C2:

Canada

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Introduction

C2.1

In order to understand the laws of succession in the Canadian context, it must first be borne in mind that Canada is a federal state. Under the Canadian Constitution, matters involving succession to property on death fall under provincial and territorial jurisdiction, as opposed to federal jurisdiction. Accordingly, it is necessary to treat each of the ten provinces and three territories as a separate jurisdiction or state, each with its own succession laws.

As discussed below, most common law jurisdictions have traditionally resolved conflict issues involving succession to property on the basis of the law of the deceased's domicile and the law of the *situs* of the deceased's assets. It is the province or territory of domicile of the deceased and the province or territory in which assets are located which are relevant for resolving such issues, as opposed to looking to Canada as a whole. There is no Canadian domicile or *situs* as such with respect to succession matters.

It must also be borne in mind that two basic legal systems co-exist within Canada: the common law in all the provinces and territories—except for the province of Quebec that has a civil law system.

Fixed rights of inheritance

General principles

C2.2

As discussed below, the general common law principle of testamentary freedom, with certain limited exceptions, applies in all jurisdictions in Canada. Unless a statute or contract provides otherwise, a testator is free to dispose of the testator's assets whichever way the testator so desires. In the absence of a statutory or contractual obligation, the deceased's spouse, ascendants or descendants have no entitlement to any share in, or any part of, the deceased's estate. In the absence of a valid will, the provincial or territorial laws of intestacy govern succession to property.

Governing law for intestate succession to movables

C2.3

The general rule is that intestate succession to the deceased's movables, wherever situate, is governed by the law of the place where the deceased died domiciled.

Governing law for intestate succession to immovables

C2.4

Succession to a deceased's immovables is governed by the law of the place where the immovables are situate.

Distinguishing between movables and immovables

C2.5

In general, immovables comprise land and interests in land, such as a lease or a life estate. Movables comprise the rest of a deceased's estate, including, in most instances, the deceased's intangible

assets. The law of the place where particular property is located determines whether such property is immovable or movable.

By way of example, consider a person who dies intestate domiciled in Belgium, but has jewellery and other valuables in safe-keeping in the province of British Columbia, and owns land there as well. Applying the above rules, the courts of British Columbia would refer to the law of Belgium in dealing with succession to the jewellery and valuables stored in British Columbia, as these are movables to be governed by the domicile of the intestate. With respect to the land located in British Columbia, however, the laws of British Columbia are determinative, as land is clearly an immovable, and therefore, succession to the land will be governed by the intestacy rules of British Columbia.

Statutory intestacy rules

C2.6

Each province has legislation that provides for devolution of property on death if a deceased dies intestate. Such legislation fixes entitlement to the deceased's property among the deceased's family members according to fixed percentages, which vary from province to province. Many provinces have a 'preferential' share, which provides for a certain value of the deceased's estate to first pass to the deceased's surviving spouse, and for the remainder to pass among family members. The surviving spouse will be entitled to receive the 'preferential share' and a portion of the remainder on an intestacy. In certain provinces (eg, Ontario) a surviving spouse has intestate rights as long as a marriage was in existence at the date of death. In other jurisdictions (such as Nunavut) a surviving married spouse loses intestate rights if a divorce has been filed for, a separation has occurred in conjunction with a property division application or agreement, or a separation has occurred and the deceased had entered into another spousal relationship, or the surviving spouse was cohabiting with someone else prior to death. In other provinces (eg, British Columbia, Saskatchewan, Manitoba, Prince Edward Island, Nova Scotia in relation to 'registered domestic partners', Quebec in relation to 'civil union spouses', and Alberta in relation to 'adult interdependent partners') and territories (eg, Northwest Territories and Nunavut) legislation has also conferred intestate rights on common law spouses. On 20 July 2005, federal legislation giving same sex couples the right to marry received Royal Assent and became law nationwide. Because of the evolving status of common law spouses across Canada, it is important to confirm with a lawyer in the jurisdiction the applicable law in relation to intestacy rights especially regarding the definition of a 'spouse'.

The preferential share varies among the provinces from a low of $50,000 in the province of Nova Scotia and the territory of Nunavut (in both jurisdictions, however, the surviving spouse does have the ability to elect to receive a home the intestate occupied as a principal residence, including all household goods and furnishings, in lieu of the preferential share where the value of the home exceeds it, or as part of the preferential share where the value of the home does not exceed it) to highs of $200,000 in Ontario and $300,000 in British Columbia (where the surviving child or children are common to the deceased and the spouse) or, in the case of Alberta, Saskatchewan and Manitoba the entirety of the net estate if the deceased left a spouse and a common child or children with that spouse. The following Table C2.1 summarizes intestate rights in each of the provinces.

Note that with respect to the references to 'child' and 'children' in Table C2.1 effective 1 January 2017 in Ontario, s 47(10) under Part II of the Succession Law Reform Act was amended to state that for the purposes of determining the beneficiaries of an intestate estate, descendants and relatives of the deceased conceived after the deceased's death and subsequently born alive will inherit as if they were born during the deceased's lifetime and survived the deceased provided specific statutory conditions have been met. Specifically, the conditions regarding a child conceived and born alive after a person's death include: (1) the person, who at the time of the death of the deceased person, was his or her spouse, must give written notice to the Estate Registrar for Ontario that the person may use reproductive material or an embryo to attempt to conceive, through assisted reproduction and with or without a surrogate, a child in relation to which the deceased person intended to be a parent; (2) the notice under (1) must be in the form provided by the Ministry of the Attorney General and given no later than six months after the deceased person's death; (3) the posthumously-conceived child must be born no later than the third anniversary of the deceased person's death, or such later time as may be specified by the Superior Court of Justice; and (4) a court has made a declaration or parentage under s 12 of the Children's Law Reform Act establishing the deceased person's parentage of the posthumously-conceived child.

Intestate rights

C2.7

Table C2.1 Intestate rights in the Canadian States Provinces and Territories

#TableB

	Spouse only	*Children only*	*Spouse + one child*	*Spouse and children*
Alberta	All to spouse (or split equally between spouse and adult interdependent partner: if deceased left both and deeming provisions *re* death of surviving spouse do not apply)	All children share equally	Either all to spouse (if all children are common with spouse) or greater of $150,000, or half of net estate to spouse, the rest equally to children (if all children are not common with spouse)	
British Columbia	All to spouse (if more than one spouse, as spouses agree—or absent agreement—as determined by the court)	All children share equally	Household furnishings and first $300,000 (if all children are common with spouse) or first $150,000 to spouse (if all children are not common with spouse), half of remaining estate to spouse and half to children	
Manitoba	All to spouse	All children share equally	Either all to spouse (if all children are common with spouse) or greater of $50,000 or half of estate, plus a further half of remaining estate, to spouse, the rest equally to children (if all children are not common with spouse)	
New Brunswick	All to spouse	All children share equally	'Marital property' (as defined by statute) to spouse, rest split equally	'Marital property' to spouse One-third of the rest to spouse Two-thirds of the rest to children
Newfoundland and Labrador	All to spouse	All children share equally	Split equally	One-third to spouse Two-thirds to children
Northwest	All to spouse	All children share equally	First $100,000 to spouse (or home occupied by	First $100,000 to spouse (or home occupied by

