation or a former spouse or common-law partner, the complex is not used primarily for any other purpose between the time construction or renovation is substantially complete and the time the complex used as described above and the individual did not claim any input tax credits in respect of the acquisition or of an improvement to the complex[130];

- if the builder is a university, public college or school authority and the complex is constructed, renovated or acquired primarily for the purpose of a student residence[131];

- if the builder is a community, society or body of individuals to which section 143 of the *Income Tax Act* applies and the complex is constructed, renovated or acquired exclusively for a place of residence for members of the community, society or body[132];

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[123] Paragraph 190(1)(f).
[124] The CRA states in paragraph 11 of GST/HST Memoranda 19.2.3 that for GST/HST purposes, "substantial completion" means that the construction or substantial renovation of the complex is at a stage of completion (generally 90% or more) so that an individual is able to reasonably inhabit the premises. If possession is given before substantial completion, the self-supply tax liability does not arise until the time of substantial completion. In the case of the construction or substantial renovation of a multiple unit residential complex or an condominium complex or the construction of an addition to a multiple unit residential complex, subsection 191(9) deems substantial completion to occur no later than when all of substantially all of the residential units in the complex are occupied.
[125] Section 191.
[126] Subsection 190.1(1). The person is also deemed to have substantially completed the construction at the earlier of the time ownership or possession is transferred to the recipient.
[127] Subsection 190.1(2).
[128] Subsection 191(2).
[129] Subsection 191(4).
[130] Subsection 191(5). The complex also cannot have been used for any other purpose before its use as the primary place of residence. In *Coutu v. R.* [2008] G.S.T.C. 207 (TCC) the judge found that a self-supply of a triplex had not occurred since 2/3 of the units were used by related persons and therefore the exception in 191(5) applied.
[131] Subsection 191(6).

- if the builder is a registrant and the complex is constructed, renovated or acquired for the purpose of providing a place of residence or lodging at a remote work site[133] for its employees or the employees of a contractor or subcontractor[134];

In the last situation, the legislation requires the builder to make an election in prescribed form although it no longer has to be filed[135]. The election defers the application of the GST/HST until the complex is sold or supplied by way of lease, licence or similar arrangement primarily to persons who are not its employees or employees of a contractor or subcontractor[136]. The builder may claim input tax credits for ongoing inputs to maintain and run the complex until such time as the complex is sold or leased primarily to the persons in the preceding sentence.

Finally, if a builder of a residential complex or an addition to a multiple unit residential complex makes a supply of the complex or of a residential unit in the complex or addition by way of lease, licence or similar arrangement and the supply is an exempt supply included in section 6.1 or 6.11 of Part I of Schedule V, and the recipient subleases the complex or unit under exempt conditions whereby occupancy is given to an individual as a place of residence or lodging, the builder is deemed to have given possession to that individual and therefore is required to self-assess under the provisions previously discussed[137].

Until February 26, 2008, the self-supply rules were limited to the situation in which the individual was given possession of the residential complex. However, as a result of a court decision, the self-supply rules now apply when the individual is given possession or use of the complex[138]. When this change to the legislation was introduced, the federal government also provided for an election to be made by a builder who did not self-assess the GST/HST on or before February 26, 2008 and who did not sell that complex before that date to another person to elect to self-assess for the GST/HST, which would then give the registrant builder the right to claim input tax credits on the costs and to claim the new residential rebate available to landlords, if the requisite conditions were met.[139].

In the case of rent-to-own agreements, a determination will have to be made whether the agreement is a sale for GST/HST purposes, in which case the self-supply rules will not apply and the builder will have to collect GST/HST from his or her customer or whether the agreement is more in the nature of a lease, licence or similar arrangement, in which case the self-supply rules will apply[140]. The determination primarily turns on the definition of a "sale" in the GST/HST legislation, which includes any transfer of ownership of the property and a transfer of the possession of the property under an agreement to transfer ownership. Thus, a rent-to-own agreement that contains a binding purchase and sale agreement will be considered to be a sale, whereas if it simply contains an option to purchase it more likely will be treated as a lease, licence or similar arrangement.

Appropriation of real property by an individual for personal use

If an individual appropriates real property for the personal use or enjoyment of the individual, a relation or a former spouse or common-law partner, and immediately before the appropriation the property was held for supply, or was used as capital property, in a business or commercial activity and was not a residential complex, the individual is deemed to make and receive a taxable supply of the property at its fair market value[141].

