Private Client Tax

Jurisdictional comparisons **Third edition 2015**

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1. NON-TAX ISSUES

1.1 Domestic law

1.1.1 Briefly describe your legal system and its origins

Canada is a federal state, with legislative powers divided between the federal and provincial governments. The federal government has legislative jurisdiction over issues concerning Canada as a whole, including foreign affairs, international trade, banking, telecommunications, bankruptcy, intellectual property, immigration and criminal law. The federal government also has broad taxing powers and may levy both direct and indirect taxes. The provincial governments' legislative jurisdiction includes real and personal property, education, health care, natural resources and intra-provincial trade and commerce. Provincial governments are limited to raising revenue through the imposition of direct taxes. The provincial governments may also delegate some of their powers to municipal governments, which enact their own bylaws.

In nine of the 10 provinces and all three territories, the legal system is based on the English common law tradition. Provincial law in Quebec is based on the French civil law tradition.

Canada's Constitution established provincial superior courts as courts of general jurisdiction, meaning that these courts are not limited to matters of provincial law. Unless specifically assigned to another level of court, provincial superior courts have jurisdiction with respect to all laws in force in Canada, whether enacted by the federal government, provincial governments, or municipalities. As a result, most litigation in Canada is adjudicated before a provincial superior court.

In addition to superior courts, each province has established provincial courts to adjudicate matters within the jurisdiction specifically granted by enabling provincial legislation. The provincial courts try certain family matters and have a substantial jurisdiction for the prosecution of criminal offences.

In certain circumstances, parties may elect or be required to adjudicate their disputes in the federal court system, particularly where they involve matters affecting the powers of the federal government. The federal courts are bilingual and bi-jural – proceedings may be conducted in either English or French and under either the common law or civil law legal systems. Income and excise tax matters in Canada generally proceed before the Tax Court of Canada, which is a statutory court of first instance. Like the Federal

Court, the Tax Court of Canada is bilingual – appeals may be brought and conducted in either English or French.

1.1.2 What is the scope of your succession law?

Every province in Canada has enacted laws governing the distribution of an individual's estate upon death. For example, in Ontario, the Succession Law Reform Act, R.S.O. 1990, c. S-26 (the SLRA) governs the distribution of an individual's assets under a will and on intestacy.

Part I of the SLRA contains the statutory provisions governing the validity of wills in Ontario. The SLRA provides for four different kinds of wills: the attested will, the holograph will, the privileged will and the international will. Section 3 provides that a will must be in writing to be valid. The most common form of will is the attested will. To be valid, an attested will must be signed by the testator (or some other person in the presence of the testator and by his or her direction), the testator must make or acknowledge his or her signature in the presence of two witnesses, and the two witnesses must sign the will in the presence of the testator. The second most common form of will is the holograph will. To be valid, a holograph will must be written entirely in the handwriting of the testator and signed by the testator.

Part II of the SLRA contains the statutory provisions governing the distribution of an intestate estate in Ontario. The statutory scheme considers categories of individuals based on proximity of relationship. Section 44 of the SLRA provides that, in the event that the intestate is survived by a spouse and no issue, the spouse is entitled to receive all of the intestate's property. Where the intestate is survived by a spouse and issue, the spouse is entitled to a preferential share of the estate, currently set at C$200,000. After the preferential share, the intestate's spouse is entitled to a distributive share of the intestate's estate depending on the number of issue surviving. Similar rules govern testate and intestate succession in other Canadian provinces.

1.1.3 When are individuals and their property subject to succession rules?

In general, Canadian provincial succession laws apply at the time of death.

1.2 Private international law

1.2.1 What is the jurisdiction of local courts in international disputes?

In Canada, local courts have the authority to exercise discretion and assume jurisdiction over an international dispute. Both the local law and prevailing international approaches are considered in deciding whether jurisdiction should be assumed in a case involving international elements and whether a Canadian province would be a convenient forum for the adjudication of any such dispute.

In order to assume jurisdiction, a court must find that there is a real and substantial connection between the forum and the matter. If a court finds that it can indeed decide an international dispute, it will next consider whether this discretion should be exercised. Despite a finding that a real and substantial connection exists, a Canadian court may still decline jurisdiction if it is not a convenient forum in which the matter should be heard and adjudicated. As such, if a local court finds that it is a *forum non conveniens*, it will generally decline hearing an international dispute. In exceptional circumstances, a Canadian court may assume jurisdiction over a matter that does not satisfy the usual grounds if it is a forum of necessity. Ultimately, the exercise of discretion must be rooted in the principles of order and fairness.

In Québec, a party may make an application arguing that the authorities of another country are in a better position to decide an international dispute. A court may decline jurisdiction on these grounds, subject to exceptional circumstances being established.

1.2.2 What approach do local courts take to conflict of laws?

With respect to conflict of laws, special rules apply depending on the circumstances or the type of law at issue. For instance, rules governing succession pursuant to a will have been largely codified in provincial estates and succession legislation. Most of the provinces are signatories to the Convention Providing a Uniform Law on the Form of an International Will. For wills, the determination of which jurisdiction's law governs depends on the classification of the property in question as movable or immovable.

For movables, the general validity of a will is governed by the law of the testator's domicile at the time of the testator's death. For immovables, the validity of a will is generally governed by the law of the jurisdiction of the immovables' *situs*. The administration of a testator's estate with respect to movables and immovables follows suit, notwithstanding the jurisdiction in which the testator's will is originally probated.

