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## Guidelines for dealing with the *Thibaudeau* decision

On May 3, 1994, the Federal Court of Appeal held, in *Thibaudeau*, that child support payments are not taxable in the hands of the recipient. The court did not make a finding with respect to the deductibility of such payments. Accordingly, those who pay child support are still entitled to claim a deduction. That decision has now been appealed.

At a meeting of family law Bar Admission Course instructors held on May 11, 1994, the following guidelines were discussed and recommended. It should be noted that these guidelines apply with respect to open files only.

- Recipient clients should be advised that they *may* not be required to pay income tax on child support payments, however, the issue is far from clear and for the present time they should continue to remit payments to Revenue Canada or place the amount in a separate account.
- With respect to 1993 tax returns, recipient clients should be advised to file a Notice of Objection within 90 days of the date of mailing of the Notice of Assessment by Revenue Canada Taxation in order to claim a refund of the tax paid.
- Clients may wish to consider the advisability of filing a Notice of Objection for income tax returns prior to 1993. Since this is purely a tax matter, clients should be advised to consult their accountants.
- If you are bringing a motion for support, or drafting Minutes of Settlement or a Separation Agreement, ensure that child support and spousal support are dealt with separately and are not melded. In the United States, where child support payments are not taxable to the recipient, melded orders are treated, for tax purposes, as spousal support orders and therefore fully taxable.
- It is anticipated that child support orders will continue to be "grossed up" to provide for the potential tax liability to the recipient notwithstanding the *Thibaudeau* decision. This will eliminate the need for variation on behalf of a recipient client if the case is ultimately overturned. Accordingly, it is critical that you provide to the court the precise amount of the required support payment and the additional amount required for potential tax payments.
- Variation applications should not be brought until the *Thibaudeau* issue is finally resolved. However, in order to preserve the rights of the payor client, it may be advisable to put the other side on notice that your client will be seeking a variation retroactive to May 3, 1994 if *Thibaudeau* is upheld.
- You must carefully consider the impact of *Thibaudeau* when negotiating a settlement. You may wish to settle the issue of child support on the basis that the support will still be taxable in the hands of the recipient and deductible to the payor. On the other hand, it must be made clear that this agreement is made in contemplation of the appeal of *Thibaudeau* and that there will be an adjustment if *Thibaudeau*

is sustained. You can then go on to provide the alternate support arrangement if *Thibaudeau* is sustained. Do not simply provide, on behalf of the payor, that if *Thibaudeau* is overturned, he or she will pay the income tax attributable to the child support payments. That is an overly simplistic way of dealing with the issue. Alternatively, you could consider providing an arbitration clause to adjust the support when the outcome of *Thibaudeau* is ascertained.

- Similarly, you should review any outstanding offers to settle to ensure that the amount of child support is adjusted if *Thibaudeau* is sustained.

- The Federal Minister of Justice is considering child support guidelines and different ways of treating the payments from an income tax point of view. There will be discussions on this issue across Canada during the coming months and a final decision is not anticipated until late fall of 1994. The fact that there may be significant changes in the law of child support should be kept in mind by all practitioners.

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## Proposed retroactive changes to Land Transfer Tax Act

Following brief mention in the provincial budget of May 20, 1993, the Ontario government introduced the *Revenue Enforcement Statute Law Amendment Act, 1993* (known as Bill 127) to the Legislature on November 29, 1993.

Bill 127 includes, among other things, a substantive change to the *Land Transfer Tax Act* (the Act) which will result in a broader range of land transactions in the Province of Ontario being subject to the highest rate of land transfer tax (which is currently 20 per cent of the purchase price or other consideration paid or given for a conveyance of land).

In addition, if Bill 127 is passed in its present form, the amendment to the Act will be effective *retroactively* to May 20, 1993. Given this proposed retroactive effect, all non-residents (as defined in the Act) who have entered into agreements to acquire an interest in land in Ontario closing after May 20, 1993, or who anticipate doing so in the future, should be advised that the proposed changes to the Act may affect their land transfer tax liability.

Generally the Act provides for tax rates ranging from 0.5 per cent to 2 per cent of the purchase price or other consideration given for most conveyances of land in Ontario. (When a non-resident person acquires an interest in land, however, the tax rate is 20 per cent unless the land can be classified as unrestricted land.)

Land which cannot be classified as unrestricted land includes land which is used as farm, an orchard, agricultural land, woodlands, or recreational land (regardless of its zoning), or is assessed as such under the Assessment Act ("Recreational or Agricultural Land").

Currently, the relevant time for determining whether or not land is unrestricted land is the date of closing of the transaction.

Bill 127 changes the definition of unrestricted land to exclude any land considered to be Recreational or Agricultural Land *at any time in the two-year period preceding the date of closing where the closing has occurred after May 20, 1993.*

Therefore, if Bill 127 is passed in its current form, as is expected, a non-resident person considering the acquisition of an interest in land in Ontario must make additional investigations to determine the use of the land during the two-year period immediately preceding the proposed conveyance to ensure that the lands qualify for the lower rate of tax. These investigations should be made prior to entering into any legally binding obligation to acquire such an interest.

In some cases, non-resident persons may choose, after discussion with counsel, to rely on information received from their vendor in assessing the character of the vendor's use during the previous two-year period. In these cases, it would be appropriate to incorporate representations and warranties by the vendor in the agreement relating to such acquisition confirming this information and providing the non-resident purchaser with a right of termination in the event of a breach of such representation and warranty becomes apparent prior to closing.

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