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[132] Subsection 191(6.1).
[133] The CRA is of the view that a work location is considered remote if the nearest established community with a population of 1,000 or more is no closer than 80 kilometres by the most direct route (see paragraph 55 in GST/HST Memoranda 19.2.3).
[134] Subsection 191(7). In this the builder must make an election in a prescribed form (GST 17).
[135] The CRA in its GST/HST Technical Information Bulletin B-065 announced that GST 17 does not have to be completed or filed. However, subsection 191(7) still refers to an election being required to be made in prescribed form so builders wanting to be extra cautious may wish to complete GST 17 and retain it on file for audit purposes.
[136] This deferral is accomplished by deeming the supply of the complex not to be a supply and any occupation of the complex not to be an occupation as a place of residence or lodging and therefore the complex retains a "new" characteristic.
[137] Subsection 191(10).
[138] This court case was *North Shore Health Region v. R.* [2008] G.S.T.C. 1 (FCA) which reversed the TCC decision by finding that the residents in the nursing home were not given possession of the units as the operator had the ability to move them to different rooms without their consent. Since possession was not given to the residents, the self-supply rules in section 191 did not operate. A consequence of this would be that the resale of such a nursing home would likely be a taxable supply.
[139] Section 236.4. The residential rebate for landlords is found in section 256.2.
[140] The CRA sets out some of the factors to be considered in this determination in GST/HST Memoranda 19.2.3 and Policy Statement P-164.
[141] Subsection 190(2).

In this situation, change-in-use rules may also apply and deem a taxable supply by way of sale. However, double taxation is avoided, because the formula for calculating any GST/HST owing on the change-in-use takes into account any tax owing as a result of the appropriation.

Self-supply of land leased for other residential purposes

If a person makes a certain exempt supply of land by way of lease, licence or similar arrangement, the person was not subject to the change-in-use rules before that time, and the recipient is not acquiring possession of the land for the purpose of constructing a residential complex or making an exempt supply of the land, the person generally is deemed to make and receive a taxable supply of the land at its fair market value[142].

The CRA provides the following example of when this rule might apply[143];

> *A landowner leases land to another person, the lessee, who intends to use the land for residential purposes. This lease is exempt under subparagraph 7(a)(i) of Part I of Schedule V. The lessee will purchase taxable construction services to have a house built on the* leased *land. (Neither the lessee nor the contractor is a builder as defined in the legislation[144].) At the time possession of the land is transferred under the lease, the landowner is subject to the self-supply rules on the fair market value of the land.*

Self-supply of a residential trailer park

If a person makes an exempt supply[145] of a site in a residential trailer park by way of lease, licence or similar arrangement and none of the sites was previously occupied, and either:

- the last acquisition of the park by the person was not an exempt supply and the person was not subject to a change-in-use rules before that time; or
- the person was entitled to claim an input tax credit to claim an input tax credit in respect of the acquisition or an improvement thereto,

the person is deemed to make and receive a taxable supply of the property at its fair market value[146].

A similar rule applies when a person increases the size of the residential trailer park and first makes an exempt supply by way of lease, licence or similar arrangement of a site in the additional area[147].

Non-substantial renovation

A person who carries out the renovation or alteration of a residential complex that is not a substantial renovation, in the course of a business of making supplies of real property must self-assess GST/HST on any amounts on which tax was not paid (other than a financial service) that would be included in calculating the adjusted cost base of the property for income tax purposes if the complex were capital property of the person under the *Income Tax Act*[148]. This provision essentially requires GST/HST to be self-assessed on renovation costs that normally would not be taxed, such as salaries and wages. No self-assessment is required on ordinary repair and maintenance costs.

The tax must be paid at the earlier of when the renovation is substantially completed and when the complex is sold.

This provision essentially applies to a person who makes a business of purchasing residential properties, fixing them up and then reselling them. Because the sale of the residential complex will likely be an exempt supply, the person would not be entitled to claim an input tax credit for this self-assessed tax or for any GST/HST paid to third-party suppliers.

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[142] Subsection 190(3). If the recipient of the supply is acquiring possession of the land for the purposes of constructing a residential complex in the course of a commercial activity, the recipient would be a builder and would be the one that may have to self-assess under the provisions of section 191.
[143] Paragraph 67 of GST/HST Memoranda 19.2.3.
[144] Based on the decision in the *Superior Modular Homes* case, the conclusion that the contractor is not a builder for GST/HST purposes may be incorrect if the contractor acquires an interest in the complex (i.e. a construction lien) while it is under construction.
[145] For a supply of site to be exempt, it must be provided for a continuous period of at least one month [see 7(b) of Part I of Schedule V].
[146] Subsection 190(4).
[147] Subsection 190(5).
[148] Section 192. A court case that determined that section 192 was applicable was *Seabrook Investments Inc. v. R.,* [2001] G.S.T.C. 62 (TCC).