The wills and succession legislation in each province provide that succession of real estate pursuant to a will is governed by the law of the place where the property is located. Accordingly, provincial courts will generally assume jurisdiction over real property situate in the province.

2. TAXATION

2.1 What are the criteria for liability to main taxes?

The concept of residence forms the basis for the determination of a person's Canadian income tax liability. Pursuant to section 3 of the Income Tax Act RSC 1985, c 1 (5th Supp) (the IT Act), Canadian resident taxpayers are liable to pay taxes annually on their worldwide income. Under subsection 250(1) of the IT Act, individuals are deemed to be residents of Canada if they spend more than 183 days in Canada during a calendar year. Otherwise, individuals may still be deemed to be residents of Canada if they meet the common law test for Canadian tax residency. Factors considered in determining whether an individual is resident in Canada include: ownership of real property in Canada; a spouse and/or dependants who remain in Canada; the presence of personal property in Canada; and the maintenance of social and economic ties to Canada.

Subsection 2(3) of the Act provides that persons who are not resident in Canada are liable to pay tax on Canadian source income. Non-resident individuals will also generally be subject to a 25% withholding tax under

Part XIII of the Act on Canadian source property income, including interest, dividends, rents and royalties, unless an exception applies under the IT Act or a tax treaty. In many cases, the general 25% Part XIII withholding tax rate may be reduced to 15% and in limited cases, to 10%, for certain types of income pursuant to the provisions of an income tax convention or treaty entered into between Canada and a foreign nation.

2.2 What are the relevant main taxes in your jurisdiction?

Income tax and capital gains tax

Under section 3 of the IT Act, income taxes are payable by all residents of Canada on their total worldwide income. Non-resident individuals are also liable to pay income taxes on Canadian source income. Paragraph 3(b) of the IT Act includes capital gains in computing income. Income tax rates vary based on the type of income and province or territory of residence, and increase based on an individual's level of income. The Canadian federal government and all provinces (except Alberta) follow a system of marginal tax rates based on total income from all sources earned during a taxation year. For 2014, the range of combined top federal and provincial marginal rates in Canada was 39% to 50% for general income, and 19.5% to 25% for capital gains.

Corporate tax

Under section 3 of the IT Act, persons resident in Canada, including corporations, are responsible for taxes on their worldwide income. Under the common law, the residence of a corporation is determined by the location of its central mind, management and control. This has generally been interpreted as the location where the members of the board of directors meet (*DeBeers Consolidated Mines Limited v Howe,* [1906] AC 455). However, if it is determined that the board of directors do not exercise independent management and control, then the place of residence of the corporation is determined by the location of the party where such control is exercised. Additionally, paragraph 250(4)(a) of the IT Act deems all corporations incorporated in Canada after 26 April 1965 to be resident in Canada.

A non-resident corporation will generally be subject to Canadian income tax on income from a business carried on at least partially in Canada, and for the disposition of taxable Canadian property. If a non-resident corporation is resident in a jurisdiction with which Canada has entered into an income tax convention or treaty, its business income will only be taxed in Canada to the extent that it is attributable to a Canadian "permanent establishment", as defined in the relevant convention or treaty. A non-resident corporation will also generally be subject to 25% Canadian withholding tax on Canadian source property income, including interest, dividends, rents and royalties, unless an exemption or lower rate applies under the Act or under a tax treaty.

Corporations are taxed at both the federal and provincial level. For a corporation which is not a Canadian-controlled private corporation (CCPC) (as such term is defined under the IT Act), the combined federal and provincial tax rates for Canadian manufacturing and processing income range from 17.5% to 31%, depending on the province or territory of the corporation's residence. For other income of a non-CCPC, the combined federal and provincial tax rates range from 25% to 31%, depending again on the province or territory of the corporation's residence. There are additional refundable taxes levied on investment income to incentivise the distribution of passive income to shareholders.

VAT/sales tax

Under the Excise Tax Act RSC 1985, c E-15 (the Excise Act), all merchants are required to collect a value-added tax of 5%, known as the Goods and Services Tax (GST), applicable to the supply of all goods and services in Canada, with the exception of goods and services that are either exempt or zero-rated. In certain provinces, the GST is harmonised with provincial sales taxes and collected by the federal government in the form of a Harmonized Sales Tax (HST), which functions in the same manner as the GST. In 2014, the HST rate in the Province of Ontario was 13%, while the rate in Alberta was limited to the GST rate of 5%.

Customs and excise taxes and duties apply to persons who are formally established in Canada at the time of importation of goods into the country. The Customs Act RSC 1985, c 1 (2nd Supp), and the Customs Tariff outline the duties and tariffs that are applicable to different classes of goods entering the country. Under section 212 of the Excise Act, every person who is liable under the Customs Act to pay duty on goods imported into Canada is also required to pay the GST applicable to the goods. These goods are also outlined in the list of tariff provisions set out in the schedule to the Customs Tariff.

Property tax

Canadian municipalities are authorised to impose a general property tax on taxpayers who own real property in the municipality. The amount of property tax payable in a year depends on the location of the taxpayer's property, and the municipality's assessment of the property's value. The tax rates applicable to properties differ among the provinces and municipalities. Additionally, different tax rates apply for different types of property; for example, lower rates apply to residential property than commercial property. The residential rates tend to be lower than in other industrial countries, as municipalities across Canada usually receive transfer payments from provincial governments.

