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John Riches

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THE

Private Wealth & Private Client Review

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Editor
John Riches

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PREFACE

I INTRODUCTION

As I reflect on the developments of the last 12 months, the overriding theme is that of continuing regulatory change in the private wealth arena. A sense of increasing pace and convergence in particular stand out in comparison with earlier years.

The pace component is best seen in the introduction of new regimes or the updating of existing rules. The theme of convergence is based upon how centrally significant the concept of 'beneficial ownership' is becoming to many of the initiatives. A third strand is an increasing divergence between the European Union and the United States in this arena: the European Union continues to force the pace on transparency, while the United States proceeds at a much more leisurely speed and gives greater weight to privacy concerns than its European neighbours.

Clients whose assets are fully declared and are in compliance with their tax obligations are becoming increasingly sensitive to the massive complexity and increased regulatory burden that falls upon service providers and the attendant costs that they are obliged to meet. This is leading to a mindset in which additional elements of complexity in asset-holding structures are being viewed with a greater degree of scepticism. In some cases, it is also leading to a review as to whether existing structures, whether trusts or holding companies, are still the best means of achieving the family's objectives and warrant additional cost and regulation.

While these compliant families fully understand the need for transparency to tax and regulatory authorities, there is growing concern about the pressure for public disclosure in the context of beneficial ownership registers when the disclosure relates not to businesses that trade and engage with the public at large, but to family asset-holding structures.

A review of the preamble to the EU's Fifth Anti-Money Laundering Directive (5 AMLD) shows that, while apparent lip service is paid to respecting an individual's right to privacy, the argument that greater public or quasi-public access to information with respect to many private asset-holding structures is required to combat the fight against terrorism and money laundering appears to hold sway. The fact that any private asset-holding structure of this type will be obliged to provide comprehensive and detailed beneficial ownership information to regulated service providers such as banks, trust and corporate service providers, legal advisers and accountants is not regarded as sufficient by EU policymakers.

5 AMLD also exemplifies a mindset in which those whose family structures (such as trusts and foundations) are managed outside the EU are subjected to a greater degree of transparency than for EU-managed structures. The rationale for this approach is that, as non-EU jurisdictions have not embraced the same degree of transparency for corporate

registers, it is necessary to render the entities that hold assets with an EU connection, such as real estate, or those with an ongoing EU 'business relationship', to public scrutiny. I deal with this in greater depth below.

Tax authorities have been swift to fasten onto the increased scope of these measures. While fighting terrorism and drug-smuggling was their original purpose, they have enabled tax authorities to widen the net of information that is collected and reported on citizens who are neither terrorists nor drug barons but who hold significant wealth in complex asset-holding structures.

In the rest of this foreword, I will consider two specific areas:

a the Organisation for Economic Co-operation and Development (OECD)'s revised Common Reporting Standard (CRS) Commentary with a focus on trust guidance; and

b the wide-reaching implications of the EU's 5 AMLD and the meaning of 'control' in a trust context with regard to UK and Maltese trust registers.

i CRS Revised Handbook (April 2018) with a focus on the amendments to trust guidance

CRS applies to trusts when:

a a trust is a reporting financial institution (RFI); or

b a trust is a passive non-financial entity (NFE) that maintains an account with an RFI.

One of the key issues under discussion under the CRS and the first version of the CRS Commentary was the status of 'protectors'.

The CRS framework provides for reporting in the context of trustees who are RFIs to be made of persons who are treated as having an 'equity interest' in the trust fund. In this context, Section VIII.C.4 of the CRS states that an equity interest is held 'by any person treated as a settlor or a beneficiary of all or a portion of the trust or any other natural person exercising ultimate effective control over the trust'.

By contrast, in relation to a trust that is a passive NFE, it is necessary to identify controlling persons in relation to the trust. In the CRS, Section VIII D.6 defines 'controlling person' on the basis that the expression is intended to correspond to the term 'beneficial owner' as described in Recommendation 10 and the interpretative note on Recommendation 10 of the Financial Action Task Force (FATF) guidance as adopted in February 2012. In the case of a trust, controlling persons means 'settlor, the trustees, the protector (if any), the beneficiary or class of beneficiaries and any other natural person exercising ultimate effective control over the trust'.

In its FAQ issued in June 2016, the OECD took the position that, where a trust is an RFI, a protector 'must be treated as an account holder irrespective of whether it has effective control over the trust'. This response does not address the clear distinction in the CRS itself between the holders of equity interests in a trust that is an RFI (which only includes protectors if they actually exercise ultimate effective control; see above) when contrasted with the 'controlling persons' definition of a trust that is a passive NFE (which includes protectors regardless of the powers they hold; see above).

The Secretariat of the OECD previously confirmed that it is their intention that protectors of trusts that are RFIs should be reported, and the FAQ was discussed in and approved by the relevant working party of the OECD.

The second version of the Commentary has amended Paragraph 253 to read:

> *The Equity Interests are held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. The reference to any other natural person exercising ultimate effective control over the trust, at a minimum, will include the trustee* ***and the protector*** *as an Equity Interest Holder.*[1]

Until the legal basis for this is made clear in the CRS treaty itself, it is considered that there is a reasonable basis for forming the opposite conclusion.

The new Commentary also provides further clarity on what reporting is required when an account is closed or a beneficiary removed:

> *Where an account is closed during the year, the fact of closure is reported (**in addition to any distributions made prior to closure**). A debt or Equity Interest in a trust could be considered to be closed, for example, where the debt is retired, or where a beneficiary is **definitely** removed.*[2]

The other main amendments to the Commentary relate to the obligation to look through equity interest holders and controlling persons, which are themselves entities. Paragraph 256 has been amended to read:

> *Where an Equity Interest (such as the interest held by a settlor, beneficiary **or any other natural person exercising ultimate effective control over the trust**) is held by an Entity, the Equity Interest holder will instead be the Controlling Persons of that Entity. As such, the trust will be required to look through a settlor, **trustee**, **protector** or beneficiary that is an Entity to locate the relevant Controlling Person. This look through obligation should correspond to the obligation to identify the beneficial owner of a trust under **domestic** AML / KYC procedures.*[3]

The new Commentary notes that, in looking through entities,

> *The Controlling Persons of Passive NFE are defined in the CRS as natural persons exercising control over the Entity. The CRS definition of the term Controlling Person corresponds to the term beneficial owner as set out in Recommendation 10 and the accompanying Interpretative Note of the 2012 FATF Recommendations.*
>
> *The identity of beneficial owner of a legal person is defined as any natural person who ultimately has controlling ownership interest which is usually defined on the basis of a threshold. Footnote 30 to the Interpretative Note to Recommendation 10 of the 2012 FATF Recommendations (as printed in March 2012) gives an exemplary ownership threshold of 25%.*

1 Emphasis added.

2 Emphasis added.

3 Emphasis added.

Although, earlier in the Commentary it notes that:

> *It is important to point out that the ownership threshold for legal persons of 25% that is specified in footnote 30 in the Interpretative Note to Recommendation 10 of the 2012 FATF Recommendations (as printed in March 2012) is only indicative.*
>
> *Should the ownership structure analysis result in doubt as to whether the person(s) with the controlling ownership interest are the beneficial owners or where no natural person exercises control through ownership interest the analysis shall proceed to identifying any other natural person(s) exercising control of the legal person through other means. As a last resort, if none of the previously mentioned tests result in identification of the beneficial owner(s), the senior managing official(s) will be treated as the beneficial owner(s).*

Various examples are given on how to look through entities. Unfortunately, the new Commentary does not cover more complex structures that had previously been raised with the OECD, such as where a purpose trust owns a private trust company.

ii Trust registers: implications of 5 AMLD and the meaning of 'control'

The key text for 5 AMLD was published in December 2017 and endorsed by a legislative resolution of the European Parliament on 19 April 2018. It was then adopted by the EU Council on 14 May 2018. On 19 June 2018, the text for 5 AMLD was then published in the Official Journal of the European Union. EU Member States must transpose 5 AMLD into their national law by 10 January 2020.

Enlarged scope of registration

4 AMLD limits the scope of trusts requiring registration on a domestic trust register in the relevant EU Member State to those that generate tax consequences; 5 AMLD widens this scope to all trusts that 'reside or are established' in the Member State concerned. It also applies to *fiducie*, *treuhand* or *fideicomiso* as well as to foundations (which fall within the concept of legal arrangements). In practice, in the case of trusts, this will be the place where the trustee resides and not referenced to the governing law of the trust itself.

Non-EU resident trusts: registration

There is a requirement for non-EU resident trusts to register in two instances. The proposed new Article 31(3a) of 5 AMLD, for a trust established or residing outside the European Union, reads:

> *Member States shall require that the beneficial ownership information of express trust and other types of legal arrangements when having a structure or functions similar to trusts shall be held in a central beneficial ownership register set up by the Member State where the trustee of the trust or similar legal arrangement is established or resides.*

> *Where the place of establishment or residence of the trustee of the trust or similar legal arrangement is outside the Union, the information referred to in paragraph 1 shall be held in a central register set up by the Member State where the trustee enters into a* ***business relationship*** *or* ***acquires real estate*** *in the name of the trust or similar legal arrangement.*[4]

On business relationships, the existing text of Article 3(13) of 4 AMLD, which is not amended by draft 5 AMLD, states: 'a business relationship means a business, professional or commercial relationship that is connected with the professional activities of an obliged entity and which is expected, at the time when the contact is established, to have an element of duration.'

It is unclear what these words mean in practice. In the broader sense, they could be taken to include sourcing professional advice from a counterparty in an EU Member State. It is understood that the intent at the time 4 AMLD was finalised was to focus on 'business trusts'. The European Union was informed at the time by STEP and other commentators that this expression did not have any well-established meaning given that the vast majority of business activity conducted in a trust context would, for reasons of liability protection, be conducted through the mechanism of underlying companies. It remains to be seen what sort of guidance will be provided on this topic. If given a wide meaning, it could mean any use of professional advisers for legal, tax accounting or investment advice within the EU could trigger a requirement to register.

So far as the acquisition of real estate is concerned, it would seem this is confined to situations of EU real estate held at the trust level alone and not where such real estate is held via an underlying entity.

