



RealTalk® about Real Estate

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Topic: Judicial Sales (aka foreclosures) – buyers liable for taxes owed by non-resident sellers

A recent decision from the British Columbia Supreme Court, *Mao v Liu* 2017 BCSC 226, underscored the risks that a buyer faces when acquiring a property through the foreclosure process.

The general rule is that if the seller is a non-resident of Canada, the buyer (yes, the buyer!) is ultimately responsible for ensuring that 25% of the purchase price is held back until CRA issues a clearance certificate.

What Happened?

In *Mao v Liu* the property was in foreclosure and the foreclosing lender's lawyer refused to provide a statutory declaration to confirm that the seller was a Canadian resident. After closing, CRA determined that the defaulting debtor (*i.e.* the actual previous property owner) was a non-resident. However, there had been no hold back and by then all of the money had been disbursed. As a result, CRA required the buyer (yes, the buyer!) to pay the seller's capital gains tax, in the amount of \$695,000.

This problem arises largely because for land titles and conveyancing purposes, the seller in a foreclosure is the Court of Queen's Bench of Alberta. However, for purposes of the *Income Tax Act*, CRA deems the seller to be the actual person on title (*i.e.* the defaulting owner).

Why Does it Matter to You?

If your client is buying a property through the foreclosure process, it may be difficult or impossible to get satisfactory confirmation that the previous owner was a Canadian resident. This places your client at considerable risk if there is nothing in the contract to provide for a 25% holdback which gets held unless and until a clearance certificate has been issued by CRA, as required by section 116 of the *Income Tax Act*.

What Can You Do?

This is a significant risk to the buyer in a foreclosure that must be dealt with early. Either (a) before making the offer, obtain a statutory declaration that the previous owner (seller) is a Canadian resident; or (b) be explicit in the offer that there will be a holdback of 25% of the purchase price (to be held by the buyer's lawyer) which will not be released unless and until a clearance certificate for the seller is issued by CRA.

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