A property or land transfer tax is also levied in British Columbia, Manitoba and Ontario. The transfer tax applies when a property is purchased, at a rate of between 0.5% and 3% of the total value of the property. Individuals purchasing their first property may be eligible for an exemption from the property or land transfer tax.

Estate/gift/death taxes
There are no specific estate and/or gift taxes in Canada, only provincial probate fees or estate administration taxes up to 1.5% of the value of the estate. However, when capital assets are transferred by way of gift, any accrued gain generally becomes taxable to the donor of the gift, with some exceptions for spouses and certain trusts. On death, the deceased is deemed to have disposed of all capital assets and, again with certain significant exceptions, the gain on such deemed disposition is taxable to him or her under subsection 70(5) of the Act.

Other taxes
Under the Canada Pension Plan R.S.C. 1985, c C-8 and the Employment Insurance Act S.C. 1996, c 23, individuals who work in Canada as employees are also required to make periodic pension and employment insurance contributions. These, along with federal and provincial income taxes, must be withheld and remitted by employers in the form of payroll deductions.

2.3 Enforcement/collection of taxes?

2.3.1 What are the basic procedures for collection and enforcement?

The Canada Revenue Agency (the Revenue Agency) is responsible for the collection of taxes in Canada. Under the IT Act, every individual who is liable to pay tax in a particular taxation year must file an income tax return for that year. GST or HST registrants (depending on the province or territory) are also required to file periodic returns.

Individual income tax returns must be filed by 30 April of the following year, or 15 June if the taxpayer (or his or her spouse or common-law partner) earns income from a business. Corporate income tax returns must be filed within six months of the end of the taxation year, as determined by the corporation's fiscal period. Although generally treated as individuals under the IT Act, *inter vivos* trusts are required to file income tax returns in a typical year by no later than 31 March for the preceding taxation year. Income tax returns may be filed by mail or electronically.

Upon receiving a tax return, the Revenue Agency commences the assessment process. The Revenue Agency officials review the return to ensure that all required information has been provided, and that the return is accurate on its face. In general, when the assessment process is complete, the Revenue Agency issues a Notice of Assessment to the taxpayer demanding the payment of any outstanding taxes, interest and/or any applicable penalties.

After the issuance of an original assessment, or as part of the review of a taxpayer's filings, the Revenue Agency may undertake an examination or audit of the taxpayer, which may result in a subsequent reassessment. The Act provides the Revenue Agency with broad powers to compel the production of non-privileged documents and records for its review. The Revenue Agency may also require a taxpayer to furnish information and to respond to questions posed by an auditor or similar officer. Generally, following a civil audit or review of a taxpayer, the Revenue Agency must issue a reassessment to the taxpayer within three years of the date of the taxpayer's original assessment. Reassessments beyond this three-year period may be permitted in cases of misrepresentation, omissions or fraud by the taxpayer. When the reassessment process is complete, the Revenue Agency issues a notice of reassessment to the taxpayer demanding the payment of any outstanding taxes, with interest (as applicable). The Revenue Agency may also impose additional penalties (including penalties for gross negligence) where it concludes that a breach of the IT Act has been committed by the taxpayer.

Pursuant to the Supreme Court of Canada's decision in *The Queen v Jarvis* (2002 SCC 73), the Revenue Agency may conduct parallel audits and investigations of taxpayers. The rights provided to individuals under the Charter of Rights and Freedoms will apply when the predominant purpose of the Revenue Agency's review of a taxpayer shifts from civil to criminal tax enforcement. The Revenue Agency will be precluded from using the broad audit provided under the IT Act when investigating criminal tax evasion or fraud and will instead need to obtain a warrant to search or review documentation.

The Revenue Agency's collections division is tasked with the collection of all tax and related debts owed to the Receiver General of Canada. The IT Act provides the Revenue Agency with several collections powers. The Revenue Agency may assert a priority in collecting tax liabilities which are subject to a deemed trust, such as remittances in respect of employment income and GST/HST debts.

2.3.2 To what extent is non-compliance an issue?

A 2011 study of worldwide tax evasion indicated that Canada ranked 11th out of 145 countries with respect to lost revenues, with an estimated $81 billion US dollars lost annually as a result of tax evasion. Non-compliance with tax laws is accordingly an issue which has been addressed by the Canadian federal government in annual Budgets.

Measures have been recently introduced (including by way of amendments to the IT Act) to close perceived loopholes and to target specific tax evasion activities. These include the use of offshore structures and methods used by some taxpayers to evade the reporting and remittance of GST and/or HST. The Canada federal government has committed to direct resources to fight offshore and domestic tax evasion. The government's efforts have included the introduction of an Offshore Tax Informant Program, whereby tipsters may be rewarded if their tips lead to the collection of more than $100,000 in taxes owed to the Receiver General of Canada, as well as an underground economy initiative (which is further discussed in response to question 2.3.5, below). The government has also directed resources to the voluntary disclosure programme (discussed in greater detail in 2.3.6, below), which has been highly successful in providing Canadian taxpayers with a relatively secure and efficient opportunity to regularise their Canadian tax positions and filings.