The regulations make provision to allow a trust to provide evidence of registration in one Member State through a 'certificate of proof of registration or an excerpt . . . of the register' to avoid the need for duplicated registration.

Public access

5 AMLD allows for a modified form of public access to the trust register by 'persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud'.

At present, there is no clearly understood meaning as to what constitutes 'legitimate interest'. The implications of the 5 AMLD preamble are, however, that NGOs and investigative journalists with anti-corruption profiles should normally be seen as being able to assert a legitimate interest. This may well be a matter where different EU jurisdictions take a variety of approaches.

There is also a requirement to interlink the various EU registers by 2021, and a requirement to provide mechanisms for the verification of data. The absence of any verification mechanism to date has been seen as a major limiting factor in the utility of beneficial ownership registers. How this verification will be policed is unclear.

The qualified public access on the basis of legitimate interest needs to be contrasted with circumstances where full public access is proposed. This is in the case of use of a non-EU holding company by a trust that either resides in an EU Member State or, it would seem, becomes registrable as a result of an EU business relationship or holding of EU real estate as noted above.

4 Emphasis added.

Article 31(4) of 5 AMLD considers the situation for trusts owning a controlling interest in a non-EU company:

> *The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II. Member States shall notify to the Commission the characteristics of those national mechanisms to ensure that the information on the beneficial ownership of a trust or a similar legal arrangement is accessible in all cases to:*
>
> *a. competent authorities and FIUs, without any restriction;*
> *b. obliged entities, within the framework of customer due diligence in accordance with Chapter II;*
> *c. any person or organisation that can demonstrate a legitimate interest;*
> *d. **any person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30(1), through direct or indirect ownership, including through bearer shareholdings, or through control via other means.***[5]

Article 30(1) is the requirement for EU companies to maintain a public register of beneficial owners. Thus, for all non-EU companies, any person can, on written request, obtain information on an EU-resident trust that controls it. It is understood at this stage that privacy may be afforded to EEA-resident companies that maintain a public register. This would mean Liechtenstein companies may not fall within the scope of sub-paragraph (d) as it is an EEA member.

It is not clear how an individual would in the first instance learn of the existence of a trust in these circumstances. There is also no recognition in these rules that non-EU companies may be subject to any form of public beneficial ownership register in their own jurisdiction (given the UK's recent proposals to extend public registers of corporate entities to its overseas territories).

iii The UK's position: Brexit transition

A recent UK parliamentary report stated:

> *Although these dates all fall after the UK's projected exit from the EU in March 2019, it now appears likely the Government will agree to a post-Brexit transitional period during which EU law would continue to apply in the UK as if it were still a Member State. In those circumstances, the new AMLD would have to be implemented if its transposition dates occur within that period (which, considering the Prime Minister has said the transition is likely to be "around two years", is likely to be the case for all three types of register).*

It is therefore anticipated, given the imminent application of 5 AMLD, that the United Kingdom will be obliged to comply with it, at least during the transitional period. Given that the United Kingdom has also been within the vanguard of transparency initiatives with its European neighbours, it would be unsurprising if it continued to apply 5 AMLD in some

5 Emphasis added.

form once the Brexit transition has concluded. Whether the public access component for trusts would be watered down remains to be seen. It is understood that the Labour Party advocates full public access to the UK trust register.

It is also unclear whether UK companies will be regarded as 'non-EU' for this purpose post-Brexit, but it is assumed they will be regarded as equivalent.

iv Meaning of 'control' in the context of EU trust registers

FATF 2012 Recommendations: Recommendations 10, 24 and 25 require trustees and financial institutions to identify 'the ownership and control structure of the customer'. I now turn to the two examples of trust registers in the EU that have been implemented under 4 AMLD, the forerunner to 5 AMLD. This throws an interesting light upon the extraordinary width of whom should be regarded as a beneficial owner in the context of a trust.

Section 5(2) of the UK's Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, which came into force on 26 June 2017, require that trustees register:

a a settlor;
b trustees;
c named beneficiaries;
d beneficiaries who have received a distribution from the trust; and
e anyone who exercises 'ultimate control' over the management of the trust.

Section 2(1)(e) Malta's Trusts and Trustees Act (Register of Beneficial Owners) Regulations (the RBO Regulations), which came into force on 1 January 2018, require that trustees register:

a a settlor;
b trustees;
c named beneficiaries;
d a protector; and
e anyone exercising 'ultimate and effective control over the trust by any means', including any other person:
- whose consent is to be obtained; or
- whose direction is binding in terms of the terms of the trust instrument or of any other instrument in writing, for material actions to be taken by the trustee.

FATF 2012 Recommendation 10: financial institutions must identify 'any other natural person exercising ultimate effective control over the trust'.

In the context of the EU's 4 AMLD and the trust register, Her Majesty's Revenue and Customs have stated that 'control' means a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to:

a dispose of, advance, lend, invest, pay or apply trust property;
b approve proposed trust distributions;
c vary or terminate the trust;
d add or remove a person as a beneficiary or to or from a class of beneficiaries;
e appoint or remove trustees or give another individual control over the trust; and
f direct, withhold consent to or veto the exercise of a power mentioned above.

In the context of the 4 AMLD and the beneficial ownership register for trusts, Malta's RBO Regulations have stated that 'control' means anyone exercising 'ultimate and effective control over the trust by any means', including any other person whose consent is to be obtained; or whose direction is binding in terms of the terms of the trust instrument or of any other instrument in writing, for material actions to be taken by the trustee.

The definition of 'material actions' means the following actions or any other actions achieving the same result:

a the amendment of the trust instrument;
b the addition or removal of any beneficiary, or any person from a class of beneficiaries, or any action affecting the entitlement of a beneficiary;
c the appointment or removal of trustees or protectors or to give another individual control over the trust;
d the acceptance of an additional settlor as may be applicable in terms of the terms of the trust instrument;
e the change of the proper law of the trust; and
f the assignment or transfer of all or most of the assets of the trust or the termination or revocation of the trust.

CRS imports into the concept of 'controlling persons' a direct link to the FATF defined terms of 'beneficial owners'. The CRS Commentary states at Paragraph 132:

> *Subparagraph D (6) sets forth the definition of the term 'Controlling Persons'. This term corresponds to the term 'beneficial owner' as described in Recommendation 10 and the Interpretative Note on Recommendation 10 of the Financial Action Task Force Recommendations (as adopted in February 2012),* ***and must be interpreted in a manner consistent with such Recommendations, with the aim of protecting the international financial system from misuse including with respect to tax crimes.***[6]

On this basis, it is highly likely that the expanded definition of control that is implicit in the UK and Maltese trust registers in an anti-money laundering context that flows from the FATF 2012 framework will, over time, result in more significant disclosure being required in a CRS tax information exchange context. This is an example of the aforementioned convergence theme (see Section I).

As a separate matter, the FATF has recently been reviewing the 2008 Guidance to Trust and Corporate Service Providers. It is possible that the amended text will also give more detailed guidance on the meaning of a 'natural person exercising effective control' in a trust context. This will have a direct impact on CRS reporting for trusts in the light of the linkage mentioned above in the CRS model treaty.

The significant extensions are most likely to impact influence exercised:

a by committees where, to date, it has been argued that no one individual can personally decide upon a course of action;
b in an indirect manner by a family individual who does not serve as a protector as such but instead has a power to appoint or remove protectors; and
c by those with negative 'veto' powers but without positive powers to decide upon specific matters that impact the relevant trust.

6 Emphasis added.

It could be timely, therefore, for advisers to consider whether current governance arrangements for the oversight of trusts are still 'fit for purpose' or not.

II CONCLUSION

What can be said at this stage is that advisers must continue to keep themselves informed on the important changes to the regulatory and transparency arena. There is no sign that the pace of reform is slowing at this point, quite the opposite.

In the longer term, it remains to be seen whether the degree of transparency and attendant public disclosure that the EU has embraced will be adopted more widely in the rest of the developed world. It is clear that the United States has been much slower to adopt measures that override privacy in such a sweeping manner.

John Riches
RMW Law LLP
London
August 2018

Chapter 12

CANADA

Margaret R O'Sullivan, Birute Luksenaite and Emma Hamilton[1]

I INTRODUCTION

i The current Canadian wealth situation

The current Canadian political, economic and social environment in 2018 is a mix of good and bad news. The only constant is change, which is moving at a progressively fast pace, with unpredictable and often unnerving results, and there is a general sense of apprehension about the future. The good news, however, is that the economy is generally stable, markets are good, corporate profits are strong and unemployment is at one of its lowest levels ever.

For the wealth management industry, times have never been better. An increasing percentage of the big six banks' revenues are now derived from wealth management, and the sector is experiencing strong income growth. Wealth management has an increasingly high profile among Canadians. One can barely surf the web, pick up a newspaper, watch TV or walk past an electronic billboard without seeing some aspect of wealth management services featured. More money than ever is being pumped into the area by financial institutions and select professional firms where consolidation is occurring.

On the legislative side, some aspects of the US tax reform have come as good news for Canadians with US connections. The increase in the US estate tax exclusion amount to US$11.2 million for 2018, indexed to inflation, means that exposure to US estate tax will impact only the wealthiest. However, this good news could be short lived owing to a sunset provision that provides that, unless there is further legislative action, after 31 December 2025 the exemption will revert back to the 2017 amount.

The Canadian government committed a major policy blunder in July 2017 when it introduced proposals and legislation aimed at what is termed unfair tax avoidance by business owners and shareholders of private corporations, including deferring tax and splitting income among family members, but backed down from the most egregious measures, much of which were ill-conceived and unworkable. One could say this climbdown was good news for the private wealth industry, but it has left a bad taste, and there are concerns as to what may still lie ahead.

More good news is that house prices are cooling and becoming more stable.

The bad news is that, at the time of writing, Canada's unrivalled and long-standing good relationship with its largest trading partner is under attack and in jeopardy as a result of President Trump's latest actions and pronouncements. If the North American Free Trade

1 Margaret R O'Sullivan is principal and Birute Luksenaite and Emma Hamilton are associate lawyers at O'Sullivan Estate Lawyers LLP.

