The Private Wealth and Private Client Review

Tenth Edition

Editor
John Riches

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PREFACE

After the past unprecedented 24 months, it is now time to look forward to the post-pandemic world and consider the developments that will likely affect high-net-worth individuals. While (at the time of writing) life begins to resume, the after-effects of the pandemic will reach into the next decade and possibly beyond. The main political question of the day is 'Who will pay for the costs of the pandemic?' As the retail and hospitality industries were forced to close, there was a severe reduction in capacity in construction and manufacturing and high unemployment rates threatened, and governments intervened to provide stimulus packages to all areas of the economy.

The latest reports indicate that the pandemic had cost the UK government £372 billion as at 31 March 2021. [1]To put this in perspective, the total tax revenue that the UK government collected for tax year 2019–2020 was £636.7 billion.[2] Therefore, the Covid-19 bill constitutes almost 60 per cent of total tax revenue, or almost 14 per cent of the UK's GDP for 2019, and there are likely to be more costs to come.

On the other side of the Atlantic, Harvard economists David Cutler and Lawrence Summers estimate the pandemic will cost the United States at least US$16 trillion if the pandemic is largely over by autumn 2021.[3] That would comprise roughly 75 per cent of the nation's 2019 GDP, which was £21.43 trillion. Over in Europe, Germany's government estimated, in December 2020, that the pandemic would cost the country €1.3 trillion, almost 33 per cent of the country's 2019 GDP.[4]

For the rest of the 2020s, the aim for governments will be to generate higher revenues to pay off this borrowing, while continuing to stimulate the economy through fiscal interventions such as keeping interest rates low and government spending. Generating higher revenues will pose a challenge, as the pandemic has worsened inequality and had the greatest impact on individuals with low incomes.[5] Meanwhile, many high-net-worth individuals have benefited financially from the pandemic.[6] Not since the end of the Second World War have the tongues of rumour wagged so much or so loudly on the subject of wealth taxes.

1 https://www.nao.org.uk/covid-19/cost-tracker/.
2 https://www.nao.org.uk/work-in-progress/the-management-of-debt-owed-to-hmrc/
3 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7604733/.
4 https://www.dw.com/en/coronavirus-germany-faces-13-trillion-covid-bill/a-56103251.
5 https://www.ft.com/content/cd075d91-fafa-47c8-a295-85bbd7a36b50.
6 https://www.ft.com/content/747a76dd-f018-4d0d-a9f3-4069bf2f5a93.

As the introduction to the UK's Wealth Tax Commission[7] Report[8] points out, the concept of a one-off levy during a time of financial crisis is not a novel one in many countries, including the UK. In 1981, during recession, Conservative Prime Minister Margaret Thatcher's government introduced a tax on banks, which raised about £400 million. In 1997, Labour Prime Minister Tony Blair's government imposed a tax on privatised utility companies, and raised £5 billion.

The OECD report on Wealth Taxes notes that in 1990, 12 countries had wealth taxes, but since then many countries have repealed the tax and now only four countries currently tax the net wealth of their residents annually.[9] Only three European countries currently have a general wealth tax, being Norway, Spain and Switzerland. The Norwegian tax is on net wealth where a resident owns more than 5 million kroner in worldwide assets. The Swiss tax is levied on worldwide assets, with the exception of immovable property abroad. The tax rates vary from canton to canton. The Spanish wealth tax progresses from 0.2 to 3.75 per cent where the individual holds assets above €700,000. Individuals living in Madrid are exempt from the tax.

Argentina was the first country to implement a wealth tax in response to the pandemic at the end of 2020 in the Solidarity and Extraordinary Contribution of Great Fortunes Law. The levy is a one-off, payable by those whose assets total 200 million pesos. The rate of the tax is progressive, with Argentinian assets taxed up to 3.5 per cent and worldwide assets taxed up to 5.25 per cent. The tax has raised roughly 223 billion pesos. This amounts to about half a per cent of Argentina's GDP[10] and 75 per cent of the government's target amount of the tax to be raised.

All taxes are wealth taxes to some degree, be they income tax, capital gains tax, value added tax, inheritance tax or corporation tax. However, these taxes are taxes on transfers of wealth, on dispositions of wealth and on accumulations of wealth rather than a tax on all the assets an individual holds on a particular date.