Territories and Nunavut			deceased as principal residence at spouse's election) remainder split equally	deceased as principal residence at spouse's election) One-third of the rest to spouse Two-thirds of the rest to children
Nova Scotia	All to spouse	All children share equally	First $50,000 to spouse (or home occupied by deceased as principal residence at spouse's election) remainder split equally	First $50,000 to spouse (or home occupied by deceased as principal residence at spouse's election) One-third of the rest to spouse Two-thirds of the rest to children
Nunavut	All to spouse	All children share equally	First $50,000 to spouse (or home occupied by deceased as principal residence at spouse's election) remainder split equally	First $50,000 to spouse subject to certain conditions if relationship breakdown (or home occupied by deceased as principal residence at spouse's election) One-third of the rest to spouse Two-thirds of the rest to children
Ontario	All to spouse	All children share equally	First $200,000 to spouse, rest split equally	First $200,000 to spouse One-third of the rest to spouse Two-thirds of the rest to children
Prince Edward Island	All to spouse	All children share equally	Split equally	One-third to spouse Two-thirds to children
Quebec	All to spouse (but if certain relatives survive, spouse may not receive entire estate)	All children share equally	One-third to spouse Two-thirds to child	One-third to spouse Two-thirds to children
Saskatchewan	All to spouse	All children share equally	Either all to spouse (if children are common with spouse) or greater of $200,000, or half the estate to spouse (if one or more children are not common with spouse)	

Yukon	All to spouse	All children share equally	First $75,000 to spouse, rest split equally	First $75,000 to spouse One-third of the rest to spouse Two-thirds of the rest to children

(Note: This chart was originally adapted and reprinted with permission from: Trust and Estate Management, Chapter 2, 'Trust and Estate Administration' developed by Margaret R O'Sullivan, Institute of Canadian Bankers, 2001. It has been updated to the time of writing, September 2020).

#TableE

Dependant's right to make a claim

C2.8

The law of each province provides certain dependants of the deceased with the right to make a claim against the estate of the deceased for support, if the deceased has not made adequate provision for the dependant. These claims may be regarded as a statutory limitation on testamentary freedom.

To qualify as a dependant, the deceased generally must have either been providing support to the person, or have been under a legal obligation to provide support, and the person must fit within a circumscribed group of family members of the deceased. Common law spouses including those of the same sex, in certain provinces, may claim against the estate of the deceased for support. As noted in para C2.6 above, because of the evolving status of common law spouses, including same sex spouses, across Canada, it is important to confirm with a lawyer in the jurisdiction the applicable law in relation to a dependant's rights. This legislation is primarily in the nature of a right to support and is subject to the exercise of judicial discretion with regard to quantum, although some provinces extend the basis for relief to include a situation where the testator has breached a 'moral obligation' to the person claiming relief. In certain cases, adult children of a deceased have been able to assert a successful claim on this basis, although they had no financial need. In general, whether or not such legislation applies in a particular case depends on the law of the domicile in respect of the deceased's movables, and on the law of the *situs* in respect of the deceased's immovables.

Matrimonial property rights on death

C2.9

Spousal rights to share in the estate of a deceased or to make a claim against the property of the deceased can also arise as a result of a province's matrimonial property regime. Most of the provinces and territories, with the exception of Alberta, British Columbia, Prince Edward Island and Yukon, create property rights on death for a surviving spouse arising out of marriage. As noted in para C2.6 above, legislation was passed providing the right for same sex couples to marry, such that property rights arising on death are now applicable in the context of same sex marriages in those jurisdictions which provide for the rights of a surviving married spouse. Some provinces and territories have extended property rights on death to some form of non-married cohabiting spouse, provided certain statutory requirements are met. Spousal rights on death also act as a limitation to testamentary freedom.

As an example, in Ontario under the Family Law Act, a 'deferred' community of property regime exists. Although during the marriage each spouse remains separate as to property and is free, with few exceptions, to deal with property as the spouse sees fit, on either marriage breakdown or death of the first spouse, the other spouse has a claim for equalization of property. In general terms, this claim is equal to one-half of the value of property which has accrued during the course of the marriage, with several exclusions including gifts and inheritances. Such a right is not a property right, or interest, in the deceased spouse's estate, but instead is considered in the nature of a creditor's right against the deceased spouse's estate. If a spouse chooses to make a claim for equalization, that spouse forfeits her or his rights under the will, as well as benefits under plans of the deceased, and under any life insurance policies.

A key issue may be what law governs the property rights of spouses in the context of determining property rights on death. In the case of Ontario, for example, this issue will be particularly germane

where the last common habitual residence of the spouses was not Ontario. If the last common habitual residence was in Ontario, section 15 of the Family Law Act provides that Ontario matrimonial law applies in determining property rights on death.

In the Ontario Superior Court of Justice decision *Burkhardt v Burkhardt 2015 ONSC 2688* the motions judge considered the application of a surviving spouse for an extension of time to file her equalization election under the Family Law Act where the testator died in Ontario (leaving separate situs wills disposing of his property in each of Ontario and Germany), but his surviving spouse had not moved with him when he relocated to Ontario, and had instead continued to reside in the matrimonial home in Germany. The judge dismissed the motion on the basis of the evidence that Germany was the couples' last common habitual residence and accordingly, the surviving spouse's rights were to be determined under German law.

Testate succession

C2.10

Succession to a testate person's estate is governed by the terms of the testator's will.

The issues that often arise in testate succession matters relate to the will itself, including:

- whether the testator had capacity to make the will;
- whether a particular beneficiary has capacity to receive under the will;
- whether the formalities of making the will were observed;
- whether the will is intrinsically or essentially valid; and
- matters relating to construction of the will.

Governing law

C2.11

In regard to the common law provinces, the following is a summary of general conflict of law principles in respect of the above matters.

Capacity to make a will

C2.12

The capacity of a testator to make a will of movables is determined by the law of the testator's domicile.

The testator's capacity to make a will of immovables is governed by the *lex situs*.

Capacity to receive a legacy

C2.13

The capacity of a beneficiary to receive a movable is determined by the law of the place where the deceased died domiciled or the law of the beneficiary's place of domicile. It appears that in the case of immovables, the capacity to receive a devise is governed by the *situs* of the immovable.

Formal validity

C2.14

The formal validity of a will concerns such issues as whether the will was in writing as required by law, and whether the will was properly witnessed. Under general conflict of laws principles, the formal validity of a will, insofar as it relates to an interest in immovables, is governed by the *situs* of the immovable. In respect of movables, the will's formal validity is governed by the testator's domicile at the time of the testator's death.

In *Quinn Estate v Ryland*, 2019 British Columbia BCCA 91 (CanLII), the court upheld the trial court's decision that a pour-over clause in the appellant's father's will that directed the residue of his estate to an inter vivos California trust to be invalid. The trust was settled prior to the execution of the will, and was amendable and revocable. The court held the residue clause to be an invalid testamentary disposition which did not comply with the formalities of British Columbia wills legislation as the testator purported to make unattested future and unknown changes to his will.

Several Canadian provinces have statutory provisions governing recognition of the validity of a will. For example, the relevant provisions of the Ontario Succession Law Reform Act provide that a will is valid and is admissible to probate in Ontario if, at the time it was made, it complied with either the internal law of the place:

- where the will was made;
- where the testator was then domiciled;
- where the testator then had habitual residence; or
- where the testator was then a national; if there was in that place one body of law governing the wills of nationals.