2.3.3 In which circumstances can default result in imprisonment?

Under the IT Act, an individual may be sentenced to a term of imprisonment for several tax offences, including:

- Failing to file or make a return as and when required, punishable by a fine and/or imprisonment for a term not exceeding 12 months (section 238).
- Making false or deceptive statements in a return, punishable by a fine and/or imprisonment for a term not exceeding two years (paragraph 239(1)(a)).
- Destroying, altering or disposing of books and records in order to evade the payment of taxes, punishable by a fine and/or imprisonment for a term not exceeding two years (section 239(1)(b)).
- Wilfully evading or attempting to evade the payment of taxes, punishable by a fine and/or imprisonment for a term not exceeding two years (section 239(1)(d)).

In 2014, there were over 100 successful convictions for tax evasion in Canada. However, sentences of imprisonment were only imposed in 34 of these cases. In serious cases involving tax evasion, the Revenue Agency may also impose fraud or similar charges under the Criminal Code, R.S.C. 1985, c. C-46 (as amended), which may carry a maximum jail term of 14 years depending on the severity of the offences and the surrounding circumstances.

2.3.4 What are your laws on extradition for tax offences?

The Canadian government may seek to have persons outside of Canada extradited to Canada pursuant to the Extradition Act, SC 1999, c 18. The Extradition Act applies in respect of any state or entity that is an extradition partner of Canada, which includes a state or entity with which Canada has entered into an extradition agreement, or whose name is listed in the Schedule to the act.

Although many extradition agreements entered into by Canada permit the extradition of persons charged with, or convicted of tax offences, it is important to review the specifics of the applicable treaty to determine whether it may be used to extradite any particular tax offenders. Extradition agreements will generally require that an offence be punishable by a sentence of more than two years imprisonment before commencing extradition proceedings. Because the treaties apply retroactively, they would include persons who committed an offence and fled Canada before a treaty came into force.

2.3.5 Have there been any recent changes of behaviour by tax authorities?

Fighting the underground economy

In November 2014, the Revenue Agency launched an underground economy strategy. Although Canada has one of the lowest participation levels in the underground economy of any Organisation for Economic Co-operation and Development (OECD) country, the federal government stated that it was committed to combating any underground economic activity in Canada.

The underground economy strategy is a three-year strategic framework whereby the Revenue Agency will:

- Further refine its understanding of the underground economy in Canada.
- Seek to reduce the social acceptability of participation in the underground economy in the country.
- Deploy a range of initiatives to encourage compliance and reduce participation in the underground economy. These initiatives will include the creation of audit teams specialised in underground economic activity, including identifying unreported and underreported income. The Revenue Agency is also seeking to have tax preparers registered with the Revenue Agency in order to help improve compliance. The registration initiative will be implemented in 2016-2017 and will enable the Revenue Agency to identify and target high-risk tax preparers who may be assisting with the underground economy.

High Net Worth/Related Party Initiative

It is understood that, at the time of writing, the Revenue Agency continues to target and focus audit activity on high net worth individuals and entities related to high net worth individuals as part of its "High Net Worth Project" or "Related Party Initiative". The initiative is primarily focused on related family-owned groups which include about 30 or more entities with a combined asset value in excess of C$50 million. As part of the Related Party Initiative, the Revenue Agency has issued lengthy and detailed questionnaires or "Audit Query Sheets" to a number of high net worth families requiring information to be provided on family wealth.
The Related Party Initiative is not unique to the Revenue Agency and is prompted, in many ways, by the efforts of other international tax authorities and OECD member states to target and assess high net worth families for compliance with tax laws and regulations. A detailed and periodic review of a Canadian family business structure is accordingly recommended for high net worth families. Any family or family business which is involved by the Revenue Agency in the Related Party Initiative should routinely engage professional advice and assistance prior to completing any Revenue Agency questionnaires or Audit Query Sheets.

Trusts initiative

In addition to the high net worth project, the Revenue Agency has, in the past few years, focused audit attention on domestic *inter vivos* trusts. The Revenue Agency was particularly concerned that trusts were not properly constituted and/or not managed in accordance with trust laws. At the time of writing, it is understood that the Revenue Agency has gained insights into discretionary family trust arrangements in Canada and that its audit initiative may not be as active as in the recent past. However, the Revenue Agency's recent attention on domestic *inter vivos* trusts underscores a need for Canadian taxpayers to pay due attention to the establishment of *inter* *vivos* trusts and to seek professional advice and guidance in relation to their ongoing management and administration.

General Anti-Avoidance Rule (the GAAR)

In addition to the above-mentioned initiatives and Revenue Agency projects, the Revenue Agency continues to review individual cases, transactions and certain tax planning to determine whether the GAAR in section 245 of the IT Act might be applied to deny tax advantages from which taxpayers might otherwise benefit. As of September 2013, the Revenue Agency's GAAR Committee recommended the application of the GAAR in 897 cases (77% of all cases referred to it) and declined the application of the GAAR in 266 cases (23% of referred cases). At the time of writing, it is understood that the Revenue Agency's GAAR Committee has generally recommended the application of the GAAR in cases involving:

- Offshore structures and transactions, including offshore insurance, leasing transactions and trusts.
- Cross-border tax-free returns of capital (often referred to as "surplus strips").
- Transactions involving foreign tax credits claimed under the IT Act for Canadian tax purposes.
- Income splitting and the application of the "kiddie tax" under the IT Act.