So if governments are to bring in wealth taxes, what might they look like? The UK Wealth Tax Report advocates a one-off wealth tax as being more effective than an annual one.[11] A one-off wealth tax is much harder for taxpayers to avoid as the date of assessment of the individual's wealth can be announced at the same time as the tax itself. Furthermore, a one-off tax does not distort taxpayers' behaviour or disincentivise taxpayers from working, investing or even being resident in the country. The report recommends that it should be possible to pay the tax in instalments to assist those who hold mainly illiquid assets, such as residential property, from having to sell in order to pay the tax. It also recommends that the tax should be levied on individuals' net wealth, that is, after deduction of debts and liabilities, and that jointly held assets should be apportioned between owners. The report then goes on to estimate that such a tax on the net assets of UK residents above £500,000 could, at 1 per cent per annum for five years, raise £260 billion. If levied on net assets above £2 million, it could raise £80 billion.

7 Although the title makes the Commission sound official, it was not a government report but rather one in which the London School of Economics played a central role.

8 https://www.wealthandpolicy.com/wp/WealthTaxFinalReport.pdf.

9 https://www.oecd.org/tax/tax-policy/role-and-design-of-net-wealth-taxes-in-the-OECD-summary.pdf.

10 https://www.bloomberg.com/news/articles/2021-05-03/argentina-wealth-tax-fought-by-millionaires-raises-2-4-billion.

11 https://www.wealthandpolicy.com/wp/WealthTaxFinalReport.pdf.

Meanwhile, a European study developed in partnership with the Karl Renner Institute and the Austrian Federal Chamber of Labour advocates a pan-European wealth tax as well.[12] The argument for a pan-European tax is that it would be much harder for individuals to avoid, unless they became resident outside of Europe altogether. Within the 22 European countries, the richest 1 per cent of individuals hold 32 per cent of European wealth whereas the poorest 50 per cent of individuals hold 4.5 per cent between them. The report finds that a 2 per cent tax on individuals who hold net assets above €1 million would only tax 3 per cent of the population and would likely raise revenues in the region of €192 billion, accounting for some evasion. A very progressive tax rate with a rate of 10 per cent above assets of €500 million could raise in the region of €357 billion, which equates to 3 per cent of European GDP.

In the United States, there is a similar wealth disparity. The richest 10 per cent of Americans hold just under 70 per cent of US wealth.[13] The *Financial Times* reported in February 2021 that a one-off 5 per cent tax on the richest 10 per cent would raise US$4 trillion, amounting to 19 per cent of the US's GDP. Democrat Elizabeth Warren advocates for an 'ultra-millionaire tax' at 2 per cent above US$50 million and 6 per cent above US$1 billion. It is estimated that this would bring in revenues of US$3.75 trillion over 10 years.[14]

As well as introducing a new wealth tax, there are also calls for changes to existing taxes. The OECD recently published a study on inheritance taxation in OECD countries, which notes that the inheritance tax bases in many countries have been narrowed due to exemptions and reliefs.[15] Making estate and gift taxes more rigorous would not only raise revenue but also reduce wealth inequality through intra-generational transfers. The report also notes that, with many countries having ageing populations, there is a disparity between wealthy older generations and poorer younger generations. On average, inheritance tax revenues equate to only 0.5 per cent of the total tax revenues in most OECD countries, with only Belgium, France, Japan and South Korea collecting 1 per cent of total tax revenues from inheritance taxes.[16]

Within the 38 member countries of the OECD, 24 tax assets that are passed on the death of the owner. Interestingly, the majority of these countries tax on the basis of the value the recipient receives. Only four countries, being the US, the UK, South Korea and Denmark, tax on the basis of the value of the deceased's estate. US President Biden is attempting to push through a reduction in the lifetime gift and estate allowance from US$11.7 million to US $3.5 million, as well as to increase the top tax rate to 45 per cent up from 40 per cent.

The UK has no tax on outright lifetime gifts between individuals, but the threshold for gifts the deceased makes in the last seven years of life and through his or her estate is £325,000. However, many individuals can circumvent this through making lifetime gifts outside the seven-year window with no tax implications. However, the OECD report suggests that capturing lifetime gifts in the tax base, as well as reducing exemptions and reliefs, would make inheritance taxes more effective as well.