Agreement is terminated or severely compromised, resulting in a decline in Canada's real domestic product, an increase in consumer prices, and job losses, it will be harmful to the Canadian economy. How can any business or individual expect to manage this risk?

Meanwhile, government and consumer debt levels are at an all-time high. Most unsettling is that a rift has begun to emerge in Canadian society, as millennials believe they cannot aspire to the economic affluence of their parents, and middle-earners are under increasing pressure to make ends meet. Further, some perceived the government's actions as divisive when it proposed tax changes targeting business owners and shareholders of private corporations who the government claimed were not paying their fair share of tax and were abusing the system. But this approach backfired, as most businesses in Canada are small and are the largest component and backbone of the economy, who would have borne the brunt of the proposals, and are made up of middle-earners who have relied on an established tax policy of over 40 years to sustain their businesses, resulting in a policy U-turn. Nevertheless, as a result, a substantial blow has been dealt to every entrepreneurial business owner who now finds himself or herself in an environment where the entrepreneurial spirit is no longer hallowed, but instead treated punitively by officials in charge of government policy. It is certainly not a supportive and conducive environment to grow our economy and reward those who take risks.

Evidently, there is a sense of discordance and unease regarding these developments; but given the volatility and uncertainty of the world in 2018, there is equally potential for new opportunities arising.

ii Key factors in respect of private clients

Canada's constitutional system is a federal one, with a clear division of powers between different levels of government. Its primary legal heritage for all provinces and territories, with the exception of Quebec, is based on English common law; Quebec's is based on civil law.

From the private client perspective, Canada offers the stability of a highly developed legal and court system and charter-based human rights protections. Property law, including succession, is a matter of provincial jurisdiction. Many modern and innovative concepts affecting private clients have been pioneered or progressed ahead of other jurisdictions in Canadian law, including equalisation of property between spouses on marital breakdown and death in several Canadian provinces recognising marriage as an equal economic partnership, recognition of common law spouses' and same-sex spouses' property and support rights, and same-sex marriage.

Many Canadian jurisdictions have modern laws governing incapacity and substitute decision-making to take into account the need for a modern infrastructure to deal with an increasingly ageing population. Canada's multiculturalism and relatively 'open-door' immigration policy, which is required to maintain positive population growth, expand the Canadian economy and is increasingly geared to attracting more entrepreneurs and skilled workers, have together created and contributed to a dynamic, sophisticated, diverse and innovative Canadian culture.

II TAX

i Personal taxation

Federal and provincial income tax

Canada taxes Canadian residents on their worldwide income from all sources, and non-residents on certain Canadian-source income, subject to international tax treaties. Income for Canadian tax purposes includes income from employment, business, property, 50 per cent of capital gains, and various other income sources, less certain deductions.

Canada is a federal state consisting of 10 provinces and three territories. The provinces and territories also tax income generally on the same basis as the federal government, except for Quebec, and increased federal tax applies to certain income not earned in a province or territory. Canadian tax is levied at graduated rates of up to approximately 54 per cent in combined federal and provincial rates on taxable income, less applicable tax credits.

Canada taxes non-residents on income earned in Canada, notably income from business or employment in Canada, and from certain taxable Canadian property, including Canadian real estate. A withholding tax of 25 per cent is deducted from certain income payable to non-residents, subject to international tax treaties that reduce the applicable rates.

Capital gains regime

Unlike most jurisdictions, Canada has no gift or inheritance tax. Instead, it levies taxes on capital gains. As of 2018, 50 per cent of capital gains are included in income upon actual disposition or deemed disposition. There is an exemption for capital gains on a principal residence and a lifetime exemption for capital gains on qualified small business corporation shares (C$848,252 in 2018) and on qualified farm or fishing property (C$1 million in 2018).

The basic tax unit is the individual. Limited opportunities exist for income splitting, including through the use of trusts. Tax on capital gains may be deferred on certain transfers of property, for example, between spouses, or on rollovers into private corporations in exchange for shares.

ii Developments relating to personal taxation

Provincial tax brackets for high earners

The combined provincial and federal tax rates for high earners in 2018 range from 44.5 per cent in Nunavut to 54 per cent in Nova Scotia. The highest tax rate in 2018 in Ontario is 53.53 per cent. In 2015, Alberta introduced graduated tax rates for taxpayers. Prior to the new rates, all Albertans paid tax based on a flat provincial tax rate of 10 per cent. As of 1 October 2015, the highest combined provincial and federal tax rate for Albertans has been 48 per cent.

2017 tax amendments in planning with private corporations

As part of the 2017 federal budget's commitment to address what it termed unfair tax-planning strategies using private corporations, the federal government released a consultation paper called 'Tax Planning Using Private Corporations' and proposed legislation that addressed advantages that were not available to most Canadians, such as income 'sprinkling' to lower-tax rate family members using private corporations; accumulating earnings that had been taxed at a low tax rate inside private corporations; multiplying the lifetime capital gains exemption; and converting a private corporation's regular income into capital gains to take advantage of the lower rate on capital gains. Owing to a strong reaction from Canadian small businesses and the professional community, the government significantly scaled back its 2017 proposals, enacting only the income sprinkling and passive income proposals, but not the capital gains proposals, which would have made it more difficult for business owners and farmers to pass on their businesses to their children.

Revised federal legislation on the taxation of trusts

Certain estates and testamentary trusts are taxed at graduated rates applicable to individuals, while trusts established during a person's lifetime are generally taxed at the top of marginal tax rates applicable to individuals. In 2016, graduated rates for certain estates and testamentary trusts were eliminated. Now, the top marginal rate is applied to testamentary trusts and certain estates. However, graduated rates will continue to be available to 'graduated rate estates' for 36 months and to certain testamentary trusts having disabled beneficiaries who are eligible for the federal disability tax credit. In addition, the taxation year end for testamentary trusts is now 31 December and testamentary trusts are required to make instalment payments of income tax.

Residence of trusts for tax purposes

The Supreme Court of Canada in 2012 clarified the law on the factual tax residence of a trust in *Fundy Settlement v. Canada*.[2] The Supreme Court of Canada held that the residence of a trust is where the central management and control of the trust occurs, a significant change from the former focus on a trustee's residence. *Discovery Trust v. Canada*[3] was the first decision to apply the test that was articulated in *Fundy Settlement*. In *Discovery Trust*, the court held that the beneficiaries' involvement in the administration of the trust did not result in the trust being resident in the province in which the beneficiaries resided, as the trustee still made all decisions with respect to the administration of the trust. Instead, the court held that the trust was resident in the province in which the trustee resided. The CRA's position in determining the location of the central management and where control of a trust takes place includes a review of whether the control rests with the trustee or someone else.[4]

In addition to factual residence, trusts may also be subject to statutory deemed residence rules for Canadian tax purposes. Trusts that are not factually resident in Canada may be deemed resident in Canada for certain tax purposes, including computing the trust's income. Deemed residence may apply to a trust if it has a Canadian-resident contributor or beneficiary.

New principal residence rules

In the Canadian system, capital gains are subject to taxation, and arise on the disposition of capital property. The capital gain is the difference between the property's adjusted cost base plus costs of disposal, and the proceeds of disposition. The adjusted cost is the actual cost of the property, subject to certain adjustments. Proceeds of disposition are, generally, the actual proceeds, but are subject to certain deeming provisions that will deem the proceeds to be equal to the fair market value of the property in respect of dispositions that are not at arm's length. A property is exempt from taxation on capital gains in the years that it is designated a principal residence.

2 *Fundy Settlement v. Canada*, 2012 SCC 14, [2012] 1 SCR 520.

3 *Discovery Trust v. Canada*, 2015 NLTD(G)86.

4 CRA, Income Tax Folio S6-F1-C1, Residence of a Trust or Estate, 24 November 2015.

As of 3 October 2016, both individuals and trusts must report the disposition of a principal residence and make a principal residence designation in the prescribed form and manner. The period in which the Canada Revenue Agency (CRA) can reassess beyond the normal reassessment period is indefinitely extended if the disposition of a property is not reported and a penalty applies for late filing. For dispositions on or after 3 October 2016, an individual who is a non-resident of Canada in the year of acquisition of a principal residence loses the bonus exemption year when calculating the principal residence exemption.

As of 2016, only certain eligible trusts may designate a property as a principal residence for any year of ownership after 2016. Eligible trusts include qualified disability trusts, alter ego trusts, spousal or common law partner trusts, joint spousal and joint common law partner trusts, and certain trusts for the exclusive benefit of the settlor during the settlor's lifetime. Eligible trusts also include 'orphan' trusts where: the settlor died before the start of the year; the eligible beneficiary is a minor child whose parents died before the start of the year and is a minor child of the settlor; and at least one beneficiary of the trust is a resident of Canada during the year and is a specified beneficiary of the trust for the year.

Non-resident speculation tax

To date, two Canadian provinces – Ontario and British Columbia – have enacted additional land transfer taxes that apply to foreign buyers. As of 21 April 2017, the Ontario government introduced a 15 per cent tax on the value of the consideration when a residential property in the Greater Golden Horseshoe area is purchased or acquired by individuals who are not citizens or permanent residents of Canada, foreign corporations, or taxable trustees of trusts involving foreign individual- or corporate trustees or beneficiaries. Residential property is defined as land that contains between one and six single family residences. The new Toronto non-resident speculation tax applies in addition to the generally applicable land transfer taxes payable on Toronto properties at rates of up to 5 per cent (2.5 per cent being the Ontario land transfer tax and an additional 2.5 per cent being the Toronto land transfer tax).

As of 2 August 2016, British Columbia enacted a similar 15 per cent property transfer tax payable by foreign individuals, corporations or taxable trustees (the Vancouver tax) in addition to the general property transfer tax of approximately 2.5 per cent on transfers of residential property located in the Metro Vancouver Regional District (the Vancouver District). The 2018 British Columbia budget introduced an increase to the Vancouver tax to 20 per cent, effective as of 21 February 2018, and a new annual speculation property tax was proposed, which will apply to Vancouver District properties at rates of up to 2 per cent of property value per year in addition to the general property tax that applies to all owners.