Change-in-use rules

The GST/HST legislation also contains change-in-use rules that apply to real property that is capital property of a registrant. The potential simultaneous application of both the self-assessment rules for a builder of a residential complex or an addition to a multiple unit residential complex that is provided by way of lease, licence or similar arrangement, and the change-in-use rules, is prevented by a provision that deems a residential complex not to be a capital property of a builder until either the self-assessment rules apply or the builder received a taxable supply of the complex or the addition[149].

For most registrants, the change-in-use rules apply when a registrant increases or decreases the use of capital real property in commercial activities. Special rules are in place for individuals and public sector bodies that are not financial institutions[150]. Insignificant changes in use (changes of less than 10%) do not trigger the change-in-use rules unless the registrant is an individual who as a result of the change in use begins to use the property primarily for the personal use or enjoyment of the individual or a related individual[151].

Finally, a registrant that appropriates property for use as capital property or for an improvement to capital property is deemed to have made, a supply of the property by way of sale immediately before that time, and if the property was last acquired for consumption, use or supply in commercial activities, to have collected tax on the FMV[152]. The registrant is then deemed to have acquired the property by way of sale and to have paid tax in respect of that supply. If the property was last acquired for consumption, use or supply in the course of commercial activities, the deemed tax paid is based on the FMV and in any other case, the deemed tax paid is the basic tax content[153]. These provisions are necessary because the change-in-use rules apply only to capital property and therefore would otherwise not have applied on the conversion of non-capital property to capital property.

Rules applicable to most registrants

In the case of an increase in commercial use, the registrant is deemed to have purchased a portion of the property and, unless that purchase is an exempt supply[154] to have paid GST/HST equal to the basic tax content of the property at that time multiplied by the percentage change in use[155]. If the registrant begins to use capital real property in commercial activities, it is deemed to have purchased the property, and unless that supply is an exempt supply, to have paid GST/HST equal to the basic tax content of the property[156].

In the case of a decrease in commercial use of capital real property by a registrant, the registrant is deemed to have made a supply of a portion of the property and, except when that supply is an exempt supply, also is deemed to have collected GST/HST equal to the basic tax content of the property multiplied by the percentage decrease in commercial use[157]. A registrant that ceases to use capital real property in commercial activities is deemed to have made a sale of the property and, except when that supply is an exempt supply, to have collected GST/HST equal to the basic tax content of the property, purchased the property and paid tax equal to that same basic tax content[158].

Rules applicable to a public sector body that is not a financial institution and to certain Crown agents

Public sector bodies that are not financial institutions and that are registrants generally are subject to a primary use test for claiming input tax credits on capital real property[159]. Consequently, the change-in-use rules to real property of these registrants apply only when the use changes from non-primary use in commercial activities to primary use in such

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[149] Subsections 195.1(1) and (2).
[150] Subsection 206(1).
[151] Section 197.
[152] Subsection 196.1(a).
[153] Subsection 196.1(b).
[154] David Sherman in his analysis/commentary in the Canada GST Service points out that the exclusion from a deemed payment of GST/HST in the case of an exempt supply, presumably to preclude input tax credits for used residential property, may not be effective because subsections 206(2) and (3) make no reference to who is the supplier. The exemption for used residential property in section 2 of Part I of Schedule V is predicated on the supply being made by someone who is not a builder. Subsections 206(2) and (3) do not outline who made the supply, so how one would determine if the supply is exempt is unclear.
[155] Subsection 206(3).
[156] Subsection 206(2).
[157] Subsection 206(5).
[158] Subsection 206(4).
[159] Subsection 209(1) states the primary use rule in subsection 199(2) applicable to capital personal property is also applicable to capital real property for such registrants. In the case of certain Crown agents, subsection 209(2) states the same thing.

activities and visa versa[160]. If a public service body files an election under section 211 in respect of capital real property, the body will use the percentage-of-use rules rather than the primary-use rule for the real property in respect of which the election is filed.

A sale of capital real property by these registrants that was used primarily in non-commercial activities generally is GST exempt unless an election under section 211 is in effect, in which case the sale generally is subject to the GST/HST[161]. However, a supply of a residential complex or an interest therein made by way of sale, and a supply of real property made by way of sale to an individual are excluded from the general exemption for supplies of real property by public service bodies and therefore could be taxable unless another exemption in Part 1 of Schedule V applies.[162].

Rules applicable to individual registrants

In the case of individual registrants, although the pro-rata rules applicable to most registrants (discussed under the rules for most registrants) generally apply special restrictions on limit the operation of those rules if the property is being used primarily for the personal use and enjoyment of the individual or a relation.