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12 https://www.feps-europe.eu/attachments/publications/a%20european%20wealth%20tax_policy%20study.pdf.

13 https://www.ft.com/content/0952761a-f565-46be-a515-12659551169a.

14 https://elizabethwarren.com/plans/ultra-millionaire-tax,

15 OECD (2021), Inheritance Taxation in OECD Countries, OECD Tax Policy Studies, OECD Publishing, Paris, https://doi.org/10.1787/e2879a7d-en.

16 ibid, p. 5.

One separate non-pandemic rationale that has been advanced in the UK to support estate and gift tax reform is the theme of 'inter-generational fairness'. A report published by the All – Parliamentary Group in early 2020[17] advocated replacing the current UK donor-based tax regime with one based on a donee-based tax where every donee was given a lifetime exemption. Gifts in excess of that exemption would attract a 10 per cent flat tax rate. The preference for a donor-based system was in part fuelled by a desire to encourage donors to make gifts to their grandchildren as well as their children. It is unclear whether this approach will find favour with the government.

Meanwhile, despite the pandemic, transparency and automatic information exchange initiatives, which formed the main subject of my forewords in earlier years, have been progressing apace. Where high-net-worth individuals are taking advantage of technological advancements and easier remote working, and spending more time in different countries, they may become tax resident in multiple jurisdictions and, if not, at least reportable under measures such as those of the Financial Action Task Force, the Common Reporting Standard (CRS) and the sixth version of the EU Directive on administrative cooperation (DAC6). Indeed, the CRS FAQs were updated to advise financial institutions that where an individual's interests are split between multiple jurisdictions, the account can be 'reported to all Reportable jurisdictions where there is a residence address'.[18] In this case, the individual will be reported to more tax authorities and perhaps subject to a higher degree of scrutiny than before.

Individuals are already facing enquiries from tax authorities as a result of the information exchanged between different countries. Currently, many enquiries are merely requesting further information, but it may be that in the near future countries will begin to adapt and modulate taxation regimes on the strength of this information. The introduction of the DAC6 legislation across the European Union will also provide a plethora of information to tax authorities and governments about arrangements that are not currently caught by the CRS.

Finally, the US is currently pursuing a global minimum corporation tax rate, which was pitched at 21 per cent before dropping to 15 per cent. Given high budget deficits and the need for increased revenue, governments are going to be even more reluctant to allow multinational corporations to avoid paying taxes in the countries in which they achieved their revenue. The oft-maligned Amazon, for example, made a record €44 billion in Europe in 2020, and yet paid no tax as the Luxembourg headquarters made a €1.2 billion loss.[19]

However governments end up dealing with the large debts that have been created, the rate of change, be it to tax rules or to disclosure obligations, continues to increase exponentially. What is clear is the need to keep a clear view of the road ahead so that our high-net-worth individual clients and their structures can adapt to the changing landscape.

John Riches
RMW Law LLP
London
August 2021

17 https://www.step.org/system/files/media/files/2020-05/STEPReform_of_inheritance_tax_report_012020.pdf.

18 https://www.oecd.org/tax/exchange-of-tax-information/CRS-related-FAQs.pdf, Sections II-VII: Due Diligence Requirements, FAQ 3.

19 https://www.theguardian.com/technology/2021/may/04/amazon-sales-income-europe-corporation-tax-luxembourg.

Chapter 7

CANADA

Margaret R O'Sullivan and Marly J Peikes[1]

I INTRODUCTION

i The current Canadian wealth situation

It is with a growing sense of optimism that we begin to now focus on adapting to a post-covid world, which will be far different than the one we knew before the pandemic. Yes, we will need to confront huge government deficits, but the good news is that the Canadian economy has been surprisingly resilient to the global crisis the pandemic created, and the prospect is for continued growth. Many have suffered, some have prospered, and others have simply kept calm and carried on with little economic impact. Private clients, however, fear a backlash, and that they will be targeted as the government seeks to introduce significant tax reforms to pay for the pandemic, and also to address increased wealth inequality. These tax changes are yet to come. The federal budget of 20 April 2021 was two years overdue, and focused on spending initiatives to strengthen the economy, not on tax reform. The bad-tasting medicine will likely only be dispensed after the next election as the Liberal party seeks a majority government. Meanwhile, private client practice has in general been covid-proof and in fact, many practitioners have had an uptick in demand for their services. They have also felt thankful and very fortunate to be in such a position in the face of others who have suffered so badly.