General anti-avoidance rule in respect of income tax

The Income Tax Act (the Tax Act) contains a general anti-avoidance rule (GAAR), which may be applied to deny a tax benefit otherwise available under the Tax Act where certain conditions are met. In considering whether the GAAR applies, a court will generally consider whether there was a tax benefit, whether the transaction (or series of transactions) giving rise to the tax benefit was an 'avoidance transaction' and whether the avoidance transaction giving rise to the tax benefit was abusive.

Whistle-blower rules, audit initiatives and compliance measures

The CRA has launched the Offshore Tax Informant Program, under which the CRA will enter into a contract to provide financial compensation to individuals who provide information that leads to the assessment and collection of additional federal taxes in excess of C$100,000, provided all recourse rights associated with the assessment have expired and where the non-compliant activity involves property located outside Canada or certain other foreign elements. Banks and other financial intermediaries are required to report international electronic funds transfers of C$10,000 and over, to the CRA. Such transfers are currently reported to Canada's Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). The CRA's Related Party Initiative is ongoing, under which individuals, including high net worth individuals (generally, with over C$50 million) or those with complex planning using many related entities, have been asked to provide detailed information and supporting documents about Canadian and foreign interests. Thresholds relating to value and complexity have been relaxed, and individuals not under audit are also being asked for such information. An aggressive tax planning reporting regime generally requires advisers to report to the CRA information concerning certain transactions on Form RC312 by 30 June of the following year. Reportable transactions or a reportable series of transactions will generally include an avoidance transaction or series of transactions for the purposes of GAAR if they feature two of the following: contingent fees, confidentiality protection or contractual protection. Where the form is not filed, the denial of tax benefits and possible penalties may result.

iii Cross-border structuring

Immigration to Canada

Canada relies heavily on immigration and offers certain tax concessions to immigrants. These same concessions, along with the lack of gift and inheritance tax, make Canada an attractive destination. Upon immigration to Canada, an individual receives a 'step up' in the tax cost of his or her capital property (excluding taxable Canadian property), which eliminates Canadian tax liability for capital gains accrued to that point. In some cases, it may be possible to transfer a foreign-registered pension plan into a Canadian-registered retirement savings plan on a tax-free basis.

Non-resident trusts and immigration trusts

Certain non-resident trusts established by non-resident settlors, provided various conditions are met, may be exempt from Canadian taxes and can distribute trust capital to Canadian-resident beneficiaries tax-free, which provides tax planning opportunities where a non-resident's trust is situated in a low-tax jurisdiction. However, the opportunities for trust planning with non-resident trusts have been significantly curtailed by the revised Section 94 of the Tax Act, which deems certain trusts with Canadian-resident contributors or Canadian-resident beneficiaries to be Canadian resident and taxable on their worldwide income. Where a trust is deemed to be Canadian resident, Canadian-resident contributors and beneficiaries may be liable for the trust's Canadian income tax, along with the trust itself.

Previously, an immigration trust could be set up to benefit an immigrant to Canada and his or her family, and the income and capital gains in the immigration trust could accrue tax-free for up to 60 months following immigration. If the trust was settled in a foreign jurisdiction (including a low-tax offshore jurisdiction) with foreign trustees who held the foreign investment assets, there could be significant tax savings depending on the applicable tax rates. However, this planning opportunity was unexpectedly eliminated as a result of the

2014 federal budget. Immigration trusts, including those established prior to the legislative changes, are now subject to Canadian tax on their worldwide income, and the 60-month exemption from the deemed residence rule is eliminated.

Emigration from Canada

A taxpayer emigrating from Canada must pay a departure tax, which taxes gains on his or her property accrued during his or her Canadian residency, subject to exceptions including for certain Canadian *situs* property and retirement plans. Payment of the departure tax may be deferred upon providing security to the CRA.

Tax treaties

Canada is party to many bilateral tax treaties, which in part aim to prevent double taxation of income. Among other benefits, Canada's tax treaties generally include tiebreaker rules for determining tax residency for treaty purposes and reduce the amount of withholding tax otherwise payable by taxpayers who are entitled to benefit under such treaties. Often, the withholding tax is reduced to 15 per cent from 25 per cent and in certain cases to zero per cent. Owing, however, to variations in the internal taxation laws of treaty nations, there can be mismatches in tax credits and timing that are not addressed in the treaties. In 2014, Canada ratified an intergovernmental agreement (IGA) relating to the US Foreign Account Tax Compliance Act (FATCA), a US law that imposes strict reporting requirements to the US taxing authority, including on financial institutions located in Canada. Canada has also agreed to implement the Organisation for Economic Co-operation and Development (OECD)'s Common Reporting Standard (CRS), which is based on FATCA. As of 1 July 2017, financial institutions located in Canada are subject to the CRS and are required to provide the CRA with certain information pertaining to accounts and account holders.

Foreign investment entity and foreign trust rules

Foreign trust rules designed to more effectively tax Canadian residents' passive investment, including income arising through non-resident trusts, have been enacted, following numerous amendments to draft legislation over a protracted period. The non-resident trust rules deem a trust to be resident in Canada if there is a Canadian-resident contributor, broadly defined, or a Canadian-resident beneficiary, and require tax to be withheld on distributions from trusts deemed Canadian resident, subject to exceptions. An election may be made to treat a portion of the trust as non-resident that will not generally be taxable in Canada. New provisions for taxing offshore investment funds have also been enacted, along with transitional provisions for those who filed under proposed foreign investment entity rules that were never enacted. The 2018 federal budget proposed additional reporting requirements for certain non-resident trusts and draft legislation was released in August 2018. The proposed requirement is for these trusts to annually report the identities of all their settlors, trustees, beneficiaries and all persons who have the ability (either under the trust terms or as a result of related agreements) to exercise control over trustees' decisions regarding the income or capital of the trust, such as protectors of a trust. The proposed reporting requirements will apply to 2021 and subsequent taxation years.

Canadian taxpayers holding specified foreign property outside Canada with a cost amount of C$100,000 or more, are required to provide more detailed information about such property on a revised Form T1135, foreign income verification statement, including names of the countries and institutions where assets are held, foreign income earned on the assets, and a maximum cost amount of the assets in the year. If Form T1135 is filed late or contains certain errors or omissions, the normal reassessment period is extended for three years, and severe penalties apply for failure to file.

iv Regulatory issues

Regulation of banking and related industries

A significant portion of Canada's private wealth services are highly concentrated in the hands of six major Canadian national banks. In 2017, *Bloomberg Markets* magazine ranked four Canadian banks among the world's top-10 strongest banks with US$100 billion or more of assets. No other country dominated the list as Canada did. Banking is federally regulated by the Office of the Superintendent of Financial Institutions Canada, while the related investment industry, trust companies and insurance firms are regulated both federally and provincially. Canada's major banks are strongly capitalised and tend to have relatively conservative lending policies compared to other banking institutions.

In 1986, the federal government began to eliminate the four pillars of Canadian finance: Canada's traditional regulatory separation between banks, trust companies, insurance companies and investment companies. Numerous acquisitions of investment firms and trust companies by the six largest Canadian banks followed. In 1998, the proposed merger of two of the largest major Canadian banks was rejected by the federal government. In the past decade, Canada's major banks have expanded significantly into the United States. Canada's major banks offer an increasing array of services, including daily banking, investment services, financial planning and insurance, and wealth management, which tend to be fairly uniform among the banks.

For Canada, deregulation resulted in a flurry of mergers and acquisitions in the 1990s, leading to consolidation and the three largest insurance companies controlling about two-thirds of the domestic market.

v Issues affecting holders of active business interests

Corporate taxation

Canada's tax environment includes low corporate taxes levied at flat rates. The rates have been declining for small businesses' active business income between 2007 and 2017. The combined net federal and provincial corporate tax rates applicable to general corporations' active business income in 2018 range between 10.5 and 31 per cent, and a similar rate applies to income that is not earned in a province.

Preferential tax treatment is offered to a 'small business corporation', which benefits from a reduced combined federal and provincial tax rate of between 10 and 22 per cent on the first C$450,000 to C$600,000 of its active business income. A small business corporation is a Canadian-controlled private corporation (CCPC) carrying on active business in Canada. The small business income limit is reduced on a straight-line basis for CCPCs that alone or as members of an associated group have taxable capital employed in Canada of between C$10 million and C$15 million in the previous year. Taxable capital is generally comprised of the corporation's retained earnings, surpluses and advances.

The 2018 federal budget proposed an additional means to reduce the small business deduction in the case of corporations that have more than C$50,000 per year of passive investment income. This proposal follows the 2017 taxation changes that target corporations that accumulate income that had benefited from the low small business tax rate. The 2018 federal budget proposed to reduce the small business limit for CCPCs and associated corporations on a straight-line basis for CCPCs that earn between C$50,000 and C$150,000 of investment income such that the small business limit would be completely eliminated where a corporation earns C$150,000 of investment income per year. The new business limit reduction is expected to operate in reference to the business limit reduction for excess taxable capital, the effective reduction being the greater of the two. For this purpose, the 2018 federal budget proposed a definition of investment income or 'adjusted aggregate investment income' (AAII). Generally, AAII will exclude taxable capital gains from the sale of active investments and investment income that is incidental to the business. These exclusions are included for the purpose of protecting investment interests in Canadian innovation industry.

Shares of a small business corporation are eligible for a lifetime capital gains exemption of C$800,000 in total, indexed for inflation from 2014 (C$848,252 in 2018), as are certain qualified farm and fishing properties (capital gains exemption being C$1 million in 2018).

Investment income earned in a CCPC is taxed at very high rates. For instance, in 2018, CCPCs in Nova Scotia and Prince Edward Island will pay income taxes on their investment income at the rate of 54.67 per cent, which is higher than the highest individual tax rate in those same provinces (54 per cent and 51.37 per cent, respectively). In other provinces, CCPCs' investment income is taxed at rates ranging between 50.67 per cent and 53.67 per cent. General corporations (non-CCPCs), who do not benefit from the small business deduction, pay taxes on their investment income at lower rates – at combined federal and provincial rates of up to 31 per cent in 2018.

For extracting corporate income by way of dividends, a gross-up, dividend tax credit (an enhanced tax credit in the case of dividends funded by the corporation's active business income that did not benefit from the small business tax rate) and a corporate refundable tax mechanism (in the case of corporations that earn investment income) is provided to avoid double taxation of income earned in the corporation that is subsequently paid to its individual shareholders, who are taxed at their marginal tax rates.