An individual who begins to use, or increases the use of, capital real property in commercial activities, is not subject to the change-in-use rules if the property was, and still is, used primarily for the personal use or enjoyment of the individual or a relation[163]. However, if the commercial use of the property changes, the individual is subject to the change-in-use rules if he or she begins at the same time to use the property primarily for personal use or enjoyment of the individual or a relation[164].

Conversely, if an individual ceases to use capital real property in commercial activities, he or she will not be subject to the change-in-use rules if the property was, and still is, used primarily for the personal use or enjoyment of the individual or a relation[165]. However, if the individual changed the use from non-primary personal use to primary personal use, he or she will be subject to the change-in-use rules[165]. In the case of reduction in commercial use, the individual is subject to the change-in-use rules unless the property was, and still is, used primarily for the personal use or enjoyment of the individual or a relation[166].

An individual registrant is denied an input tax credit for any tax paid in respect of an improvement to capital real property if the property is used primarily for the personal use or enjoyment of the individual or a relation[167].

EXEMPT SUPPLIES OF REAL PROPERTY

The majority of the rules applicable exempt supplies of real property can be found in Part I of Schedule V[168]. Since the tax status of supplies under the HST is identical to the tax status under the GST, they are not discussed in this paper.

[160] Subsection 199(3) deems the registrant to have received a supply of the property by way of sale and to have paid tax equal to the basic tax content when the property begins to be used primarily in commercial activities and subsection 199(4) only permits an input tax credit to be claimed on any improvements to the property only when it is so used. Subsection 200(2) deems the registrant to made a supply of the property by way of sale and to have collected tax equal to the basic tax content when the property is no longer used primarily in commercial activities (the registrant is also deemed to have paid tax equal to this same amount which although it would not be eligible for an input tax credit at that time would be so eligible if the property began to be used again primarily in commercial activities in the future). Subsection 200(3) deems an actual sale of capital real property used otherwise than primarily in commercial activities to be an exempt supply. Subsection 200(4) operates in much the same fashion on sales of capital personal property by certain Crown agents.

[161] Subsections 209(1) and (2) which state that the rules in 200(3) and (4) for the sale of capital personal property used primarily in non-commercial activities apply to capital real property used by such registrants.

[162] Subsection 209(3).

[163] Subsections 208(2) and (3).

[164] Subsection 208(3).

[165] Subsection 207(1). If the property were not being used primarily for the personal use or enjoyment of the individual or a relation, he or she would be deemed to have made such a sale and collected tax equal to the basic tax content (less any tax that the individual was deemed to have collected under section 190).

[166] Subsection 207(2). The individual is given credit for any tax that is triggered by section 190.

[167] Subsection 208(4).

[168] Some other exemptions can be found in other Parts of Schedule V, such as the exemption for supplies of real property by charities that are not public institutions (section 1 of Part V.1) and the supply of certain real property by a public service body (other than a financial institution, a municipality or a government (section 25 of Part VI).

SERVICES IN RELATION TO REAL PROPERTY

Place of supply

The place of supply rules for real property changed when the HST was introduced in Ontario and British Columbia. The place of negotiation, which had been a factor under the old rules, was removed. Instead, the focus was put on where the real property was located[169].

A supply of a service in relation to Canadian real property that is situated primarily in HST provinces is subject to the HST. The applicable HST rate is the provincial rate in which the greatest proportion of the real property in the HST provinces is located (in the case of a tie, the provincial rate that is the highest applies).

A supply of a service in relation to Canadian real property that is not situated primarily in HST provinces is only subject to the GST.

COMMON COMPLIANCE ISSUES

This part of the paper summarizes some common compliance issues that we have seen in our experience in the real estate area.

Bare Trustee Registration and Remittance

After more than 20 years, one would think that the issue of bare trustee registration and reliance would no longer exist. Yet, we continue to see situations in which bare nominee corporations are registered for the GST/HST and file the GST/HST returns in respect of the beneficial owners for which they simply hold legal title.

Failure by registered purchasers to self-assess GST/HST on the purchase of real property

GST/HST registered purchasers are required to self-assess for any taxes payable on the purchase of real property (with the exception of purchasers who are individuals purchasing a residential complex or a cemetery plot or place of burial). These registrants can then claim an input tax credit to the extent that the property is used in commercial activities. If the property will be or is used exclusively by the registered purchaser in commercial activities, a full input tax credit would be available.

Nevertheless, there is a technical requirement to self-assess and claim that offsetting input tax credit and this is often overlooked.

We have also seen situations in which GST/HST was paid by registered purchasers in error to the vendor instead of being remitted on a self-assessment basis to the CRA.