This legislation also specifically provides that a change in the domicile of the testator, after the will is made, does not render the will invalid as regards the manner and formalities of its making.

With regard to the issue of formal validity, it should be noted that all Canadian jurisdictions (save for Quebec and Canada's three territories) namely—British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island, Newfoundland and Labrador, New Brunswick and Nova Scotia—have adopted the Convention Providing a Uniform Law on the Form of an International Will. The effect of this Convention is to hold a will valid if it is made in compliance with the terms of the Convention, regardless of the place where it was made, the location of the assets, and the nationality, domicile or residence of the testator. Given the few jurisdictions in the world that have become parties to this Convention, often termed the Uniform Wills Convention, in Canadian professional practice it is seldom resorted to because of its limited application.

Essential or intrinsic validity

C2.15

Essential or intrinsic validity usually refers to such matters as the testamentary capacity of the testator, whether the will complies with rules against perpetuities and accumulations, validity of the exercise of powers of appointment, validity of a gift to an attesting witness or a charity and whether the will was free and voluntary and not subject to fraud, mistake or undue influence sufficient to make it invalid.

The general position is that the validity of a will, insofar as it relates to an interest in land, is governed by the *situs* of the real property, and with respect to movables, is governed by the domicile of the testator at the testator's date of death.

Construction

C2.16

The general position is that the law intended by the testator governs construction of a will. A rebuttable presumption arises that the testator intended the applicable law to be of the testator's domicile at the time the testator executed the will. In respect of immovables, if the interest that would arise from such construction would not be allowed or be recognized by the law of the *situs* of the immovable, then the law of the *situs* will prevail.

Revocation

C2.17

In Ontario, for example, a will is revoked by execution of a subsequent will if it includes a revocation statement (if no such statement is made, the subsequent will revokes the previous will only to the extent of any inconsistencies between the two wills) by a subsequent marriage (unless the will is made in contemplation of the marriage and the intention is demonstrated that it should survive the

marriage or if the surviving spouse elects to receive the benefits provided under the will) and by burning, tearing or otherwise destroying the will. Divorce subsequent to execution of the will invalidates only those provisions of the will relating to the testator's former spouse (not the entire will), except where a contrary intention appears in the will.

Generally, revocation of a will by execution of a later will or codicil depends on the effect of the subsequently executed document on the first, which is determined by applying the law and rules governing the validity of the second document.

With regard to the choice of law applicable to revocation of a will by other mode (such as burning, tearing, or otherwise destroying (but not by subsequent marriage which is discussed below)) it appears that leading textual authorities are divided as to whether it is the law of the testator's domicile that governs such revocation in the case of movables and the law of the *situs* of immovables in that instance, or whether the same choice of law rule applies to both movables and immovables—being the testator's domicile at the time of the act. There is little law on the issue, but a recent lower court decision in British Columbia (*Morton v Christian 2014 BCSC 1303 (CanLII)*) appears to have relied on the latter approach, and applied the law of the testator's domicile at the date of the alleged act of revocation.

With respect to revocation of a will by a subsequent marriage, while leading legal commentary on this point again differs, in *Davies v Collins 2010 NSSC 457 (CanLII)* (affirmed on appeal in *2011 NSCA 79 (CanLII)*) the issue was classified as an independent conflict category in its own right; with the same choice of law rule applying to both movables and immovables (as if it were a matrimonial law issue). The decision supports the view that whether or not a subsequent marriage revokes a will depends upon the law of the place where the testator was domiciled at the time of the marriage with regard to both movables and immovables. In *Sato v Sato* 2017 BCSC 1394, the court determined the deceased after an extensive review of the facts was domiciled in British Columbia at the date of his marriage, with the effect that his prior will was revoked (under the former *Wills Act,* RSBC 1996, c 489*,* marriage automatically revoked a will, but this is no longer the case under the new *Wills, Estates and Succession Act,* SBC 2009, c 13, which came into effect on 31 March 2014) and his estate would pass on intestacy to his widow, and that he was not domiciled in Luxembourg, where his prior will would not be revoked by marriage. On appeal, the court held that the trial judge did not err in determining that the deceased was domiciled in British Columbia.

Impact of the European Union Succession Regulation

C2.18

The above regarding applicable law with respect to testate succession should be considered in conjunction with the possible impact of the European Union's Succession Regulation—that became fully operational on 17 August 2015. The Succession Regulation can significantly impact Canadians with assets in, or other ties to a participating EU Member State, or foreign individuals with connections to participating EU Member States who also have assets in Canada.

Change of domicile

C2.19

For beneficiaries making dependant's claims or otherwise seeking relief against an estate, determining the testator's domicile for the purposes of determining which law will govern such issues will be of vital importance. If the testator has changed domicile during the testator's lifetime, it will be a question of fact as to where the testator was domiciled at the time of the testator's death.

In *Foote v Foote Estate 2011 ABCA 1 (Alta CA)* leave to appeal to the Supreme Court of Canada dismissed with costs (*2011 CanLII 40928*) the testator was born and lived the first 43 years of his life in Alberta, and it was undisputed that Alberta was his domicile of origin. He then moved to Norfolk Island and spent many years there, and it was again undisputed that Norfolk Island was his domicile of choice. On his death, a dispute arose as to whether he had either changed his domicile of choice prior to his death or abandoned his domicile of choice with the consequence that his domicile reverted to his domicile of origin at the time of his death. The Alberta Court of Appeal confirmed that the acquisition of a domicile of choice involves two factors, the acquisition of residence in fact in a new place and the intention of permanently settling in that place. The court noted that the choice must be

voluntary, not dictated by business, debts or health. Regarding the abandonment of a domicile, the court noted that the test is similar to that for acquisition of a domicile of choice, requiring an intention to cease to reside in a place coupled with acts that end the person's residency there. Based upon the facts in this case, most notably that the testator had only taken preliminary steps to leave Norfolk Island and return to Canada and that he was contemplating this move for medical reasons, the court found that the testator had not acquired a new domicile of choice nor had he abandoned his domicile of choice. The court did confirm that it was not necessary for the testator to have completely ceased residence in Norfolk Island to have abandoned it as his domicile, but noted that his residency in Canada was brief and that Norfolk Island continued to be his permanent home until his death.

Vanston v Scott 2014 SKQB 64 (CanLII) is also illustrative of the detailed factual analysis and problems a court faces in determining an individual's domicile, as well as the doctrine of reverter. The court was asked to determine the deceased's domicile at death for purposes of determining which jurisdictions' laws governed succession to the deceased's movable property at death. The deceased was born in Alberta (his domicile of origin) and died in Kelowna, British Columbia. The deceased practised medicine for many years in British Columbia and subsequently moved to Saskatchewan in 1999 for work. Soon after his move, he met his second wife who resided in British Columbia. They maintained a long-distance relationship for seven years until 2008 when she moved to Saskatchewan to live with the deceased. In 2012 the deceased lost his job and spent the next six months looking for employment throughout Canada. Without locating a new job, the deceased and his spouse moved to Kelowna—they sold a condominium in Saskatchewan, cancelled their utilities and services there, sold items of furniture, and placed other items in storage, and moved a large number of personal belongings to a rented residence in Kelowna, that had been rented for a three-month rental term, and would thereafter be rented on a month-to-month lease. They also registered their vehicle in British Columbia. The evidence indicated that shortly after arriving in British Columbia, the deceased and his spouse travelled internationally in search of employment with a view to working outside Canada, and within a week of their return from this international job search, the deceased died in British Columbia.