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 and territorial 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

1 Margaret O'Sullivan is managing partner of and Marly Peikes is an associate lawyer at O'Sullivan Estate Lawyers LLP.

an increasingly ageing population. Canada's multiculturalism and relatively open-door immigration policy, which are required to maintain positive population growth, expand the Canadian economy and are 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 or territorial 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 2021, 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$892,218 in 2021) and on qualified farm or fishing property (C$1 million in 2021). 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 or territorial tax brackets for high earners

The combined provincial or territorial and federal tax rates for high earners in 2021 range from 44.5 per cent in Nunavut to 54 per cent in Nova Scotia. The highest tax rate in 2021 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. Over the past 10 years, there has been a significant increase in the top marginal rate. Combined rates in Ontario and Quebec in 2009 were below 50 per cent.

Intergenerational small business and farm transfers

A private member's bill passed a third reading in the House of Commons on 12 May 2021, received royal assent on 29 June 2021 and is now in effect. It limits the application of certain anti-avoidance rules that currently result in a sale of small business shares to an arm's-length purchaser being taxed at lower capital gains rates than a sale to a child or grandchild. The anti-avoidance rules operate so that the owner receives a dividend at higher rates. The result of the current rules is that they penalise intergenerational sales because of this increased tax burden. The legislation would level the playing field so that a sale to a family member would have the same level of tax as would a sale to an arm's-length purchaser, thereby facilitating intergenerational sales. The federal government plans to introduce amendments against tax avoidance.

Revised federal legislation on the taxation of trusts and new reporting requirements for 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.

New trust reporting rules were introduced in July 2018, effective for taxation years ending on or after 31 December 2021. The new rules require the identity of settlors, trustees and beneficiaries and those who have control over trustee decisions to pay income or capital, such as a protector, to be reported to the government. As well as this, trusts (with limited exceptions) must file a tax return. Previously, a trust would file a tax return only if it received income or made distributions to the beneficiaries in a year. Non-resident trusts that are required to file a trust tax return are also subject to the new disclosure rules. There are significant penalties for non-compliance of the greater of C$2500 or 5 per cent of the highest fair market value of the trust's assets. With the onset of these new obligations, it is incumbent for trustees to gather the necessary information.

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

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

3 *Discovery Trust v. Canada*, 2015 NLTD(G)86. Also see *The Herman Grad 2000 Family Trust v. Minister of Revenue*, 2016 ONSC 2402 and *Boettger v. Agence du revenue de Quebec*, 2017 QCCA 1670 (CanLii).

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 Canada Revenue Agency (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.

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.

Since 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 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 parent died before the start of the year and is a minor child of the settlor, even if the other parent is living; 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.

There is increasing speculation and significant media and professional commentary that the government may in future, perhaps after the next federal election, introduce a number of tax reforms to pay for the pandemic, including curtailing the principal residence exemption so that it is no longer unlimited, but instead is capped. Canada is one of the very few OECD countries that allow for a full exemption. Criticism has been levelled that a full exemption results in increased income inequality, because the owners of high-value homes receive a windfall by allowing them to be untaxed.

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

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 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 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 (Vancouver district). The 2018 British Columbia budget introduced an increase to the tax to 20 per cent, effective as of 21 February 2018, and expanded the tax outside the Vancouver district to cover several other regions. British Columbia also has a speculation and vacancy tax that has a higher rate of 2 per cent for foreign owners, and it applies to residential properties in certain areas of the province. In 2017, Vancouver also implemented an empty-home tax, which is to increase from 1.25 per cent in 2020 to 3 per cent in 2021.

The 2021 federal budget has proposed a 1 per cent federal tax effective 1 January 2022 on foreign-owned vacant property. The objective of the tax is to discourage housing speculation and vacancy of homes in major urban centres.

General anti-avoidance rule in respect of income tax

The Income Tax Act (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.