2.3.6 Are there any voluntary disclosure or amnesty programmes?

Canada's tax system is a self-reporting system in which taxpayers are responsible for accurately assessing and reporting their tax liabilities. Where a taxpayer has previously provided inaccurate or incomplete information, the taxpayer may make an application to the Revenue Agency under the federal Voluntary Disclosures Program (the VDP).

The VDP applies to disclosures for income taxes, excise taxes, sales taxes and other taxes and charges. Taxpayers who make a valid disclosure under the VDP must pay the outstanding taxes or charges, typically with interest, but are not charged penalties or prosecuted with respect to the disclosure if it is accepted by the Revenue Agency.

Disclosures made after 1 January 2005 for income taxes, and after 1 April 2007 for excise and sales taxes, are subject to a 10-year limitation period, meaning that penalties may only be cancelled and discretionary interest relief may only be provided in respect of this period. Disclosures may be submitted or initiated with the Revenue Agency on a named or on a no-name basis. In order to be accepted as a valid disclosure by the Revenue Agency, the disclosure must be voluntary and complete. This means that the taxpayer must provide full and accurate facts and documentation to the Revenue Agency before the taxpayer becomes aware of any compliance action being initiated by the Revenue Agency.

Under normal circumstances, a taxpayer is entitled to utilise the benefits of the VDP only one time. A second disclosure for the same taxpayer may be considered by the Revenue Agency if the circumstances surrounding the second disclosure are beyond the taxpayer's control. Second disclosures are only permitted on a named basis.

Voluntary disclosures initiated on a no-name basis are generally assigned a reference number and a strict 90-day deadline for the submission of details and information (including outstanding tax filings) on a named basis. The Revenue Agency recently announced changes to the processing of voluntary disclosures in an effort to make the process more efficient for Canadian taxpayers. It is understood that this move was, in part, prompted by the overall success of the voluntary disclosure initiative, which has resulted in a large number of Canadian resident taxpayers disclosing information to the Revenue Agency and regularising their Canadian tax positions.

3. EXEMPTIONS AND/OR EXIT TAXES FOR NEW IMMIGRANTS AND EMIGRANTS?

3.1 Which taxes are relevant in your jurisdiction?

There are no taxation implications, *per se*, in obtaining Canadian citizenship. However, to the extent that individuals are resident in Canada when they become citizens, they will continue to be liable to pay income taxes under the IT Act. Citizens of Canada may cease to be tax residents of the country and may also be considered or deemed to be resident in another country for tax purposes, including under a tax treaty or convention which Canada has entered into with another nation.

Immigrating to Canada

Under section 128.1 of the IT Act, individuals are deemed to have disposed of and reacquired all of their capital property at its fair market value immediately prior to immigrating to Canada. Consequently, individuals who become residents of Canada will be liable to pay Canadian tax only on the gains accrued after their arrival in Canada when a capital asset is sold or otherwise disposed of. Nonetheless, immigrants to Canada might wish to dispose of their capital property prior to establishing residency. Likewise, immigrants to Canada should carefully consider and obtain professional tax advice as to whether their existing property and asset holdings outside of Canada may trigger the application of non-resident trust rules, foreign accrual property income rules and/or foreign investment entity rules under the IT Act. In many cases, depending on the tax laws of the jurisdiction of a prospective immigrant's residence, pre-immigration tax planning may be possible in order to make the relocation and transition to Canada as tax-effective as possible.

Until recently, immigration trusts offered certain tax advantages to Canadian immigrants and were a central feature of pre-entry income tax planning. However, as a result of amendments to the IT Act announced in the 2014 Federal Budget, planning involving immigration trusts is no longer available for future taxation years. Previously established immigration trusts will become subject to Canadian income taxation on their worldwide income on an accelerated basis and should accordingly be reviewed.

In particular, immigrants to Canada should consider disposing of any property that is likely to give rise to the possibility of double taxation before establishing residency. If prospective immigrants have made contributions to non-Canadian trusts, they should also determine whether any such trusts may be subject to the non-resident trust rules in section 94 of the IT Act.

Emigrating from Canada

Individuals emigrating from Canada must pay taxes upon departure. Subsection 128.1(4) of the IT Act imposes a deemed disposition on the fair market value of, with certain exceptions, all of an individual's property. An individual, in other words, is generally deemed to dispose of his or her property at the time of departure and to receive the deemed proceeds of disposition equal to the fair market value of such property. These proceeds become the cost of property on the deemed reacquisition and give rise to capital gains taxes or tax recapture in respect of depreciable property (often referred to as "departure" or "exit" taxes), as applicable. In some cases, taxpayers departing Canada may post security with the Revenue Agency for departure or exit taxes payable in order to defer the payment of the taxes.

In general, real or immovable property situated in Canada (which is "taxable Canadian property" for the purposes of the IT Act) is a notable exception to the departure or exit tax rules under section 128.1 of the IT Act. Taxes are payable in respect of any accrued gains in such taxable property when disposed of by non-residents of Canada. Non-residents disposing of taxable property are generally required to apply for a clearance certificate from the Revenue Agency under section 116 of the IT Act in respect of the disposition.

In addition, section 128.1(10) of the IT Act requires that individuals who own reportable properties with a total value of more than C$25,000 immediately after the time of emigration from Canada, must report their property holdings to the Revenue Agency. Reportable properties exclude personal use properties such as belongings with a value of less than C$10,000. A Canadian life insurance policy is, however, a reportable property.