Based on the evidence before the court, it held that the deceased had abandoned Saskatchewan as his domicile of choice upon leaving that province. While the deceased had fulfilled the first part of the test to acquire a new domicile of choice by acquiring a residence in British Columbia, he had failed to fulfil the second part of the test, which was an indefinite intention to live in British Columbia.

Despite not having lived in Alberta for approximately 25 years prior to his death, the court found that the deceased's domicile of origin had revived, as he had successfully abandoned his former domicile of choice—without yet acquiring a new one.

On appeal, and in light of the relevant standards of review, the court found that the trial judge did not err in finding that: (i) the deceased had not acquired a domicile of choice in British Columbia; and (ii) the deceased had abandoned his domicile of choice in Saskatchewan.

However, given that no evidence was led on the issue of the deceased's domicile of origin, the Court of Appeal for Saskatchewan found that the trial judge did err in refusing to reopen the trial and has remitted the matter for a new trial on this one narrow issue (*2016 SKCA 75 (CanLII)*). This issue was not retried however as the parties reached a settlement (see 2017 SKQB 69 (CanLII)). It is interesting to note however that one Canadian jurisdiction – Manitoba – has abolished the revival of domicile of origin in this scenario by statute (see s 6 of the Domicile and Habitual Residence Act, R.S.M. 1987, c. D96).

Testamentary trusts

C2.20

In each common law province, the distinction between domicile and *situs* is relevant in determining the applicable law that governs any trusts created under the will of a testator.

It is important to distinguish between the validity of the will creating any trusts, and the validity of the trusts established under the will.

Governing law for testamentary trust of movables

Validity

C2.21

The general rule is that the validity of the will is governed by the law of the testator's domicile as at the testator's date of death. The formal validity of the trust provisions contained under the will depends on the law which governs validity of the will. If the will fails, so will the trust provisions it contemplates. However, issues concerning the essential validity of the trust provisions under a will are considered severable.

The general position appears to be that the essential validity of a testamentary trust of movables will be governed by the law chosen by the testator unless there are strong public policy considerations to the contrary. In the absence of an express or implied choice of law which is effective, the general rule is that validity of the trust will be determined under the internal law of the testator's domicile as at the date of the testator's death.

Construction

C2.22

The construction of a testamentary trust of movables is governed by the law expressly or impliedly designated by the testator, and failing a designation, by the law of the testator's domicile at the time of the making of the will.

Administration

C2.23

Case law has not determined conclusively which law governs administration of a testamentary trust of movables, and whether a different law should govern administration from that which governs validity and construction. It has been considered to be the place of administration, but in certain cases the law of the testator's domicile at the time of the testator's death may govern.

In *Kelemen v Alberta (Public Trustee)* (subnom *Re Jagos (Estate of)) 2007 CarswellAlta 117, 2007 ABQB 56, [2007] 4 WWR 562, 71 Alta L R (4th) 366 (QB)*) the court considered whether Alberta law or Romanian law should apply in relation to a guardian's application for the immediate release of funds to a beneficiary aged 16. The will provided that the funds be held in trust for the beneficiary until she reached the 'age of majority'. The issue arose of which jurisdiction's age of majority should apply. The court characterized the issue as involving the administration of a trust. The court referred to the provincial International Convention Implementation Act pursuant to which the 1985 Hague Convention on the Law Applicable to Trusts and on Their Recognition—is applicable in Alberta to determine the conflict of laws principles to determine the applicable law. Using the factors set out in the Convention, the court determined the law of closest connection should apply, and that the trust was most closely connected with Alberta. Accordingly, the court held that the phrase 'age of majority' should be interpreted according to Alberta law.

In *Webster-Tweel v Royal Trust Corp of Canada (2010) 185 ACWS (3d) 1098, 2010 ABQB 139 (Alta QB)* the court considered whether Alberta law or Quebec law should apply in relation to a beneficiary's application for a complete accounting for the entire period of the administration of several trusts. The applicant beneficiary was requesting a complete accounting for two related trusts of which she was a contingent beneficiary (further accounting regarding a related trust of which she was a vested beneficiary was also requested, however the trust deed in that trust had selected Quebec law to govern, and therefore the forum issue only arose regarding the other two trusts). The corporate trustee claimed that the law of Quebec governed such a request, even though the assets of the trust had been moved in 1978, several years after the establishment of the trusts, to the corporate trustee's Alberta office. Based upon uncontroverted expert evidence, if Quebec law applied, the beneficiary was not entitled to any more information than she had already received for any of the trusts. The court characterized the issue of a beneficiary's right to an accounting as most closely involving the administration of a trust. In this case, as in *Kelemen* above, the court found that the law of the jurisdiction with the closest connection to a trust should govern the administration of the trust, but in this case the court went on to find that this law also extended to determinations of whether the law governing the administration of the trust had been validly changed during the course of the trust administration. The court determined (uncontroversially) that at the inception of the trusts of which the applicant beneficiary was a contingent beneficiary, Quebec had been the jurisdiction most closely associated with the trusts, and therefore Quebec law governed whether the law governing the trusts'

administration had been validly changed. Quebec law states that the law applicable to a trust's administration is immutable unless a court order changing such law is obtained, or, prior to 1994, a private member's bill had been passed by the Quebec legislature changing such law, and since neither exception applied in this case, the court held that Quebec law governed the applicant beneficiary's entitlement regarding an accounting for the trusts, despite the 1978 change of jurisdiction of the assets.

In *Tyrell v Tyrell,* 2017 ONSC 4063, the testator died domiciled in Nevis, a small Caribbean island, where the testator had drafted a will that dealt with his assets, the majority of which were held in Nevis. The estate was probated in Nevis by the named estate trustee, the testator's sister who resided in Ontario, but an application was brought in Ontario against the estate trustee by certain beneficiaries seeking the removal and replacement of the named estate trustee, as well as an accounting from the estate trustee for his administration. The estate trustee took the position that Ontario was not the proper jurisdiction for such application, as Nevis was where the testator was domiciled. The beneficiaries argued that the jurisdiction in which the estate trustee was normally resident was the proper jurisdiction to adjudicate the dispute. The court agreed with the beneficiaries and found that the most significant connecting factor is the residence of the estate trustee, and that the will was most 'substantially connected' to the province of Ontario, and therefore Ontario had jurisdiction over matters relating to the administration of the Will.

Governing law for testamentary trust of immovables

C2.24

With regard to a testamentary trust of immovables, the law of the *situs* is generally the controlling factor and will govern issues involving both validity and administration, with certain possible exceptions where a trust is comprised of both movables and immovables. The law of the *situs* will also apply with respect to issues of construction, failing an express or implied choice of law by the testator, with possible exceptions where the domicile of the testator at the time of the making of the will may be considered determinative.