Whistleblower rules, audit initiatives and compliance measures

The CRA has launched the offshore tax informant programme, 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 the non-compliant activity involves property located outside Canada or certain other foreign elements. As of 2020, the CRA has assessed over C$60 million in additional taxes. 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 audit programme (RPAP) 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. There are over 30 audit teams across the country involved in the RPAP programme. Between 2014 to 2019, more than 900 audits were completed. However, in response to a question tabled in Parliament in June 2021, the CRA says that to date there have been no prosecutions or convictions, but that it has referred 44 cases to its criminal investigations programme since 2015, only two of which proceeded to federal prosecutors with no charges laid afterwards. The lack of prosecutions follows more than 6.770 audits since 2015. However, about 3,000 cases are ongoing, some in the court process. 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, a denial of tax benefits and possible penalties may result.

Possible upcoming tax reforms

Undoubtedly, the government will need to address the unprecedented deficit resulting from the coronavirus pandemic in upcoming budgets. There is significant speculation about what tax reform measures might be introduced. In addition, the government has enunciated very clearly in numerous statements its concern to address extreme income inequality, which has only increased as a result of the pandemic. Possible tax reforms, apart from curtailing the principal residence exemption previously discussed, may include a higher corporate tax rate and increasing the inclusion rate for capital gains from 50 per cent to a higher percentage. It is possible that the rate of graduated sales tax could also be increased. There has been significant professional writing and media discussion about the introduction of a wealth tax, estate tax or inheritance tax, or some combination of them. An annual wealth tax was proposed by the New Democratic Party (NDP) in the 2019 federal election, and the NDP also introduced a motion to the House of Commons in 2020 for an annual wealth tax, but it was defeated.

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 trust is situated in a low-tax jurisdiction. However, the opportunities for trust planning with non-resident trusts have been significantly curtailed by 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 to 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 implemented 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. Information exchanges commenced in June 2018. On 20 April 2020, the CRA released detailed revised guidance on FATCA and the CRS.

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 who meets certain requirements, 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. Additional reporting requirements for certain non-resident trusts and, as noted previously, new reporting rules were introduced in 2018.

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, a 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 applicable 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 and Canada continues to shine when it comes to international recognition of the strength of its banking sector. 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 declined for small businesses' active business income between 2007 and 2017 but have substantially increased since then, making Canada far less competitive than previously, particularly given the substantial decrease in the US corporate tax rates, the United States being Canada's largest trading partner. However, the Biden administration has proposed to raise the corporate tax rate to 28 per cent from 21 per cent, to take effect as early as January 2022, which will substantially narrow the gap. The combined net federal and provincial corporate tax rates applicable to general corporations' active business income in 2021 range between 23 and 31 per cent.

Preferential tax treatment is offered to a small business corporation, which benefits from a reduced combined federal and provincial tax rate of between 9 and 12.2 per cent on the first C$500,000 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.

In 2018, amendments to tax legislation were enacted to reduce the small business deduction in the case of corporations that have more than C$50,000 per year of passive investment income. These changes follow the 2017 taxation changes that target corporations that accumulate income that had benefited from the low small business tax rate. The small business limit for CCPCs and associated corporations is reduced 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. For this purpose, a definition of investment income or adjusted aggregate investment income (AAII) was introduced. 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. Ontario and New Brunswick subsequently decided they would not create parallel legislation and instead have preserved the small business limit at the provincial level.

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$892,218 in 2021), as are certain qualified farm and fishing properties (capital gains exemption being C$1 million in 2021).

Investment income earned in a CCPC is taxed at very high rates. For instance, in 2021, CCPCs in Prince Edward Island, the province with the highest provincial tax rate for investment income earned in CCPCs, will pay income taxes on their investment income at a rate of 54.67 per cent, which is higher than the highest individual tax rate of 51.37 per cent. In other provinces, CCPC investment income is taxed at rates ranging between 46.67 per cent in Alberta and 53.67 per cent in Newfoundland and Labrador. 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 2021.

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 a business owner's spouse or common-law partner 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. The shares cannot be shares of a professional corporation. 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 2021 in Ontario, the highest individual tax rate on eligible dividends is 39.34 per cent and that on non-eligible dividends is 47.74 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. New rules introduced in 2018 that apply to taxation years after 2018 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.