The 2017 tax amendments made significant changes to shareholder taxation. The changes make dividends received by individual shareholders taxable at the top marginal rates (these provisions being called a 'tax on split income' (TOSI)), unless the shareholders receiving the dividends can show substantial labour or capital contributions to the operations of the business of the corporation. For example, TOSI will not apply to the business owner's spouse aged 65 or older; shareholders over the age of 18 who make a substantial labour contribution to the corporation's business of at least 20 hours per week; and shareholders over the age of 25 who own 10 per cent or more interest in the corporation that earns less than 90 per cent of its income from the provision of services. Those shareholders who do not meet these 'bright line' tests will face a 'reasonableness' test review by the CRA.

There are generally two kinds of dividends that can be paid to individual shareholders of CCPCs: eligible and non-eligible dividends. Generally, eligible dividends are funded by the corporation's income that did not benefit from the small business tax rate. Eligible and non-eligible dividends are taxed at different rates in the hands of individual shareholders. For instance, in 2018 in Ontario, the highest individual tax rate on eligible dividends is about 39 per cent and that on non-eligible dividends is approximately 47 per cent. As part of the current tax integration rules, when a corporation pays a dividend to its shareholders, it may be able to receive a tax refund that is based on the corporation's notional refundable dividend tax on hand (RDTOH) account, which is calculated in reference to the corporation's investment income. The 2018 federal budget proposed to limit CCPCs' access to the RDTOH refund to the payment of non-eligible dividends, with an exception for that portion of the RDTOH that arises from the corporation's eligible portfolio income, which is proposed in the budget to be calculated as a new 'eligible RDTOH'. An existing RDTOH account will be redefined as 'non-eligible RDTOH' and it is proposed that companies will only be able to obtain refunds from the non-eligible RDTOH account upon the payment of non-eligible dividends, and a full refund from the non-eligible RDTOH account will need to be issued before a refund from the eligible RDTOH account can be accessed.

A tax-deferred transfer or rollover of certain eligible property to a taxable Canadian corporation for consideration, which must include shares of the corporation, is available, subject to certain conditions. The corporation may retain the shareholder's tax cost of the property or may elect a higher tax cost, within limits. Among other results, the corporation then assumes the tax liability relating to gains on the property, the payment of which is deferred to a later date.

Goods and services tax, provincial sales tax and harmonised sales tax

Federally, Canada levies a 5 per cent supply-side tax on most services and goods, including those made in Canada and imported, and certain property. The goods and services tax (GST) applies at all stages of production, subject to an input tax credit for tax paid at an earlier stage, and businesses are responsible for collecting and remitting the tax. The provinces and territories levy their own sales tax in addition to the GST. Five provinces have harmonised the GST with the provincial sales tax and this is known as harmonised sales tax. Combined, these taxes range from 5 per cent (in Alberta, Northwest Territories, Nunavut and Yukon) to 15 per cent (New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island).

III SUCCESSION

i Overview of succession in Canada

Provincial and territorial jurisdiction

In Canada, succession to property on death is generally a matter within the jurisdiction of the provinces and territories. Of Canada's 10 provinces and three territories, 12 are governed under common law, and one – the province of Quebec – under civil law. With respect to aboriginal Canadians who are subject to the Indian Act, succession to property on death falls within the jurisdiction of the federal government. Certain First Nations, however, have entered into self-government agreements that permit enactment of individualised laws, including those that relate to succession. These two latter scenarios are beyond the scope of this chapter.

Conflicts of laws

With regard to determining the applicable law, the law governing succession to movables is generally that of the testator's domicile and the law governing succession to immovables, typically the jurisdiction where the property is located. Formal validity, which includes such matters as execution requirements for a will, is determined by conflicts of law principles (and in respect of succession to movables is also generally that of the testator's domicile at date of death and in respect of succession to immovables is typically the jurisdiction where the property is located), and in several provinces has been expanded by statute.

For clients with certain connections to both Canada and a participating EU Member State, it is important to consider the impact of the EU Succession Regulation (Regulation (EU) No. 650/2012), which is, in effect, for deaths post 17 August 2015, including as it relates to a client's ability to choose the law of his or her nationality to govern certain succession issues.

Probate or equivalent court process

The common law principle of testamentary freedom is the general rule in Canadian succession law, as modified by contract or legislation. After the testator's death, a will is typically submitted to probate or equivalent court process, whereby it is validated and the executors' appointment as legal representatives confirmed. In this process, the will and supporting documents, which may include a detailed asset listing, become public. Probate fees are typically levied in the form of a flat fee, or tax based on a percentage of estate assets (e.g., approximately 1.5 per cent in Ontario). In some provinces, in particular those with a high rate structure to probate a will, the option of creating a second, non-probate will that governs private company shares and other assets that do not require a court grant of probate to administer is often used to minimise probate fees and tax. A Quebec notarial will need not be submitted to probate in that province.

Once probate has been granted, the resulting certificate, grant or other like document is used by the personal representative to deal with third-party institutions and entities in the process of transferring title to the personal representative and gathering in the assets.

Legislative provisions for succession on intestacy

In an event of intestacy, each province and territory provides for a scheme of property division: typically between the testator's surviving spouse and children – if any – failing which to other relatives as specified. Some provinces allocate the spouse a preferential share prior to dividing the estate between spouse and children. In this context, spouses are married spouses, including same-sex married spouses and, in some provinces and two territories, *de facto* spouses, providing certain conditions are met. A court process for letters of administration or equivalent provides for the appointment of estate trustees on intestacy.

As of 1 January 2017, under Part III of the Succession Law Reform Act[5] in Ontario, Section 47(1) was amended to state that for the purposes of determining the beneficiaries on intestacy, the deceased's descendants and relatives conceived and born alive after the deceased's date of death shall inherit as if they were born during the deceased's lifetime and survived, provided specific statutory conditions are met.[6]

Legislative provisions for dependants' support

In all provinces, a dependant can claim support from the deceased's estate, provided he or she stands in a certain relationship with the deceased (typically including a spouse, *de facto* spouse or minor child) and the deceased was providing him or her with support or had a support obligation at the time of death. The quantum of support is determined circumstantially and with judicial discretion, usually taking into account needs and means,[7] and in some cases, the

5 RSO 1990, c S26.

6 Ibid, see Section 1.1(1).

7 See, for example, *Bath v. Bath Estate*, 2016 BCSC 1239.

dependant's accustomed standard of living.[8] Some provinces recognise a moral entitlement to share in a deceased's estate and will vary the distribution in a will or award support on this basis.[9] Recent decisions have also shown that support may be awarded to a dependant in spite of an existing domestic contract if its terms have become unfair with the passage of time.[10]

In Canada, it appears that cases involving entitlement to support in modern 'non-traditional' relationships (usually involving *de facto* spouses) are on the rise, including in recent decisions in Alberta[11] and British Columbia.[12]

Legislative provisions for matrimonial property rights on death

Property law in Canada falls under the jurisdiction of the provinces and territories; thus the availability and scheme of statutory property division claims by surviving spouses upon death of a spouse vary throughout Canada. The matrimonial property regimes of most provinces and territories provide a surviving spouse with property rights on a first spouse's death. For example, in Ontario, a surviving spouse has a right to elect to claim against the deceased spouse's estate to notionally equalise the property acquired during marriage as between the two of them. If such an equalisation claim is made, he or she thereby loses entitlements, if any, under the deceased spouse's will and to certain other benefits. In New Brunswick, Newfoundland and Labrador, Ontario and Quebec, claims for division of property on death of a spouse are available to legally married spouses only as well as, in the case of Quebec, the survivor of a couple who have entered into a civil union. Currently, in British Columbia, Alberta, Prince Edward Island and the Yukon, death does not trigger a statutory property claim for the surviving spouse. All other provinces and territories provide a statutory claim to division of property on death and extend its availability to surviving *de facto* spouses provided the specific requirements of the governing legislation have been met.

ii Key legislative or case law changes affecting succession

Increased Ontario compliance to probate a will

In Ontario in 2011, legislative measures were enacted under the Estate Administration Tax Act permitting the Minister of Finance to assess estates for payment of additional Estate Administration Tax. No practical means or process for determining which estates to assess was put in place until 1 January 2015 when, with little forewarning, a new regulation under the Act came into effect. The changes usher in a new reporting regime that is triggered by applying for and receiving a certificate of appointment of estate trustee. Estate representatives must now, in addition to the paperwork relating to the certificate, provide an estate information return to the Ministry of Finance within 90 calendar days of the court issuing the certificate of appointment. Most significantly, the return (an approved form, which is available from the Ministry) requires detailed information about each estate asset and its fair market date of death value. The estate representative must be able to corroborate the reported asset values. Penalties include fines and even imprisonment for failing to file a return or where

8 See, for example, *McKenna Estate (Re)*, 2015 ABQB 37; *Morassut v. Jaczynski*, 2015 ONSC 502.

9 See, for example *Tippett v. Tippett Estate*, 2015 BCSC 291; *Philp v. Philp Estate*, 2017 BCSC 625.

10 See, for example, *McKenna Estate (Re)*, 2015 ABQB 37.

11 *Riley Estate (Re)*, 2014 ABQB 725; *Umbach v. Lang Estate*, 2016 ABQB 16, 2016; *Wright v. Lemoine*, 2017 ABQB 395.

12 *Re Richardson Estate,* 2014 BCSC 2162; *Coombes Estate (Re)*, 2015 BCSC 2050; *Kish v. Sobchak Estate*, 2016 BCCA 65; *Connor Estate*, 2017 BCSC 978.

the information filed was false or misleading. Amending returns must be filed within 30 days of discovering a prior return was incorrect or incomplete, except where the value previously provided for an estate asset has been determined to be incorrect and more than four years have passed since the issuance of the certificate of appointment. The Ministry has broad audit powers in conducting its review of the returns, including assessment of further tax if the estate date of death value is determined to be higher than originally reported.