Recognition of foreign trusts

C2.25

The Hague Convention on the Law Applicable to Trusts and on Their Recognition adopted in 1984 by the Hague Conference on Private International Law has been ratified by Canada, and, at the time of writing, is in force in the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island, New Brunswick, Newfoundland and Labrador, Nova Scotia and as of 12 February 2018 in Ontario. Each of these provinces has legislation in place adopting the Convention. One significant achievement of the Convention is that it provides greater certainty in that the settlor or testator may select the law to govern a trust without the need for a substantial relationship with the chosen jurisdiction.

Under the Civil Code of Quebec, a comprehensive set of conflict laws is provided, including those with regard to trusts. Of note in this regard is the discretionary doctrine available under the Civil Code of Quebec of forum of necessity, under which a Quebec court may take jurisdiction of a matter in certain circumstances if access to justice will be denied in the foreign jurisdiction to which the matter in question actually related, although the enforcement of an order made in Quebec based upon this doctrine could be problematic, especially where the Quebec law on which the order is based conflicts with the foreign jurisdiction's law regarding inheritance or property entitlement.

Information publicly available on death

C2.26

In order to 'probate' a will, that is, to submit a will to court to validate it and confirm the authority of the legal personal representative of the estate, it is necessary to submit the original will. Once probate has been granted, the will becomes a public document. It is then possible for any member of the

public to search the court file and obtain a copy of the will, as well as any material which forms part of the court file, including documentation submitted in order to obtain the grant of probate.

Several Canadian provinces require that in order to secure a grant of probate, a sworn inventory of the estate must be submitted, ie, a list and description of all assets of the deceased and their value. Others, such as Ontario, do not require a formal inventory, but instead require that a sworn affidavit be included in the court application, which gives a total value of the estate as well as a breakdown between the value of personalty and real estate (although a new parallel reporting regime came into force in Ontario in 2015 requiring estate representatives to submit an information return to the Ministry of Finance detailing each estate asset, and its fair market date of death value within 180 days of being issued a certificate of appointment by the court, as well as subsequent amending returns where necessary). Should any court proceedings be taken, such as to contest the will or to pass the accounts of the legal personal representative, these documents will also form part of the court file, that becomes a public record.

Formalities for wills

C2.27

In each province there is legislation that sets out the formal requirements for making a valid will.

The types of wills available vary between the Canadian provinces. As a result of the Covid-19 pandemic, several provinces including British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and Newfoundland and Labrador have emergency orders in place to allow for virtual execution of wills and powers of attorney, and in some by counterpart. British Columbia has proposed legislation to allow for electronic wills created on a computer and signed electronically.

English form wills

C2.28

In all provinces, the English form of a will is available, that is, a will in writing executed by the testator in the presence of two witnesses who subscribe the will in the presence of the testator.

Holograph wills

C2.29

Several provinces also permit holograph wills, that is a will made wholly in the handwriting of the testator and signed by the testator. No witnesses are required for a holograph will. Holograph wills are recognized as being valid for all purposes in Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, the Northwest Territories, Nunavut and the Yukon.

Prince Edward Island has not legalized holograph wills (except for active members of the Canadian Armed Forces, or any mariner, or seaman or seawoman at sea, or in the course of a voyage) however, it has ‘substantial compliance’ legislation, allowing a court to determine if a holograph will can be accepted regardless of the statutory necessity for witnesses.

British Columbia does not permit holograph wills (again with an exception for active members of the Canadian Armed Forces) however, under the Wills, Estates and Succession Act the court may make an order curing deficiencies so that a record or document is fully effective as a will; alternately, a will may be valid and admissible to probate including if it is made in accordance with the law of the place where the will was made; the law of the will-maker’s domicile, ordinary residence or country of citizenship either when the will was made or on the will-maker’s death; or the law where the will-maker’s property is situated either at the date the will was made, or on the date of death.

Notarial wills

C2.30

In Quebec, a civil law jurisdiction, notarial wills are also available. A notarial will is made before a notary and one witness, and in certain limited circumstances a second witness. The notary reads the

will to the testator, and the testator makes a formal declaration that the will represents the testator's last wishes. The testator, witness and notary then subscribe the will in each other's presence.

International wills

C2.31

As noted above at para C2.14, several Canadian provinces are signatories to the Uniform Wills Convention. The Convention stipulates its own requirements for the execution of a valid will, including that the will be executed before two witnesses and an authorized person, who in the Canadian provinces is a lawyer, who in turn completes a certification form. As noted above, this form of will is seldom used because of the limited application of the Convention.

Witness qualifications

C2.32

Each province also has statutory provisions in its respective wills legislation dealing with qualification of witnesses to a will. By way of example, in Ontario if a witness to a will is a beneficiary or spouse of a beneficiary, any bequests to the beneficiary are voidable. Witnesses generally, under the common law rules, must have reached the age of majority and be mentally competent at the time of witnessing the will to be competent witnesses to a will.

Formal capacity to make a will

C2.33

Each province's wills legislation stipulates the formal capacity required of a testator to make a will. In Ontario, for example, the testator must have attained the age of 18 years, with certain exceptions including certain military personnel who must attain the age of 16 years, and be mentally competent within the relevant legal definition of competency.

Recognition of foreign wills

C2.34

As noted at para C2.14 above in the context of the governing law for formal validity of a will, the general rule in respect of formal validity is that, for movables, the law of the domicile of the deceased at her or his date of death will be determinative. Through legislation the Canadian provinces have, however, extended the traditional private conflicts rules, so that several laws now govern validity of wills.

In general, such legislation recognizes a will of movables to be a valid will if it was either valid where the will was made, or where the domicile of the testator was at the date of the making of the will. Some provinces also include the law of the place where the testator was a national when the will was made, the law of the domicile of origin of the testator, and the law where the testator had habitual residence.

With regard to immovables, the general rule is that a will is recognized as a valid will if made in accordance with the law of the *situs* of the immovables. Ontario, however, applies the same rules of recognition for wills in relation to movables and immovables.

Separate *situs* wills in the Canadian context

C2.35

As part of domestic will planning, multiple wills are becoming increasingly popular as a technique to avoid *inter alia* the increasingly high fees payable on application for a grant of probate, which are now levied in all of the Canadian provinces except Manitoba and Quebec. For the international client who may have assets in a Canadian province, it will be important to consider how local law applies and what fees are exigible should it be necessary to seek probate in the particular jurisdiction. In Ontario,

for example, estate administration tax—which is payable when seeking a grant of probate—is levied on the value of the assets of the estate. Should a person die domiciled in Ontario with substantial assets, including worldwide personalty, and real estate in Ontario, these assets will be exposed to a tax of approximately 1.5 per cent of their value. With proper planning, including the use of multiple wills and separate *situs* wills, such taxes may be minimized.

Some of the traditional reasons for using separate *situs* wills include expediting the probate process so that one does not have to await receipt of the original grant of probate in order to apply locally to have a grant issued. A separate *situs* will can be directly admitted to probate without such delay. Other reasons for using a separate *situs* will include to ensure that the will is valid in accordance with local law and to avoid some of the problems inherent in admitting a foreign will drawn in another form, under a different law and possibly in a different language, to probate in a foreign jurisdiction. In particular, should interpretation issues arise in future which might require judicial interpretation and hence resort to application of the foreign law, unwarranted complexity and expense will arise. All of these reasons have equal application in the Canadian context.