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. 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 GST. Five provinces have harmonised GST with provincial sales tax, and this is known as harmonised sales tax. Combined, these taxes range from 5 per cent (in Alberta, British Columbia, Manitoba, the Northwest Territories, Nunavut, Quebec, Saskatchewan 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 on 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 European Union 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 is confirmed. In this process, the will and supporting documents, which may include a detailed asset listing, become public. In a recent decision,[5] the Supreme Court of Canada confirmed Canada's fundamental principle of open court proceedings and upheld the appellant court's decision lifting a sealing order to probate files, the estate trustees having unsuccessfully argued that the court files should be sealed to protect the privacy and dignity of the victims of violence.

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 will not need to be submitted to probate in that province. Manitoba abolished probate fees effective 1 July 2020 as well as provincial sales tax on the preparation of wills.

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.

5 *Sherman Estate v. Donovan*, 2021 SCC 25.

In Ontario, the preferential share was increased from C$200,000 to C$350,000 for deaths that occurred on 1 March 2021 or later. British Columbia, Alberta, Saskatchewan and Manitoba also make a distinction in determining the share to which a surviving spouse is entitled on an intestacy based on whether there was common issue with the deceased or issue from a different relationship.

As of 1 January 2017, under Part III of the Succession Law Reform Act[6] 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.[7]

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. In Nova Scotia, a de facto spouse is only considered a dependant if registered as a domestic partner.[8] When considering whether a de facto spouse is considered a dependant, the constitutionality of the distinction between a couple registered as a domestic partnership and a couple in an unregistered common law relationship was upheld in the recent decision of *LeBlanc v. Cushing Estate*.[9]

The quantum of support is determined circumstantially and with judicial discretion, usually taking into account needs and means,[10] and in some cases, the dependant's accustomed standard of living.[11] 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.[12] 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.[13]

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[14] and British Columbia.[15]

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

6 RSO 1990, c S26.
7 ibid., see Section 1.1(1).
8 Vital Statistics Act, RSNS 1989, c 494, Part II.
9 *LeBlanc v. Cushing Estate*, 2020 NSSC 162.
10 See, for example, *Bath v. Bath Estate*, 2016 BCSC 1239.
11 See, for example, *McKenna Estate (Re)*, 2015 ABQB 37; *Morassut v. Jaczynski*, 2015 ONSC 502.
12 See, for example, *Tippett v. Tippett Estate*, 2015 BCSC 291; *Philp v. Philp Estate*, 2017 BCSC 625.
13 See, for example, *McKenna Estate (Re)*, 2015 ABQB 37.
14 *Riley Estate (Re)*, 2014 ABQB 725; *Umbach v. Lang Estate*, 2016 ABQB 16, 2016; *Wright v. Lemoine*, 2017 ABQB 395.
15 *Re Richardson Estate*, 2014 BCSC 2162; *Coombes Estate (Re)*, 2015 BCSC 2050; *Kish v. Sobchak Estate*, 2016 BCCA 65; *Connor Estate*, 2017 BCSC 978.

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. The remaining 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

Gifts in wills and public policy

Two Canadian lower court decisions (one decision from New Brunswick and another from an Ontario court) limited testamentary freedom by altering gifts in wills for public policy reasons. The New Brunswick decision of *McCorkill v. Streed*[16] 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.[17] In the Ontario decision of *Spence v. BMO Trust Co*,[18] 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).[19] In a recent Nova Scotia case, the court held that testamentary freedom is a decision of fundamental personal choice, which is protected under the Canadian Charter of Rights and Freedoms. The court 'read down' Nova Scotia legislation that would otherwise have given non-dependant adult children of a testator the right to make a claim for support as a dependant of their parent's estate to exclude them.[20]

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 to their four children (each spouse having two children from a prior marriage). After the husband's death, the wife made

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

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

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

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

20 *Lawen Estate v. Nova Scotia* (Attorney General, 2019 NSSC 162).

a new will and gifted her estate to her two adult children, then 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.[21] 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 estate to his biological children. The testator's stepchildren brought an application regarding the 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.[22] A recent Ontario lower court decision looked at the remedy of constructive trust and when it may arise.[23]

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, and the maximum rate of US estate tax increased from 35 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 to US$11.7 million for 2021, 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. The Biden administration has proposed to decrease the exemption to US$3.5 million and to increase the highest estate tax rate from 40 to 45 per cent. Such a decrease in the exemption would significantly impact many Canadians who are subject to the US transfer tax regime.

Income tax-related reporting requirements

FATCA, introduced to combat offshore tax evasion, affects 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.