Gifts in wills altered for public policy reasons

Recent Canadian lower court decisions (one decision from New Brunswick and another from an Ontario court) had limited testamentary freedom by altering gifts in wills for public policy reasons. The New Brunswick decision of *McCorkill v. Streed*[13] had the effect of striking an unconditional bequest to a racist corporation on the basis of public policy. This decision was upheld on appeal and an application for leave to appeal to the Supreme Court of Canada was dismissed.[14] In the Ontario decision of *Spence v. BMO Trust Co*,[15] a court struck the entire will of a testator who was survived by two adult daughters (neither of whom qualified as dependants) where one daughter was entirely left out of the distribution of the estate. The will stated the testator had excluded the daughter because she had not communicated with him for years. Based on affidavit evidence, however, the court concluded that the real reason for the daughter's exclusion was that she had had a child with a man of a different race. Again, the doctrine of public policy was employed and the entire will was struck down with the result that both daughters shared in the estate equally on intestacy. The Ontario Court of Appeal reversed the decision, thereby confirming in this instance that testators do not have any obligation to benefit persons who they have no legal obligation to support or otherwise benefit (e.g., non-dependent adult children).[16]

Mutual wills

In a recent Ontario lower court decision, two spouses executed wills simultaneously leaving everything to the survivor of them, followed by an identical gift over to their four children (each spouse having two children from a prior marriage). After the husband's death, the wife made a new will and gifted her estate to her two adult children and she subsequently died. On an application commenced by the husband's two adult children, the court found that while there was not a direct written or oral agreement that the spouses' original wills were mutual wills, as a result of the extrinsic evidence presented – including with respect to the family context – an oral contract had existed between the spouses and by virtue of it, neither spouse was entitled to vary his or her will without the consent of the other spouse. The court held that the estate of the surviving spouse was to be divided between all four children.[17] In a similar case, the testator and his wife executed wills without receiving legal advice. The testator left his entire estate to his wife and, if she predeceased him, the estate went to his two stepchildren. The wife died and two days later, the testator executed a will leaving his entire

13 *McCorkill v. Streed*, 2014 NBQB 148 (discussed at length in *Spence v. BMO Trust Co*, 2016 ONCA 196)

14 *Canadian Association for Free Expression v. Streed et al*, (2015), 9 ETR (4th) 203 (NBCA); CanLII 34017 (SCC).

15 *Spence v. BMO Trust Co*, 2015 ONSC 615.

16 *Spence Estate (Re)* 2016 ONCA 196, application to the Supreme Court of Canada for leave to appeal dismissed 2016 CanLII 34005.

17 *Rammage v. Estate of Roussel*, 2016 ONSC 1857.

estate to his biological children. The testator's stepchildren brought an application regarding validity of the second will, questioning the capacity of the testator. However, the Court found no evidence or agreement to support the argument that mutual wills existed between the couple. The second will was valid.[18]

iii Cross-border developments

Changes to US transfer tax

Canada is home to many dual citizens, including US–Canadian citizens. Many Canadians own holiday, real or personal property in the United States, or spend significant time in the United States. A number of Canadians are, as a result, subject to the US transfer tax regime (US estate, gift, and generation-skipping transfer taxes) and are attentive to any changes related to it. Following the American Taxpayer Relief Act of 2012, which became law on 2 January 2013, the US exemption from estate tax was US$5 million, indexed for inflation (i.e., US$5.49 million for 2017) and the maximum rate of US estate tax increased from 35 per cent to 40 per cent, both permanently, subject to future legislation.

On 22 December 2017, President Donald Trump signed into law the Tax Cuts and Jobs Act, which temporarily doubles the federal estate and gift tax exemption from US$5.6 million to US$11.2 million for 2018, indexed for inflation. The increase is effective until 2025. Unless permanent legislation is enacted, the exemption will return to the pre-2018 regime in 2026. Where applicable, the US estate and gift tax exemption remains unified.

Income tax-related reporting requirements

FATCA, introduced to combat offshore tax evasion, will affect Canadians with US connections and Canadian financial institutions. Final regulations under FATCA set out detailed reporting and withholding requirements for non-US financial institutions with respect to accounts with certain US connections, including those beneficially owned by US citizens. Information to be reported includes identifying information, information about the values of the accounts, and transaction amounts. Other non-US entities (and certain Canadian trusts) are also required to report the ownership or beneficial interests of US citizens.

Under FATCA, such information is generally required to be provided directly to the US Internal Revenue Service (IRS) by non-US financial institutions and entities. Canada has ratified a Model 1 type IGA with the United States and passed legislation that aims to implement the IGA. Designed to ease compliance with FATCA, the IGA modifies FATCA's provisions in respect of Canadian financial institutions and other Canadian entities, and expands the tax information exchange provisions between Canada and the United States. Pursuant to the IGA, Canadian financial institutions will generally report information to the CRA rather than directly to the IRS, although they are generally required to register with the IRS to obtain an identification number. It is intended that by complying with the IGA, Canadian financial institutions will avoid a 30 per cent withholding requirement under FATCA on certain payments to them. Also, certain Canadian-registered plans are exempt from reporting under the IGA, and local financial institutions may be entitled to additional relief.

A self-reporting scheme applies to US persons (including US citizens, green-card holders and certain persons who spend a substantial amount of time in the United States) in

18 *Lavoie v. Trudel*, 2016 ONSC 4141.

Canada and elsewhere that may require reporting of non-US bank and financial accounts on a Report of Foreign Bank and Financial Accounts. Under FATCA, US persons must generally also report certain non-US financial assets exceeding threshold values on a Statement of Specified Foreign Financial Assets (Form 8938), filed with their tax returns.

In June 2015, Canada signed the Multilateral Competent Authority Agreement (MCAA), which provides for a coordinated arrangement for the automatic exchange of financial account information among various countries. Under the MCAA, Canada agreed to implement the OECD's CRS. As of 1 July 2017, financial institutions located in Canada are subject to the CRS and are required to provide the CRA with certain information pertaining to accounts and account holders. The first information exchanges will take place in 2018. The CRS is based on FATCA and is similar in effect.

United States income tax penalties for Canadian residents

The Canadian government has expressed its concern to the US authorities and certain concessions have been granted to Canadian residents who are dual citizens of Canada and the United States. The US IRS has provided measures to assist such persons to fulfil their filing and reporting obligations. In June 2014, the IRS announced streamlined filing compliance procedures for certain US taxpayers who non-wilfully failed to disclose offshore assets, eliminating former requirements that taxpayers owe US$1,500 or less per taxation year and a former risk questionnaire, and requiring a certification regarding the taxpayer's non-wilful conduct. Certain penalties or enforcement actions may be avoided, and taxpayers may claim retroactive deferral of income earned in Canadian retirement plans. The IRS has announced it will end the 2014 Offshore Voluntary Disclosure Program in September 2018.

Uniform Substitute Decision-Making legislation

The Uniform Law Conference of Canada (ULCC) adopted the Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (Uniform Act) in August 2016. The Uniform Act is a joint project of the ULCC and the Uniform Law Commission of the United States (ULC), which was undertaken to promote cross-border portability and utility of substitute decision-making documents for property and personal care. The ULC adopted its version of the Uniform Act in July 2014 and US states may now consider enacting it internally. To date, Idaho, Connecticut and Alaska have enacted it. It is up to each Canadian province and territory to consider adopting and implementing the Uniform Act. This new uniform legislation in each jurisdiction marks a significant step forward in promoting cross-border effectiveness of powers of attorney.

Under the ULCC Uniform Act, which differs from the ULC one, a 'substitute decision-making document' will be formally valid if it complies with any of the following:

a the law indicated in the document;
b the law of the jurisdiction in which it was executed;
c the jurisdiction in which the individual was habitually resident; or
d the law of the place it is to be used.

In the Canadian Uniform Act, the application of the governing law can only be refused if its application would be manifestly contrary to the public policy of the enacting province or territory, which the notes to the Uniform Act indicate in matters relating to personal care, including specific medical procedures. The Uniform Acts provide for the ability of a third party to rely on a document as well as, subject to certain exceptions, the obligation of third parties within a reasonable time to accept a substitute decision-making document and not require an additional or different form of authority. It also provides for a court order mandating acceptance and liability for legal costs for refusal to accept a substitute decision-making document in violation of each Uniform Act.

Recognition of foreign trusts

The Hague Convention of the Law Applicable to Trusts and on Their Recognition, adopted in 1984 by the Hague Conference on Private International Law, was ratified by Canada and for several years has been in force in the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Saskatchewan, and, as of 12 February 2018, Ontario, meaning it is now in effect in all Canadian common law provinces.

iv Applicable changes affecting personal property

Same-sex marriage and Quebec civil unions

In 2005, Canada legalised same-sex marriage and, as a result, a broad array of statutory and common law rights have been available to same-sex married spouses for over a decade, including rights to share in an estate upon intestacy and any rights to property division under provincial family law statutes. Quebec also solemnises a civil union for same-sex or opposite-sex couples, which confers similar rights to marriage.

Rights of de facto spouses

For unmarried *de facto* spouses Canada recognises a limited subset of legal rights. *De facto* spouses are treated similarly to married spouses for various purposes, including taxation and certain government benefits, but significant gaps remain in respect of property rights on relationship breakdown and death, although this varies by province and territory.

Spousal support provisions for de facto spouses in Quebec

In early 2013, the Supreme Court of Canada delivered its decision in *Quebec (Attorney General) v. A*,[19] also known as *Lola v. Eric*. Lola (not her real name) claimed spousal support and property rights from her billionaire *de facto* spouse Eric. The province of Quebec has a greater percentage of *de facto* spouses than any other province (approximately 32 per cent in 2011, with the national average being 16.7 per cent) and there are few legal rights provided to these spouses on relationship breakdown.[20] While a majority of the Supreme Court agreed with the Quebec Court of Appeal in finding that Article 585 of the Quebec Civil Code, which does not provide spousal support for *de facto* spouses although it provides for support among married or civil union spouses, discriminates against *de facto* spouses on equality grounds, the discrimination is justified on the principle of respecting individual couples' choice and autonomy.

19 *Ford v. Quebec (Attorney General)* [1988] 2 SCR 712.

20 *Statistics Canada*, 'Portrait of Families and Living Arrangements in Canada: Families, households and marital status, 2011 Census of Population', September 2012, p. 6.