Revocation of a will

C2.36

In each province there is legislation that sets out the ways in which a will may be revoked. Generally, revocation occurs by making a new will if the new will includes a revocation statement (if no such statement is made, the new will revokes the old will—only to the extent of any inconsistencies between the two wills) or by destruction of the will by the testator or at the testator's direction. In addition, in most provinces, marriage will automatically revoke a will, unless the will was specifically made in contemplation of marriage. However, marriage does not revoke a will under the Alberta Wills and Succession Act, the British Columbia Wills, Estates and Succession Act, or the Quebec Civil Code. In several provinces, a formal divorce decree subsequent to the execution of the will invalidates those provisions of the will referring to the testator's former spouse (but not the entire will) except where a contrary intention appears in the will.

Probate formalities

Purpose of letters probate

C2.37

The purpose of securing a court order of probate in respect of a will is:

- to confirm the authority of the executor named in the will to act as the legal representative of the estate; and
- to confirm the validity of the will.

A grant of probate affords protection to the executor in administering the will and effecting a distribution of assets under its terms, should, for example, another later will be subsequently discovered. Proof of letters probate also provides statutory protection to third parties in dealing with the executor who has received the grant, including relying on the executor's instructions. Many third parties, such as Canadian financial institutions, will require a grant of probate before the third party will allow the executor to administer the deceased's assets held with them, with certain exceptions including where the assets are of modest value where other comfort, such as an indemnity, may be adequate.

Proof in common form and proof in solemn form

C2.38

To establish the validity of a will and the authority of the legal personal representative over the assets of a deceased, if the deceased died testate, the will is submitted to court together with supporting material for proof in 'common form', which does not require a formal court appearance and hearing. In some instances, however, including when the validity of the will is challenged, or when the original will

has been lost or destroyed, or when there are other issues regarding its validity, the court may require a formal open court hearing, which is generally termed ‘proof in solemn form’.

The material which must be submitted to secure a grant of probate differs from province to province, but generally includes a valuation of the estate, and in some provinces, a sworn inventory of the assets of the deceased as at the date of death, together with the original will, and any codicils to it, and either an affidavit of one of the witnesses to the will or an affidavit confirming that the signature on the will is that of the testator.

Probate fees

C2.39

All provinces, with the exception of Manitoba and Quebec, charge probate fees based on the value of the estate. Manitoba abolished probate fees effective July 1, 2020. In Quebec there is no charge for notarial wills and a flat fee of approximately $100 for holograph and witnessed wills, whilst in Ontario, for example, the fee is approximately 1.5 per cent of the value of the assets (with the exception of real estate outside the province) of the deceased.

Situs of assets will be relevant to probate fees payable. As noted, provincial probate fees are not levied on real estate outside the province. In *Re Bloom Estate (2004) 5 ETR (3d) 1 (BCSC)* a British Columbia court held that because securities held in an estate were maintained through a book entry system in Ontario and because probate legislation in British Columbia required probate to be levied on assets situated in the province, the value of the securities were not subject to provincial probate fees. The British Columbia legislature has since amended the definition of ‘value of the estate’ to include the intangible personal property of the deceased wherever situate.

Letters of administration

C2.40

In contrast with the situation where the deceased dies testate and personal representatives are named in the will, if the deceased dies intestate there will be no named personal representative, and it will be necessary to apply to court to have an administrator appointed for the estate. In certain provinces, including Ontario, the administrator must be a resident of the province where the deceased had residence, unless a court orders otherwise, generally with the beneficiaries’ consent. Most provinces require that an administration bond be filed with the court in order to obtain a court grant of letters of administration. In certain circumstances, however, the court may use its discretion to dispense with the need for a bond.

Ancillary grants and resealing

C2.41

Where a grant of letters probate is made by a court other than that of a Canadian province or by a British court, or, for some provinces, by a state of the United States (US) a new grant must be applied for in each province in order to allow assets to be administered there. This grant is usually referred to as a grant of ancillary letters probate.

If the grant of letters probate or of letters of administration is given by another Canadian province, a court of the United Kingdom (UK) a British possession, or, in some provinces, by a state of the US, the original grant may be ‘resealed’ as opposed to a new grant being issued, which is a somewhat simpler process.

In order for the foreign personal representative to have authority to deal with the assets in a Canadian province (including a personal representative from another province) it will be necessary to qualify as a personal representative by obtaining an ancillary grant or resealing the original grant where there is real estate and, often, also in respect of personalty where an institution requires a local grant before it will recognize the authority of the foreign personal representative.

Generally, each of the Canadian provinces will allow an original grant of probate to be made in respect of a deceased even though the deceased was not domiciled in the province, provided that there are assets in the province.

In order for a foreign personal representative to obtain a grant, whether an original grant or an ancillary grant, some provinces require that a bond first be posted, which the court has discretion to dispense with. Applications for a grant can be made by the applicant, or by way of a nominee.

Authority of executors and administrators

Derivation of authority

C2.42

The authority of an executor named under a will derives from the will itself and is effective from the moment of death. Accordingly, the executor is in a position to take charge immediately of the assets of the deceased. The executor's authority is not dependent on receipt from the court of a grant of probate. This is in contrast to the position of a court-appointed administrator, who has no power to act in the estate until a court order is made. The administrator's authority derives solely from the court order, and is generally more circumscribed than that of an executor appointed under a will.

Foreign personal representatives

C2.43

In respect of foreign personal representatives, the general position is that they have no authority to deal with assets in a foreign jurisdiction until their authority has been confirmed by way of obtaining a court grant in the jurisdiction. However, Canadian federal banking legislation allows a banking institution, at its discretion, to rely on a foreign grant of probate in dealing with the deceased's accounts and some provincial corporation statutes allow a corporation, at its discretion, to effect a transmission of shares based on a foreign grant or evidence of title other than a grant of probate, as the corporation sees fit.

In some provinces it has been held that strict common law principles of conflict of laws which hold that foreign executors cannot be added to an action in a jurisdiction outside the province in which they received their grant of probate apply (see eg, *Hill v Hill 2010 CarswellAlta 1629, 2010 ABQB 528 (Alta QB)*). This rule derives from the common law principle that a court should not interfere with the administration of a foreign estate, and anyone seeking to bring an action against an estate or a deceased must do so in the jurisdiction where the executors derived their authority. However, some cases have relaxed this rule in certain circumstances (see eg, *Felton v Ranaghan [1955] 3 DLR 526 (Sask CA)*).

Position of heirs

C2.44

Under general common law principles, and relevant succession legislation in the common law provinces, upon death the assets and liabilities of the deceased vest in the deceased's personal representative, who is under an obligation to collect the assets and distribute them in accordance with the deceased's will. The personal representative of the estate has full legal ownership of the deceased's property and holds it on trust to pay the liabilities of the deceased and distribute the remainder to the beneficiaries. The beneficiaries, as such, do not have direct ownership of the property, but instead have equitable ownership only.

In contrast, under civil law principles, which apply in Quebec, the succession of the estate of a person commences on that person's death at the place of last domicile. Ownership of the estate devolves immediately to the beneficiaries upon the death of the testator. The successors have the option of rejecting it or accepting it with the benefit of an inventory—so as to protect themselves in case unexpected liabilities are discovered.

Taxation

General principles of Canadian taxation

C2.45

Residents of Canada are taxed on their worldwide income. Non-residents are subject to Canadian tax on their Canadian-sourced income, subject to the provisions of any relevant income tax treaty.