Incorrect payment of GST/HST on holdbacks

GST/HST is not payable on any holdback of consideration pursuant to an agreement in writing for the construction, renovation or alteration of, or repair to, any real property yet we have seen cases where tax was charged on these amounts.

Partnerships

A partnership is a person for GST/HST purposes and therefore if it is carrying on a commercial activity, it is the party that should be registered and accounting for the tax. However, we have seen situations in which a bare nominee corporation or a general partner is accounting for the tax on the commercial activities of the partnership.

Unregistered suppliers/contractors

In the real estate area, the problem of unregistered suppliers and/or contractors is more common than in many other industry sectors. In the home renovation business, the introduction of the HST may encourage more renovations to be done on a cash basis.

[169] Section 14 of the *New Harmonized Value-added Tax System Regulations.*

Extras

Extras in the case of home purchases generally form part of the consideration on which GST/HST should be collected and may affect the amount of federal and provincial housing rebates that can be claimed. We have seen instances of these extras not being factored into the rebate calculations.

Coupons/reductions

Builders may offer fixed dollar amount coupons or rebates for homes in slower moving developments which the buyer can use toward the purchase of extras. The application of GST/HST to these coupons will depend upon whether the builder chooses to reduce the value of the consideration for the supply of the extras or as a partial cash payment (in which case it can claim an input tax credit equal to the tax fraction of the coupon value)[170].

In the former case, the reduction in the consideration would have an effect on the calculation of the federal and provincial housing rebates (and the transitional tax and RST transitional rebates). In the latter case, the value of the coupon would not alter the calculation of any of these amounts.

Remittance of tax on extras before being required

Under the Condominium Act, any payment that a purchaser makes on account of an agreement of purchase and sale of a unit before the condominium corporation is registered is required to be held in trust by a trustee of a prescribed class or the builder's solicitor. We have seen cases in which payment for extras was not held in trust if the builder wanted access to the cash sooner. In these cases, the GST on those payments was remitted before the legislation required, which is the earlier of the date ownership is transferred and the day that is 60 days after the condominium complex is registered as a condominium[171].

Combined supply rules for transitional purposes

The transitional rules for the Ontario and British Columbia HST for combined supplies are the same as in previous HST implementations[172]. A combined supply is a supply that includes a combination of personal property, real property or a service for which the consideration for each element is not separately identified.

The transitional rules state that if the provincial portion of the HST would not be payable on the supply of property included in a combined supply if it were supplied separately because ownership or possession of it transferred before July 1, 2010, then it is deemed to be supplied separately and the provincial portion of the HST is not payable.

As David Sherman points out[173], the application of this rule may or may not be advantageous to the purchaser. In practice, it is possible that many contractors may simply ignore this rule.

Transfer of housing rebates to builder

In general, if an individual purchaser purchases a residential condominium unit from a builder for use as a place of residence for himself or herself or a relative, the new housing rebates can be transferred to the builder. However, if the individual is purchasing the unit for rental purposes, he or she must file for the new residential rental property rebate for landlords (both federally and provincially) with the CRA and wait for a refund. This can result in a substantial cash flow issue if the individual purchases a number of units for rental.

We have seen situations in which the individuals in question sign affidavits that they are purchasing the unit(s) for use as a primary residence of their tenant(s) and then transferring the new housing rebate to the builder in an attempt to resolve this cash flow issue (i.e., the buyer gets this rebate directly from the builder instead of having to wait for it from the government). Unfortunately, the GST/HST legislation establishes joint and several liability for the transferred new housing rebates if the builder knew or ought to have known that the individual was not entitled to the rebate (e.g., the unit

[170] Subsection 181(3).
[171] Paragraph 168(5)(a).
[172] Section 52 of the *New Harmonized Value-added Tax System Regulations.*
[173] See commentary to subsections 341(5) and 356(7) in the Canada GST Service.

was going to be rented rather than occupied as a primary place of residence by the individual or a qualifying relative of the individual)[174]. Therefore, it will be important for builders to establish procedures to prevent this situation from arising.

Recovery of exempt amounts from tenants

Landlords who incur exempt supplies such as property taxes or insurance, but recover these amounts from tenants under commercial leases are required to collect GST/HST on the recoveries, because they constitute additional consideration for the commercial lease and not an exempt supply of the property taxes or insurance.

Mixed use properties

If a particular property is used partially in exempt activities and partially in commercial activities, input tax credits can generally be claimed only on expenditures that relate to the commercial activities. This fact can be overlooked and full input tax credits can be claimed in error.

[174] Subsection 254(6).