4. USE OF ASSET HOLDING VEHICLES

4.1 Which vehicles are available in your jurisdiction and how are they treated by the courts?

Trusts

With the exception of Québec, all other Canadian provinces and territories recognise the English law of trusts. Trusts may also be used for planning in Québec, albeit subject to a different set of rules than in other parts of the country. In each province, trusts, including *inter vivos* and testamentary trusts, are governed under a combination of trustees' legislation and the common law. Trustees' duties and powers are also governed by provincial legislation, in addition to the common law applicable to fiduciary relationships.

A trust is, with certain exceptions, considered to be an "individual" under subsection 104(2) of the IT Act and is accordingly subject to income tax in Canada if resident in the country. The common law test for determining the residence of a trust is where its central management and control abides, including control over investment decisions, the administration of trust property, the responsibility for banking and financial arrangements and the power to enter into contracts on behalf of the trust (*Fundy Settlement v The Queen.*, 2012 SCC 14). The Supreme Court of Canada's 2012 decision in *Fundy Settlement* signalled a departure from previously held notions of trust residency (that is, a trust is resident in the jurisdiction where its trustees are resident) and approved the application of the common law test otherwise used to determine the residence of corporations to determine the residence of trusts.

Partnerships (general and limited)

Partnerships in Canada are formed and governed by provincial partnership legislation and the partnership agreement. In Ontario, the Partnerships Act, RSO 1990, c P 5, defines a partnership as "the relation that subsists between persons carrying on a business in common with a view to profit". Therefore, unlike a corporation, a partnership is not considered to be a separate legal entity for Canadian law and tax purposes.

There are three types of partnerships that may be formed under Canadian law: a general partnership; a limited partnership; and, a limited liability partnership. In a general partnership, all partners are jointly and severally liable for the liabilities of the partnership. In a limited partnership, the general partner is liable for the liabilities of the partnership and limited partners are only liable for their agreed upon capital contribution. A limited liability partnership is usually used in the context of professional partnerships (for example law firms, accounting firms, and so on).

Partnerships are not separate taxpayers for Canadian income tax purposes. Each partner is allocated a share of the partnership's income or loss and then includes this in the computation of the partner's income for tax purposes. The partnership does not file a tax return, but it is required to file an annual "information return" detailing the distribution of the profit or loss of the partnership.

Companies

Under Canadian law, corporations are treated as separate legal entities and as separate taxpayers. Accordingly, corporations are entitled to acquire rights, own property and become subject to obligations independently of their members. In some cases, the courts may determine that it is appropriate to ignore the separate legal personality of a corporation and pierce or lift the corporate veil, thereby extending liability to shareholders, directors and other persons in effective control of the corporation. However, the courts generally respect the separate status of corporations and will only pierce the corporate veil where it is required by statute or where other extraordinary circumstances exist.

Foundations

Foundations are only recognised and used in the charitable sector in Canada. Section 149.1 of the IT Act recognises public and private charitable foundations. Canada does not permit or recognise the use of foundations for private family assets and planning. *Inter vivos* trusts established on an irrevocable basis are accordingly commonly used for tax and estate planning. The trusts' governing agreements or indentures may permit trustees to make discretionary distributions of income and/or capital to one or more named beneficiaries, in a similar manner as the constating documents of European family foundations. Foundations established in European countries may be treated as trusts or as corporations in Canada, depending on the facts and circumstances (*Sommerer v The Queen*, 2012 FCA 207). In general, the Revenue Agency takes the position that stiftungs established in European jurisdictions such as Lichtenstein are to be treated as trusts for Canadian tax purposes.

5. PHILANTHROPIC AND CHARITABLE OPTIONS

5.1 Is there a compulsory registration system for charities?

There is no compulsory registration system for charities in Canada. However, registration improves the legitimacy and credibility of a charitable organisation. Additionally, registered charities have certain privileges that other organisations do not have, such as the ability to issue receipts to individual or corporate donors for income tax purposes.

An organisation considering registration should be aware of legislative requirements. For instance, in Canada, a registered charity must devote all of its resources to its charitable objects. Thus, a registered charity would be limited in its ability to engage in ancillary activities such as political lobbying.

The body responsible for charitable registration in Canada is the Revenue Agency. To successfully register as a charity, the Revenue Agency must be satisfied that the applicant is a charity as defined in law; has objects or purposes and activities that are charitable; and will carry out its activities in accordance with the law. The legal definition of charity is based on common law standards that have developed over time. To fit within the definition, an organisation must, among other things, demonstrate that its activities and purposes provide a tangible benefit to the public; and that those who are eligible to receive this benefit are either the public as a whole or a significant part of the public. With respect to objects or activities that are charitable, the Charities Accounting Act, RSO 1990, c C 10, defines a charitable purpose as: "relief of poverty; advancement of education; advancement of religion; and any other purpose beneficial to the community."

5.2 Are there any tax reliefs available?

Income tax

As registered charities, an exemption from income tax is provided under section 149.1 of the IT Act for charitable foundations. Normally, organisations are taxed on their profits. As charities are not intended to make profits and are benefiting the public, their income is exempt from taxation under Part I of the IT Act.

Individual and corporate donors may also receive tax benefits proportionate to the value of their donations under sections 118.1 and 110.1 of the IT Act. Corporate donors receive "tax deductions", which are calculated as an amount deductible from their total taxable income. By contrast, individual donors receive "tax credits", which are calculated as an amount deductible from their total tax payable.