Whether or not an individual is a resident of Canada for tax purposes is a question of fact. The Income Tax Act (Canada) (ITA) does not contain a definition of residence. The ITA, however, automatically deems a person to be resident in Canada for tax purposes if such individual is resident in Canada for a period totalling 183 days or more in one taxation year.

With regard to trusts, if all the trustees of a trust are resident in Canada, the trust has generally been considered to be resident in Canada. Where some trustees are non-residents of Canada, determination of the residence of the trust is more problematic. Of primary importance has been determining where the trustee who manages and controls the trust assets resides. In the case of *Garron Family Trust v The Queen 2009 TCC 450 (CanLII) 2009 DTC 1287 (TCC)* the court held that the appropriate test to determine the residency of a trust is in fact the test used to determine the residency of a corporation, namely the central management and control test. The court also found that the non-resident trustee was a trustee in name only, and the Canadian-resident beneficiaries actually controlled the trust. The case of *Dill and Pearman, Trustees of the Thibodeau Family Trust v The Queen 78 DTC 6376 (FCTD)* until 2009 the undisputed authority for the residency of trustees test was distinguished in such a way as to render it irrelevant. The Tax Court of Canada's decision was upheld on appeal (*St Michael Trust Corp v The Queen 2010 FCA 309*) and the Federal Court of Appeal noted that the determination of where the central management and control of a trust is actually located is fundamentally a question of fact. The Federal Court of Appeal's decision, and therefore the central management and control test for trust residency, was affirmed by the Supreme Court of Canada in *Fundy Settlement v Canada 2012 SCC 14*.

In *Antle v The Queen 2009 TCC 465 (CanLII)* the court found that the trust in question, which had trustees resident in Barbados, was never created, as the Canadian-resident settlor, despite signing a trust deed and other documentation, never intended to create a trust, and retained control over the trust assets and decisions throughout the relevant period, as well as finding that the trust was never properly constituted as the property in question was never transferred to the trust. The case was also upheld on appeal (*Antle v The Queen 2010 FCA 280*) leave to appeal to the Supreme Court of Canada dismissed (*2012 CanLII 4145*) although in this case the Federal Court of Appeal went further than the Tax Court of Canada, holding that not only was the trust not validly constituted, but since the trust deed did not reflect the true arrangement between the parties involved, the trust was in fact a sham, a finding the lower court had declined to make. The Federal Court of Appeal stated that the intent or state of mind necessary to give rise to a criminal intent to deceive was not necessary in order for the trust to be a sham, as it would be in a prosecution for tax evasion.

Income tax is levied at both the federal and provincial level. Provincial tax is computed as a portion of the federal tax, except in Quebec. A decision from Newfoundland and Labrador was the first Canadian decision to consider trust residence for tax purposes at the provincial level. In *Discovery Trust v Canada (National Revenue) 2015 NLTD(G) 86 CanLII* the court confirmed that the test for tax residency of a trust to be followed for provincial tax purposes is the one affirmed by the Supreme Court of Canada in *Fundy Settlement v Canada*. The decision also provides a useful examination of some of the factors to be considered in determining whether the trustee maintained 'central management and control' over the trust.[1]

#FootnoteB

1 Please also see *The Herman Grad 2000 Family Trust v Minister of Revenue*, 2016 ONSC 2402 with respect to 'central management and control' over two trusts in Alberta, where the court found that a trust is resident where the actual decision-maker resides, which in this case was in Ontario and Boettger c. Agence du revenue du Quebec, 2017 QCCA 1670 (CanLII) in which the Quebec Court of Appeal upheld the decision of the trial court that the residence of a trust was Quebec and not Alberta..

#FootnoteE

Lifetime gifts

C2.46

There is no gift tax in Canada. A gift of capital property will, however, give rise to a disposition of property and may result in income tax consequences.

Disposition of capital property

C2.47

In the Canadian system, capital gains are subject to taxation, and arise when capital property is disposed of. 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 several 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 which are not at arm's-length. Preferential treatment is given to a principal residence that is exempt from taxation on capital gains. Also, an exemption of capital gains exists for shares of certain active Canadian-controlled private companies and for qualified farm and fishing property, in the amount of $800,000 for 2014, indexed for inflation thereafter (being $883,384 CAD for 2020).

Capital gains tax

C2.48

For capital property, 50 per cent of the capital gain is taxable. If capital losses exceed gains in a year, 50 per cent of the loss over the gain is allowed as a capital loss and may be offset against the taxable capital gains of other years, including carry-back provisions for three years and an indefinite carry-forward against future capital gains.

Non-arm's-length transfers

C2.49

Transfers of property, including by way of gift between non-arm's-length parties as defined under the ITA, are subject to special rules for non-arm's-length transfers. These rules have the effect of deeming that certain transfers have occurred at fair market value.

Deferral of capital gains

C2.50

A deferral of the taxation of capital gains is available in respect of certain transfers to spouses and common law partners, including same sex spouses, or to qualifying trusts in respect of the same. The property may be rolled over to the spouse or partner or qualifying trust on a tax-deferred basis, and is not subject to taxation until disposition by the spouse or common law partner, or qualifying trust, or on the death of the spouse or common law partner, whichever first occurs. Furthermore, a roll-over to defer taxation of capital gains is also available in respect of certain intergenerational transfers of farm property.

The Canada Revenue Agency introduced legislation that came into effect in June 2001 to facilitate individuals aged 65 and older using an *inter vivos* trust for appreciated property by allowing a roll-over of appreciated property to an alter ego trust, or to a joint partner trust, thereby deferring the capital gains tax (CGT) on the transfer of property to such trusts. The alter ego trust and joint partner trust allow for the greater use of trusts as will substitutes, as well as in inter-provincial planning to take advantage of lower tax rates in some of the Canadian provinces and territories by siting a trust in these jurisdictions in which the Quebec Court of Appeal upheld the decision of the trial court that the residence of a trust was Quebec and not Alberta.

Attribution of income

C2.51

Canada has a progressive system of income taxation, and the rate of tax paid increases with the level of an individual's taxable income. This creates an incentive to attempt to split income among lower-rate taxpayers in a family unit. To prevent abusive forms of income splitting, a complex set of rules exists under the ITA. When a transfer is to be made between spouses and family members, including by way of gift, these rules must be analysed to determine whether they will result in attribution of income to the transferor of the property.

Taxation on death

C2.52

Succession duties or gift and inheritance taxes no longer exist in any of the Canadian provinces—nor do they exist at the federal level. The succession duty regime that existed at the federal level pre-1971 was effectively replaced by the capital gains regime effective from 1 January 1972. The last of the succession duties was repealed at the provincial level in 1986.

On death, income earned in the year of death is subject to taxation. On death, an individual is deemed to dispose of his capital property owned immediately before death for proceeds equal to the fair market value of the property, which can give rise to taxable capital gains in the year of death.

As discussed above with regard to lifetime gifts to a spouse, common law partner or a qualifying trust in respect of the same, rollover relief is also available on death if the surviving spouse or common law partner inherits capital property outright or through a qualifying trust. In addition, farm property that is inherited by a child, grandchild or great-grandchild is also eligible for a deferral of capital gains tax.