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

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

23 *Nelson v. Trottier*, 2019 ONSC 1657.

Information to be reported includes identifying information, information about the values of 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 in effect a Model 1 type IGA with the United States. 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 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. By complying with the IGA, Canadian financial institutions avoid a 30 per cent withholding requirement under FATCA on certain payments to them. In addition, 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 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 took place in June 2018. The CRS is based on FATCA and is similar in effect.

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 where 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. Little progress has been forthcoming to adopt the Canadian Uniform Act. The Alberta Law Reform Institute reviewed it and conducted a broad consultation, but there was no broad support for its implementation.

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 is 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, 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. On 1 January 2020, Alberta introduced the Matrimonial Property Act,[24] which provides that the same property division rules will apply to both married spouses and couples in a relationship of interdependence.

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*,[25] 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.[26] While a majority of the Supreme Court agreed

24 Matrimonial Property Act, RSA 2000, c M-8.

25 2013 SCC 5.

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

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.

Common law property division for de facto spouses

In *Kerr v. Baranow and Vanasse v. Seguin*,[27] 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,[28] Alberta[29] and Ontario,[30] with relatively little valuation analyses having been reported to date.

27 [2011] SCJ No. 10.

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

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

30 *Mudronja v. Mudronja*, 2014 ONSC, 6217, *Tremblay v. Tremblay*, 2016 ONSC 588.

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

In two companion cases, *Pecore v. Pecore*[31] and *Madsen Estate v. Saylor*,[32] 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 donor 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 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*,[33] a Saskatchewan court held that if an i*nter 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 the 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.[34] In *Mroz (Litigation guardian of) v. Mroz*,[35] 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 that 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*[36] 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,

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

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

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

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

35 2015 ONCA 171.

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

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.

The 2020 Ontario Superior Court of Justice decision in *Calmusky v. Calmusky*[37] adds a further dimension to the presumption of resulting trust. The Court found that the presumption of a resulting trust applied to a registered account designated to an adult beneficiary. However, in the 2021 Ontario Superior Court decision in *Mak (Estate) v. Mak* the Court came to the opposite conclusion and held a resulting trust cannot apply to a beneficiary designation of such a plan.[38] These conflicting decisions have left uncertainty for lawyers and financial advisers with respect to beneficiary designations.

Adding more uncertainty to joint ownership, in the decision of *Marley v. Salga*,[39] the Ontario Superior Court expanded the ways in which spouses can sever a joint tenancy through a course of dealing. In this case, the deceased and his widow owned their matrimonial home as joint tenants with right of survivorship. The deceased dealt with his one-half interest in the home under his will and the Court relied on evidence to support that the widow had knowledge of the deceased's steps to deal with his one-half interest, which the Court held evidenced a mutual intention to hold the home as equal tenants-in-common. This decision was upheld at the Ontario Court of Appeal.[40]

In Quebec, there is no equivalence to joint tenancy or rights of survivorship. In *Gauthier v. Gauthier*,[41] 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.

In the British Columbia Court of Appeal decision in *McKendry v. McKendry*,[42] 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

37 *Calmusky v. Calmusky*, 2020 ONSC 1506.
38 *Mak (Estate) v. Mak*, 2021 ONSC 4415.
39 *Marley v. Salga*, 2019 ONSC 3527.
40 *Marley v. Salga*, 2020 ONCA 104.
41 2016 QCCS 2333.
42 2017 BCCA 48; similar decision by the Ontario Court of Appeal in *Laski v. Laski*, 2016 ONCA 337.

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)*,[43] 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[44] 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*,[45] 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 more recent British Columbia Court of Appeal decision of *Namdarpour v. Vahman*[46] illustrated that the presumption of advancement is an evidentiary presumption that may operate where the judge is unable to reach a conclusion about the transferor's actual intention.

Exempting certain matrimonial property from the equalisation regime

The 2012 Ontario Court of Appeal decision in *Spencer v. Riesberry*[47] held that in the circumstances, a matrimonial property held by a family trust where one of the beneficiaries 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.