Consumption tax
The GST applies to most property and services in Canada. The provinces of New Brunswick, Nova Scotia, Newfoundland and Labrador, Ontario, and Prince Edward Island have harmonised their provincial sales tax with the GST to create an HST. Registered charities receive certain relief from GST/HST. While businesses are required to register for GST/HST, many charities are not. Moreover, most supplies made by charities are exempt from GST/HST.

Property tax
Typically, property taxes in Canada are imposed at a municipal level. Each jurisdiction has its own property tax regime and some offer exemptions for charitable organisations. Commonly, exemptions are granted to those charitable organisations which can demonstrate that they fit within one or more categories of a set list. These categories may include: cemeteries; churches; education institutions; libraries; historic sites; hospitals; recreational facilities for the poor, seniors, persons with disabilities and other identified groups; property owned by specific community groups such as the Canadian Red Cross; and community centres.

5.3 Are there any particular distribution requirements and can domestic charities apply funds outside your jurisdiction?

The Revenue Agency imposes a disbursement quota on registered charities. This quota represents the minimum amount a charity is required to spend each year on its own charitable activities or on gifts to qualified donees, such as other registered charities. The disbursement quota calculation is determined by the value of the property that is not used for charitable activities or administration. For instance, if the average value of a registered charity's property not used directly in charitable activities or administration exceeds $100,000 during the 24 months before the beginning of the fiscal period, the charity's disbursement quota is 3.5% of the average value of that property.

Canadian charities may operate abroad or they may make gifts to qualified donees who are outside of the country. The list of qualified donees is quite narrow and includes only a limited number of foreign organisations. As such, most Canadian charities wishing to operate outside of Canada choose to do so by delivering their own programmes.

The Revenue Agency's Charities Directorate is increasingly concerned with charitable organisations operating in parts of the world where terrorism or other forms of violence are prevalent. Canada encourages charities to follow best practices in relation to, among other things, internal governance, fundraising and financial accountability. Moreover, Canada has enacted the Charities Registration (Security Information) Act, SC 2001, c 41, to ensure that the tax benefits reserved for Canadian charities are not used to provide support to terrorism.

6. REGULATORY ENVIRONMENT

6.1 What is the financial environment like for funds and other investment vehicles?

Canada continues to have a robust environment for funds and investment vehicles. In general, mutual funds remain popular investment choices for Canadian investors and a variety of mutual funds are actively promoted by Canadian banks and other financial institutions. Other, more sophisticated investment products are also available. Public Canadian corporations also generally list their shares for trading on one or more Canadian stock exchanges, of which the largest stock exchange is the Toronto Stock Exchange (the TSX). By market capitalisation, the TSX is the third largest stock exchange in North America and the seventh largest exchange in the world.

As in other OECD member countries, securities and investment products in Canada are regulated under both federal and provincial legislation. Provincial securities commissions have jurisdiction over provincial securities legislation and associated regulations. In general, the Bank of Canada (Canada's central bank) establishes and monitors monetary policy in the country.

From an income tax perspective, the IT Act recognises and provides Canadians with the option to make contributions to certain registered tax plans. These registered tax plans include (and are not limited to) registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs) and tax-free savings accounts (TFSAs). Each registered plan is governed by a separate series of rules under the IT Act. Canadians may make annual contributions to RRSPs, which can, in turn, hold "qualified investments". These "qualified investments" may, in general, include the shares of publicly-listed corporations and/or certain mutual funds or other securities. Canadian taxpayers are subject to an annual maximum contribution limit to an RRSP. Unused contribution space may be brought forward into future taxation years. Taxpayers may generally deduct the amount of contributions made by them to an RRSP from their incomes in respect of the taxation year for which the contributions are made. Investments held in RRSPs may grow on a tax-free basis until they are ultimately withdrawn by a taxpayer. The quantum of the withdrawal is generally included in the taxpayer's income in respect of the year in which the withdrawal takes place and is taxed accordingly.

In contrast to RRSPs, TFSAs provide Canadian resident taxpayers with the opportunity to hold cash or securities in a separate account which is wholly sheltered from income taxation. Securities held in a TFSA may grow over time on a tax-free basis and be similarly withdrawn by a taxpayer on a tax-free basis. For the 2009 through 2012 taxation years, taxpayers could contribute a total of C$5,000 per year to a TFSA. The contribution amount was increased to C$5,500 per year for 2013 and subsequent taxation years. As with RRSPs, unused contribution space may be brought forward into and applied during future taxation years.

6.2 What is the impact of anti-money laundering legislation on professional/banking confidentiality?

Due in particular to their international and US presence, a number of Canadian banks and financial institutions have been impacted by global anti-money laundering legislation and the end of banking secrecy and confidentiality rules in several global jurisdictions. It is generally understood that these banks and financial institutions are making efforts to comply with all legislation, rules and regulations, both foreign and domestic. Canadian banks and financial institutions have been particularly affected by the US Foreign Account Tax Compliance Act (FATCA) rules, which are discussed in response to question 6.4, below.

6.3 Is it necessary to comply with tax and other information exchanges?

Canada has entered into numerous international tax treaties, conventions and tax information exchange agreements with foreign jurisdictions. Recently, Canada has entered into exchange agreements with jurisdictions such as Lichtenstein, Jersey, the Isle of Man and certain Caribbean states which were previously (and may still be) considered as tax havens or highly favourable jurisdictions from an income tax perspective.