Generally, the graduated rate schedule for individuals applies to certain will and testamentary trusts. However, in 2016, graduated income tax rates for testamentary trusts were eliminated and testamentary trusts with certain exceptions will be taxed at the top marginal tax rate. An estate will be taxed at the graduated income tax rates for 36 months after the deceased's death if it qualifies as a 'graduated rate estate', and testamentary trusts qualifying as 'qualified disability trusts' (eg, for the benefit of persons who are eligible for the Disability Tax Credit) will be taxed at graduated income tax rates. As well, administrative changes include that testamentary trusts other than graduated rate estates must now have a year end of 31 December, and testamentary trusts are now no longer exempt from the requirement to make income tax instalment payments.

As set out above, the death of the income beneficiary of a life interest trust triggers a deemed disposition. Tax arises on the income beneficiary's death (or in the case of a joint partner trust, on the surviving income beneficiary's death) on all income earned by the trust from the beginning of that tax year to the income beneficiary's date of death, as well as on all previously unrealized capital gains on the trust's capital property, including, in the case of a testamentary spouse trust, on any deferred capital gains.

Non-resident taxation

C2.53

Non-residents of Canada may be subject to Canadian taxation if they have taxable income earned in Canada or if they are subject to withholding tax on their Canadian-sourced income.

If a non-resident is either employed in Canada, has income from employment, carries on business in Canada or disposes of taxable Canadian property, he will be subject to Canadian tax.

Individuals who have never resided in Canada may still be subject to Canadian taxation if they have taxable Canadian property. On disposition of such property, including on deemed realization on death, they are subject to Canadian tax on any taxable capital gains.

Taxable Canadian property includes *inter alia* real property in Canada, capital property used by a taxpayer in carrying on a business in Canada, and a share of the capital stock of a private corporation, an interest in a partnership or an interest in a trust if, at any time during the 60-month period that ends at the time of the disposition of this property, more than 50 per cent of the fair market value of the share or interest was derived directly or indirectly (subject to exceptions) from one or any combination of:

(a) real or immovable property situated in Canada;

(b) Canadian resource properties;

(c) timber resource properties; and

(d) options, interests, or rights—in (a)–(c) above.

Dispositions of trust property coming within the definition of taxable Canadian property will be subject to the tax clearance certificate requirements of the ITA, s 116.

Taxation of non-residents is subject to treaty relief in respect of countries with which Canada has entered into a tax treaty. Where an individual is considered resident for tax purposes in more than one jurisdiction, resort may be had to any 'tie-breaker' rules under the applicable tax treaty to determine which country will assert its tax jurisdiction.

Given that Canada is one of the few jurisdictions in the world which does not have an inheritance tax or succession duty regime, but instead taxes capital gains on death, problems of potential double taxation arise both for Canadians owning property in a foreign jurisdiction which may also impose an inheritance tax or succession duty, and vice versa for the non-resident who owns taxable Canadian property, which as outlined above is subject to Canadian taxation on any capital gains.

In particular, this was a serious problem between Canada and the US given the frequency of cross-border ownership of property. Relief from potential double taxation is now available as a result of the 1995 Protocol to the Canada–US Tax Treaty. As a result of the Protocol, there is a tax credit available against US estate tax paid which can reduce Canadian tax on the deceased's final tax return. US estate tax paid on US real estate can be used to offset capital gains arising on the deemed realization of property on death of the deceased and on certain types of US source income, such as dividends and certain US wages. In addition, for estates exceeding the total gift and estate tax effective exemption limit applicable at the time of the deceased's date of death, US estate tax may also be used to offset capital gains tax which arises on death from US stocks which are deemed to be disposed of at death. (Note that the exemption limits and estate tax rates have undergone significant changes in recent years under the relevant US legislation). In December 2017, the US Government enacted legislation which in 2020 provides for a $11.58 million estate tax exemption limit indexed for inflation and a 40 per cent top estate tax rate, subject to future legislative changes as the increased exemption is effective from 2018 until 2025. Where applicable, the effective estate and gift tax exemptions have been unified.

Similar relief is afforded to US taxpayers by a credit against US estate tax for Canadian capital gains paid on the death of a US taxpayer.

An estate planning technique commonly used by Canadian residents to shelter US estate tax exposure for US *situs* assets is the use of either a Canadian holding company or a trust, with the objective of altering the *situs* of the assets held. In 2004, the Canada Revenue Agency took the position that there will be a shareholder benefit where any personal-use real property is acquired by a single purpose corporation or there is an acquisition of shares of a single purpose corporation holding personal-use real property (except as a result of the death of the individual's spouse or common law partner). This position now curtails the use of holding US personal-use real property through a single purpose corporation.

With regard to the taxation of non-resident trusts, certain non-resident trusts are now taxed in some respects as deemed residents of Canada with a view to reducing opportunities for the establishment of a non-resident trust for the benefit of Canadian resident beneficiaries, or by Canadian-resident contributors, accordingly reducing the scope for offshore tax planning using trusts. As of June 2013, a deemed resident trust calculates and pays Canadian tax on its worldwide income like a Canadian tax resident and must file an annual trust tax return like a Canadian tax resident.

Canadian resident beneficiaries or contributors are jointly and severally liable for tax amounts with the trustees of a non-resident trust, subject to conditions. The taxable assets of the non-resident trust generally exclude assets which do not relate to a Canadian resident beneficiary or contributor, provided that an irrevocable election is made. Exceptions would be provided for certain trusts, which exceptions previously included immigration trusts for up to five years after a contributor becomes a Canadian resident but the federal government unexpectedly eliminated this planning opportunity in the 2014 federal budget. Canada's Income Tax Conventions Interpretation Act now provides that 's 94 deemed resident' trust is also deemed Canadian resident for treaty purposes.

In the decision of *Sommerer v The Queen 2011 TCC 212, aff'd 2012 FCA 207* it was held that the attribution rule in s 75(2) of the Income Tax Act (Canada), which generally applies when a taxpayer retains certain rights or control over trust property, did not apply when property was sold at fair market value to a non-resident trust. In response, the federal government has extended the non-resident trust rules to non-resident trusts to which s 75(2) attribution would otherwise apply, and disallowed tax-deferred distributions from these trusts. Section 75(2) is limited to Canadian resident trusts excluding those deemed Canadian resident.

Recognition of foreign taxes

C2.54

Non-residents are subject to withholding tax on various payments from Canadian sources, including certain types of interest income, dividends, income from an estate or trust, rents and royalties, pension income and various retirement arrangement payments.

Where a Canadian resident taxpayer receives income from foreign-sourced investments, or from real property in another country, such Canadian resident will be taxable on it in Canada. A provincial and federal tax credit is available against Canadian tax where such income has been subject to taxation in the jurisdiction from which it has been sourced.

Liability for tax

C2.55

A taxpayer is liable for the payment of tax and must file a return of income each year and pay the tax owing. In respect of an estate or a trust, the legal personal representative of the estate, or the trustee of the trust, has the legal responsibility for tax compliance matters.

The legal personal representative or trustee has personal liability for any taxes, interest or penalties that remain unsatisfied in respect of an estate or trust under the legal personal representative's or trustee's control to the extent of the value of the property distributed, if he distributes property without first obtaining a clearance certificate from the Canada Revenue Agency. A trustee also has personal exposure to liability with respect to necessary filings related to non-resident beneficiaries of the trust.