Common law property division for de facto spouses

In *Kerr v. Baranow* and *Vanasse v. Seguin*,[21] the Supreme Court reviewed the principles of unjust enrichment and resulting trust applicable to *de facto* spouses on relationship breakdown. After a relationship of over 25 years, Ms Kerr claimed property and support entitlements. Both parties had worked and Mr Baranow had cared for Ms Kerr after she had suffered a stroke. The court reviewed the law of unjust enrichment applicable to *de facto* spouses not included in most provincial statutory property division schemes. The elements of the claim are enrichment of one spouse, the corresponding deprivation of another and absence of juristic reason (such as a contract), and remedies have included a constructive trust and monetary amounts, including amounts relating to value received. Where appropriate, the claimant should be treated as a co-venturer in a joint family venture and should share the couple's mutual gains. Indicia of a joint family venture include mutual effort, economic integration, intention and priority to the family, and there must also be a link between the contribution and wealth accumulated. A new trial was ordered in *Kerr* regarding unjust enrichment. A monetary remedy is not limited to a value-received approach, and in *Vanasse*, the Supreme Court upheld a monetary award granted at trial to a partner who had cared for a young family and given up career opportunities during a 12-year relationship.

Discretionary trust interests as matrimonial property

British Columbia's Family Law Act is the first Canadian family law statute to expressly address discretionary trust interests in the division of family property by categorising certain beneficial interests in property held in discretionary trusts as excluded property. Problems with the original wording of the Act have been rectified by amendments that came into force on 26 May 2014, thereby clarifying that only the increase in value of the spouse's beneficial interest in a discretionary trust will be subject to division on separation (rather than the increase in value of all of the property in the trust, as originally drafted). Valuation of these interests on separation will continue to remain a live and litigious issue in this province and throughout Canada, as evidenced by reported decisions in Saskatchewan,[22] Alberta[23] and Ontario[24] with relatively little valuation analyses having been reported to date.

Legal presumptions relating to jointly held personal property clarified and effect of transfer examined

In two companion cases, *Pecore v. Pecore*[25] and *Madsen Estate v. Saylor*,[26] the Supreme Court of Canada clarified the common-law presumptions of resulting trust and advancement, which are legal presumptions subject to being rebutted on the civil standard of proof. The Court clarified that a recipient of gratuitously transferred personal property is generally presumed to hold it on resulting trust for the donor. The presumption that the property so transferred is advanced to the donee that has historically applied to certain family relationships, applies to transfers between a parent and minor child (and not from parent to adult child). The Court also canvassed issues of evidence. In *Pecore*, the Court found that a father who had placed

21 [2011] SCJ No. 10.

22 *Grosse v. Grosse*, 2015 SKCA 68.

23 *Shopik v. Shopik*, 2014 ABQB 41 (CanLII).

24 *Mudronja v. Mudronja*, 2014 ONSC 6217; *Tremblay v. Tremblay*, 2016 ONSC 588.

25 *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 SCR 795.

26 *Saylor v. Madsen Estate*, 2007 SCC 18, [2007] 1 SCR 838.

financial accounts into joint names with his daughter had an actual intention to gift these, whereas in *Madsen* the opposite result prevailed. In *Bradford v. Lyell*,[27] a Saskatchewan court held that if an *inter vivos* transfer of a condo property into joint ownership by a grandmother to her granddaughter was found to be intended as a gift of the right of survivorship at the time of the transfer, both the legal and equitable title vested when the joint title was created such that the gift was complete at that time and the grandmother could not later change her mind in her will, thereby entitling the granddaughter to the beneficial ownership of the property upon the grandmother's death.

Joint ownership continues to be a legal minefield in the context of estates and estate planning. Two subsequent Ontario Court of Appeal decisions have added further outcomes to gratuitous transfers of property into joint ownership. In *Sawdon Estate v. Sawdon*, the court found that evidence of intention regarding the transfer may not only show that the presumption of resulting trust has been rebutted, but also that a transfer of personal property into joint names created a trust of the beneficial right of survivorship for certain beneficiaries in addition to the surviving joint owners (two of the deceased's children) such that the property passed outside the deceased's estate and was divided equally among all five of the deceased's children.[28] In *Mroz (Litigation guardian of) v. Mroz*,[29] the Ontario Court of Appeal reviewed a mother's transfer of her home into joint ownership with her daughter where the mother's will directed that the proceeds of sale from the home be used to fund two legacies to her grandchildren. In this instance and based on the findings of the trial judge regarding the mother's intentions at the time of the transfer, the Court held that the daughter had not rebutted the presumption of resulting trust, held the property as trustee and the property was to be dealt with in accordance with her mother's will. *Mroz* was distinguished from *Sawdon* given that the trust obligation in *Sawdon* arose at the time of the transfer (it was *inter vivos*) and in *Mroz* the trust obligation was not to arise until after the mother's death. In other words, it would appear from these two decisions that trust obligations must take effect prior to a joint owner's death for the result in *Sawdon* to occur.

In Ontario, the Court of Appeal in *Andrade v. Andrade*,[30] found that the presumption of resulting trust applied where a mother purchased a property using funds provided to her by her children who lived in the home with her, which were applied to the down payment, mortgage and expenses, but the property was held in the names of two of her seven adult children at any given time. The court indicated that the trial judge had erred in finding that the mother had not contributed any of her own funds to the home, and that once her children had provided funds to their mother, the funds became hers. The court also noted that while the tax treatment of the asset post-transfer is one factor to be considered in determining intention at the time of a transfer of a property (in this case, units in the home had been rented out to third parties over the years and the title-holders had reported the rental income on their returns, while their mother had actually received the rent), but it is not determinative of the transferor's intention. Adding a further dimension to the presumption of resulting trust, a 2015 Alberta Queen's Bench decision considered, among other matters, whether the presumption applies when a person designates a beneficiary of a retirement plan

27 *Bradford v. Lyell*, 2013 SKQB 330 (CanLII).

28 *Sawdon Estate*, 2014 ONCA 101 (CanLII).

29 2015 ONCA 171.

30 *Andrade v. Andrade*, 2016 ONCA 368.

(or other financial products capable of being designated).[31] The judge ultimately avoided deciding the issue by finding evidence of the deceased's intention on a balance of probabilities to gift the retirement plans proceeds to his son as the named beneficiary, leaving the question open for future judicial determination.

In Quebec, there is no equivalence to joint tenancy or rights of survivorship. In *Gauthier v. Gauthier*,[32] the deceased and his son signed an account opening agreement in Florida that held the deceased's inheritance. The will named the deceased's three children as beneficiaries, but the son submitted that the account agreement left the inheritance to him, or in the alternative, his father intended to gift the account. The Court did not apply *Pecore*, but rather looked to the deceased's intentions. The Court held that the deceased did not intend to gift the account.

Most recently, in the British Columbia Court of Appeal decision in *McKendry v. McKendry*,[33] the deceased transferred property into joint tenancy with her son and executed a trust declaration to support her intention that the property was to be held in trust. The deceased later decided to gift the property to her son. The deceased executed a two-page document drafted by her lawyer and revised her will to include a clause outlining that the property was to be a gift. The trial court held that the property was held in trust for the deceased by the son and an executed deed would have perfected the gift, but the Court of Appeal found the deceased's intentions to be 'manifest and unambiguous' in providing an *inter vivos* gift to her son. The presumption of resulting trust was not considered in this case. This decision highlights the importance of providing clear evidence of intention, whether that is through a third party or supporting documentation.

Legal presumption of advancement as between spouses in BC

In *F(VJ) v. W(SK)*,[34] the British Columbia Court of Appeal confirmed the common law presumption of advancement between spouses was not abolished by the enactment of that province's new Family Law Act[35] in 2011, and noted that a BC statute contained no express provision altering the impact of or abolishing the presumption as was the case in the family law statutes of other Canadian jurisdictions such as Alberta, Saskatchewan and Ontario. However, in *HCF v. DTF*,[36] the British Columbia Superior Court made a compelling finding that the presumption of advancement is an outdated concept and cannot co-exist with the property division scheme under the Family Law Act. The Court held that the husband who owned excluded property was able to retain that exclusion on separation notwithstanding that he gifted it to his wife. The law in this area is far from settled and will be challenged as the decision is currently under appeal to the British Columbia Court of Appeal.

Exempting certain matrimonial property from the equalisation regime

The 2012 Ontario Court of Appeal decision in *Spencer v. Riesberry*[37] held that in the circumstances, a matrimonial property held by a family trust where one of the beneficiaries

31 *Morrison Estate (Re)*, 2015 ABQB 769.
32 2016 QCCS 2333.
33 2017 BCCA 48; similar decision by the Ontario Court of Appeal in *Laski v. Laski*, 2016 ONCA 337.
34 2016 BCCA 186 (appeal dismissed with costs).
35 SBC 2011, c.25.
36 2017 BCSC 1226 (currently under appeal).
37 *Spencer v. Riesberry*, 2012 ONCA 418.

resided did not qualify as a matrimonial home for the purposes of Ontario's Family Law Act and excluded it from the equalisation calculation as the beneficiary in question did not have an 'interest' in the property within the meaning of the Act (although the value of the interest in the trust was still included for the purposes of the calculation). This case represents a frustration of the matrimonial home protection contained in the Act, as well as a potential circumvention of the usual requirements for the spouse's consent on the sale or encumbrance of a matrimonial home and the right of possession for the non-titled spouse.

Proprietary estoppel

The equitable claim of proprietary estoppel has been successfully used in two recent Ontario cases as the basis for a cause of action in respect of an unfulfilled or reneged promise or assurance relating to a cottage property.[38] In both *Clarke v. Johnson* and *Love v. Schumacher*, the equity resulted in the appropriate remedy being, based on the facts and the exercise of judicial discretion, a proprietary one in the form of an exclusive, irrevocable and time-specific licence (as a monetary award was found in both instances to be inappropriate or insufficient). In both decisions, the courts followed the modern UK test to establish proprietary estoppel, being the establishment of three criteria:

a encouragement or acquiescence in respect of land;

b detrimental reliance; and

c unconscionability.