In general, Canada's tax information exchange agreements do not compel the production of information which is neither held by Canadian authorities nor in the possession of persons who are within Canada's territorial boundaries. However, Canada's tax exchange agreements do, in general (subject to certain exceptions), mandate the production of information which is accessible to or in the possession of Canada's competent authority (being the Revenue Agency) or the competent authority of a foreign state, without regard to the reason why the information is necessarily sought. The specific production of information sought by a foreign competent authority under a tax exchange agreement would need to proceed in accordance with Canada's domestic laws, including under any applicable provisions of the IT Act.

6.4 What is the impact of US and other FATCA rules?

As discussed in response to question 6.2, above, it is understood that Canadian financial institutions are actively complying with FATCA requirements. From a practical perspective, customers of Canadian financial institutions are being asked to provide details regarding what connections, if any, they may have to the US. This has imposed an additional compliance requirement on banks and their customers and has, in certain instances, included the completion of US FATCA forms.

7. KEY PLANNING POINTS FOR LONG TERM RESIDENT FAMILIES

The following key planning points should be considered by long-term Canadian resident families:

- Planning involving one or more family trusts and holding companies.

- The use of tax-deferred transfers, reorganisations of share capital or "freezes" under the IT Act for Canadian corporations, including in order to have future corporate growth accrue to the benefit of future generations.
- Planning involving spousal trusts (either testamentary or *inter vivos*), joint partner or alter ego trusts, depending on a taxpayer's age and family circumstances.
- Planning involving Canadian life insurance policies, including to fund the payment of capital gains taxes arising as a result of the deemed disposition and reacquisition of capital assets immediately prior to an individual's death, under subsection 70(5) of the IT Act.
- Multiple will planning in certain Canadian provinces (namely Ontario) to shelter certain assets (namely private company shares and partnership interests) from the payment of provincial probate fees or estate administration taxes.
- Planning involving marriage or domestic contracts in certain Canadian provinces (either before or after marriage) to best preserve family business and trust interests and to best keep these interests within a business family.

8. KEY POINTS FOR MIGRATING/TEMPORARY RESIDENT FAMILIES

As a result of the end of planning involving immigration trusts (as announced in the 2014 federal Budget), migrating or temporary resident families in Canada should take note of the following key points:

- Effectively utilising the provisions of section 128.1 of the IT Act to "bump" the cost basis of capital assets at the time of immigration to Canada to the assets' fair market values at that time.
- Mitigating the effect of or ensuring that, among others, non-resident trust rules, foreign accrual property income rules and foreign investment entity rules do not apply to an immigrant's foreign holdings.
- Liquidating investments and holdings prior to Canadian immigration, or engaging in pre-immigration tax planning to ensure that investments are held in a tax-efficient manner for Canadian tax purposes, and to mitigate double taxation as best as possible.
- Effectively planning for exit or departure taxes payable in respect of the deemed disposition of properties when one ceases to be a Canadian tax resident.

9. FORTHCOMING LEGISLATION AND OTHER CHANGES

Notable amendments to the IT Act are to become effective as of 1 January 2016. These amendments particularly target the tax treatment of testamentary trusts. At the time of writing, testamentary trusts (like individuals) continue to be subject to graduated rate taxation both federally and provincially. Many of the Canadian tax benefits presently available to individuals are, accordingly, also available to testamentary trusts.

The federal government expressed concerns in the 2013 and 2014 federal Budgets that testamentary trusts were being used by taxpayers as a means of achieving tax savings which might otherwise not be available to them. The 2014 Budget sought to tax testamentary trusts in a similar manner as *inter vivos* trusts, which are subject to the highest marginal tax rates in the province of their residence, subject to flowing-through income to beneficiaries. There are certain exceptions to the forthcoming top marginal tax rate treatment of testamentary trusts, most notably for trusts established for the benefit of certain disabled beneficiaries and for "graduated rate estates" (GREs).

Graduated rate tax treatment will be available to a deceased individual's estate for a 36-month period. At the end of the 36-month period, should the estate continue to exist, there will be a deemed year-end and the GRE will come to an end. Top marginal rate taxation will apply to the estate at the end of the GRE term. It is expected that the 36-month GRE term is the reasonable period during which most Canadian estates will be administered, but existing estate and tax planning should be revisited and re-evaluated by a Canadian tax professional, as necessary.

The 1 January 2016 amendments to the IT Act also include changes to the taxation of spousal, alter ego and joint partner trusts upon the death of a life tenant or surviving beneficiary, as the case may be. The IT Act permits the tax-deferred transfer or "rollover" of property into spousal, alter ego and joint partner trusts. Spousal trusts may be established on a testamentary basis or on an *inter vivos* basis, while alter ego and joint partner trust planning is available to individual or spouses who are above the age of 65. At the time of writing, on the death of a surviving spouse or life tenant of a spousal, alter ego or joint partner trust, it is the trust that is responsible for the payment of the resulting capital gains tax liability. However, as a result of the 1 January 2016 amendments, the estate of the surviving spouse or life tenant will be responsible for the payment of the capital gains tax liability. While this may be beneficial in certain circumstances, it may impose challenges to existing planning for a number of individuals, particularly in second or multiple marriage situations. Existing planning should therefore be revisited and re-evaluated by a Canadian tax professional.

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