A third case arising in British Columbia, resulting in a successful proprietary estoppel claim involving a horse farm that saw the trial judge award the entire horse farm to the applicant, has been remitted back to the trial judge to assess the outstanding claims of unjust enrichment and express or implied trust, as well as the proportionality of the trial judge's remedy to the proprietary estoppel claim.[39] An application for leave to appeal this decision was recently dismissed by the Supreme Court of Canada.[40] *Cowper-Smith v. Morgan*[41] is a British Columbia appellate court decision in which the proprietary estoppel claim was unsuccessful as the person against whom the claim was advanced did not own the property in question at the time the assurance or representation was made. On appeal to the Supreme Court of Canada,[42] the Court's ruling clarified the test for proprietary estoppel and expanded its scope. The British Columbia appellate court decision was overturned and the Court found that proprietary estoppel had been established by the appellants. The Court found that reliance on an expectation to enjoy a right or benefit over a property, even without an interest in such property, is reasonable.

38 *Clarke v. Johnson*, 2014 ONCA 237 and *Love v. Schumacher Estate*, 2014 ONSC 4080.

39 *Sabey v. Rommel*, 2014 BCCA 360.

40 *Jesse Sabey v. Warren Scott Beardsley as executor of the will of Kim Louise von Hopffgarten, deceased, et al.* 2015 CanLII 16734.

41 2016 BCCA 200 (overturned).

42 *Cowper-Smith v. Morgan*, 2017 SCC 61.

IV WEALTH STRUCTURING AND REGULATION

i Common vehicles for wealth structuring

Trusts and holding companies are perhaps two of the most common vehicles used in wealth structuring.

Trusts

Income splitting

Trusts can be established *inter vivos* or by will. *Inter vivos* trusts are often used to split income with family members, where the trust earns income and acts as a conduit to allocate income, including taxable capital gains, among beneficiaries who are subject to lower rates. Effective planning involves careful attention to the possible application of the attribution rules, which can attribute income back to a high-tax rate taxpayer.

Trusts used in conjunction with an 'estate freeze'

Trusts are also commonly used in conjunction with an estate freeze to hold growth property for future generations, such as common shares of a private company which are expected to grow in value, and thereby defer taxation on any gains until the future rather than until the death of the founder. This can achieve significant tax savings. The use of a trust can allow for control of the timing of distribution of property, for selection of beneficiaries and for general wealth protection purposes. Generally, a fully discretionary trust is used for such purposes.

Trusts as will substitutes

Trusts are also increasingly used as will substitutes, in particular 'alter ego' and 'joint partner' trusts that are specifically defined under Canadian income tax legislation and allow persons aged 65 and over, provided certain conditions are met, to roll over capital property on a tax-deferred basis, as opposed to triggering capital gains. Alter ego and joint partner trusts are often used to provide for succession to property on the death of the spouse(s) as a substitute to a will. They may offer benefits such as:

a avoiding expensive court fees, probate taxes and the protracted court probate process;
b more privacy than a will;
c ensuring capital succession to property on death; and
d protection against estate litigation, including will challenges and other claims arising on death.

Trusts may also offer an effective and sophisticated vehicle to manage assets on incapacity as a primary alternative to a power of attorney.

Use of testamentary trusts for income splitting and other benefits

Testamentary trusts (trusts created under a will) have been used to provide for income splitting after the testator's death. Certain estates and testamentary trusts are taxed at the graduated rates applicable to individuals, whereas trusts established during lifetime are subject to the top marginal tax rates applicable to individuals. Prior to 2016, testamentary trusts allowed for income splitting between the trust and one or more beneficiaries, which resulted in significant tax savings. However, commencing in 2016, testamentary trusts are subject to the top tax rate applicable to individuals and, consequently, the above tax benefits have been eliminated, although it will still be possible to 'sprinkle' income among a group of beneficiaries of a discretionary testamentary trust if the trust terms permit. Also, the use of a testamentary trust may provide for capital succession planning and can safeguard against beneficiaries' matrimonial and creditor claims, among other benefits.

Multiple wills used to minimise probate fees

Multiple wills are increasingly used in certain provinces in order to minimise estate administration tax and probate fees. For example, in Ontario, estate administration tax is approximately 1.5 per cent of the value of estate assets. Assets are often segregated under two wills: a primary will and a secondary will. Assets that generally do not require a probated will to administer by way of proof of executors' authority to third parties, such as financial institutions and purchasers of land property, are segregated under a secondary will. The secondary will would typically include private company shares, family loans, tangible personal property and beneficial trust interests. Only the primary will is typically probated, and applicable tax or court fees are then based on the value of the assets passing under the primary will, which is generally expected to be a more modest asset value base.

Holding companies

Holding companies are a common feature of Canadian estate planning. They are often used to hold investment assets, including US securities and certain other US *situs* assets to protect against exposure to US estate tax, to defer tax on active business income where shares of an active business are held by the holding company, to split income, including in conjunction with use of a family trust, for asset protection and retirement planning.

Potential tax advantages of holding companies

The utility of an investment holding company to earn investment income at a lower tax rate than if earned personally will depend on changing tax rates, which historically have at certain times offered tax advantages and at other times are neutral and less advantageous.

Holding companies are also used in conjunction with probate fee and estate tax minimisation strategies as outlined above. Private company shares can pass under a secondary will, which typically may not need to be probated, thereby saving fees and tax, which can be significant where the shares have a high value. There is potential for double taxation on death where assets are held in a holding company, since a deceased person will be subject to personal taxation on the deemed disposition of the shares of the holding company giving rise to possible taxable capital gains, and also the same gains may be reflected in the holding company's underlying assets, on which tax will be paid at the corporate level on sale of the assets or wind-up of the company. It is therefore necessary to implement proper *post mortem* tax planning to avoid potential double taxation on death.

ii Anti-money laundering regime

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act came into effect in 2001. It introduced requirements for a compliance regime, record-keeping, client identification and reporting. Reporting entities must implement a compliance regime, keep certain records, obtain certain client identification and report suspicious transactions to an independent agency, the FINTRAC. Certain other financial transactions, as well as terrorist property, must also be reported. Reporting entities include financial institutions, such as banks, trust companies, loan companies, life insurance companies, brokers and agents, securities dealers, accountants and accounting firms carrying out certain transactions, real estate brokers, and certain others. The legislation imposes harsh financial and criminal penalties, including imprisonment for failure to report. Reporting entities have to send large cash transaction reports to FINTRAC when they receive an amount of C$10,000 or more in cash in the course of a single transaction, and financial entities, money service businesses and casinos have to report incoming and outgoing international electronic funds transfers of C$10,000 or more in a single transaction.

V OUTLOOK AND CONCLUSIONS

Hopefully, a year from now, our worst fears regarding the Canadian outlook will have come to naught, but the current trajectory points to more uncertainty and turbulence, and an increasingly high-tax environment, allowing less opportunity and scope for tax planning. Perhaps the silver lining in this dark cloud is that there is a renewed focus on 'core' wealth management and tax planning, and a more balanced, holistic, long-term and values-based approach to private wealth. We can only hope.

With demographic change and trillions of dollars yet to be transferred intergenerationally, there is the possibility for new ideas and opportunities, which bodes well for the private client adviser.

Appendix 1

ABOUT THE AUTHORS

MARGARET R O'SULLIVAN

O'Sullivan Estate Lawyers LLP

Margaret O'Sullivan exclusively practises estate planning, estate litigation, advising executors, trustees and beneficiaries, and administration of trusts and estates. Prior to establishing an independent trusts and estates boutique firm, she was a partner at Stikeman Elliott, where she directed its trusts and estates practice. She is a past deputy chair and member of the board of directors and council for the STEP Worldwide; past chair of the professional standards committee of STEP Worldwide; past member of the management and finance committee; past deputy chair of STEP (Canada); past chair of the editorial board for STEP Inside; past chair of the Trusts and Estates Law section, Ontario Bar Association; elected fellow, ACTEC, 1995; and academician of The International Academy of Estate and Trust Law. She received the 2014 STEP Founder's Award for Outstanding Achievement and the Ontario Bar Association's 2013 Award of Excellence in Trusts and Estates Law.

She has written two textbooks for the Trust Institute of the Institute of Canadian Bankers: *Engineering of a Trust* and *Trust and Estate Management*. She is also author of the Canada chapter of *International Succession Laws* (Tottel, 2009) and contributing author to *Widdifield on Executors and Trustees* (Carswell, 2002), *Key Developments in Estates and Trusts Law in Ontario* (Canada Law Book, 2008) and to *The International Comparative Legal Guide to: Private Client 2018* (Global Legal Group 2018). She was called to the Ontario Bar in 1983.

BIRUTE LUKSENAITE

O'Sullivan Estate Lawyers LLP

Birute's practice includes tax, estate and incapacity planning, estate administration and estate dispute resolution. Birute has extensive experience in personal and corporate taxation law and financial planning. She completed her articles at the Tax Court of Canada and subsequently practised at a national Canadian law firm and a Big Four accounting firm in Toronto and New York and worked at a major Canadian bank. Birute is currently completing the Diploma Programme of the Society of Trust and Estate Practitioners (STEP). She also serves on the Executive Committee of Ontario Bar Association's Tax Section.

EMMA HAMILTON

O'Sullivan Estate Lawyers LLP

Emma's practice includes estate planning, estate administration and estate dispute resolution. Prior to joining O'Sullivan Estate Lawyers, Emma practiced in the areas of trusts and estates at a full service firm in Calgary. She has experience in succession and incapacity planning, estate and trust administration, estate litigation and family law matters, including domestic contracts. Emma is currently completing the STEP diploma programme and is a member of the Junior Trust and Estate Practitioners, a Toronto-based discussion forum for junior trust and estate lawyers. She is also a contributing author to various publications on estate and trust topics.

O'SULLIVAN ESTATE LAWYERS LLP

Toronto-Dominion Centre
TD Bank Tower
66 Wellington Street West, Suite 3430
PO Box 68
Toronto
Ontario M5K 1E7
Canada
Tel: +1 416 363 3700
Fax: +1 416 363 9570
mosullivan@osullivanlaw.com
bluksenaite@osullivanlaw.com
ehamilton@osullivanlaw.com
www.osullivanlaw.com

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