The Supreme Court of Canada decision in *Yared v. Karam*[48] found that a family home held in a trust that one spouse controls can be included in a married couple's family patrimony to be divided equally between the spouses on the breakdown of a marriage. A family patrimony, which is unique to Quebec, is created when a couple marries and includes the property belonging to spouses that they use to meet their family's needs. Under Quebec's Civil Code, 'rights which confer use' are included in the family patrimony, and the Court held that the control that the trustee had over the trust property gave him rights which confer use. This case illustrates Quebec's treatment of trusts in the family law context and how the civil law regime in Quebec differs from the common law regime in the rest of Canada.

43 2016 BCCA 186 (appeal dismissed with costs).
44 SBC 2011, c.25.
45 2017 BCSC 1226.
46 2019 BCCA 153.
47 *Spencer v. Riesberry*, 2012 ONCA 418.
48 *Yared v. Karam*, 2019 SCC 62.

Proprietary estoppel

The equitable claim of proprietary estoppel was successfully used in two 2014 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.[49] 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: encouragement or acquiescence in respect of land; detrimental reliance; and 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, was 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.[50] *Cowper-Smith v. Morgan*[51] 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,[52] the court 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.

Execution of estate planning documents during the covid-19 pandemic and beyond

Each province and territory has its own formal requirements for making a valid will and powers of attorney. In every province and territory except for Quebec, the law requires a will to be in writing and signed at the end by the will-maker in the presence of two witnesses, who each in turn sign the will in the presence of the will-maker and each other (Manitoba also has additional requirements of initialling each page). A similar process must be followed for a continuing or enduring power of attorney for property and for personal care, although the number of witnesses varies from one to two among the provinces and territories.

To address the problem of executing estate planning documents during the covid-19 pandemic, all of the provinces and territories except for Nova Scotia, Prince Edward Island, Yukon, the Northwest Territories and Nunavut released emergency orders that temporarily allow for the virtual execution of wills and powers of attorney by means of 'audio-visual communication technology'. Some of the provinces also require that one of the witnesses should be a lawyer. Quebec's emergency legislation allows electronic signing of notarial wills, which are wills that a notary prepares and that the will-maker signs in the virtual presence of the notary and another witness.

Some provinces, including British Columbia, Saskatchewan and Ontario, have gone so far as making permanent changes to their legislation to adopt technology in the execution of

49 *Clarke v. Johnson*, 2014 ONCA 237 and *Love v. Schumacher Estate*, 2014 ONSC 4080.
50 *Sabey v. Rommel*, 2014 BCCA 360.
51 2016 BCCA 200 (overturned).
52 *Cowper-Smith v. Morgan*, 2017 SCC 61.

estate planning documents. On 14 August 2020, Bill 21 received royal assent and amended British Columbia's Wills, Estates and Succession Act, recognising electronic wills that are created on a computer and signed electronically and for which there is no printed copy, the first Canadian jurisdiction to do so. On 19 April 2021, Bill 245 received royal assent and amended Ontario's Succession Law Reform Act to allow for the virtual execution of wills and powers of attorney permanently. It will be interesting to see whether the other provinces and territories follow suit to adopt technology in the execution of estate planning documents permanently.

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 that 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 or spouses 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 with exceptions for graduated rate estates and for qualified disability 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. In addition, 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 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, and 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 have been 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, because 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 and new transparency requirements

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. All regulated entities starting 1 June 2021 will also be required to obtain and take reasonable steps to confirm the accuracy of beneficial ownership information they obtain, and not just in certain sectors. 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 the 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.

In the past few years, initiatives to require company, trust and real estate transparency have been prolific on the global stage. In Canada, they form a backdrop to recent legislative proposals and changes. In 2018, the federal government introduced legislation that came into effect on 13 June 2019, which amended the Canada Business Corporations Act to require that corporations collect and keep a register of specified information regarding those who have significant control over a corporation, including registered shareholders, beneficial owners of shares and persons who have direct or indirect influence, and as a result have control over the corporation. The information is not to be publicly available, but is to be available to directors, shareholders and creditors of the corporation. In the 19 April 2021 federal budget, the government finally announced it would build and implement a publicly accessible corporate beneficial ownership registry by 2025 and has allocated C$2.1 million for such purpose. This appears to be a modest amount given the complexity, magnitude and importance of a public registry, in particular given criticism that Canada has been lax in its enforcement of its money laundering rules, and that significant funds are laundered in Canada as a result, including through shell corporations.

In December 2017, the Canadian finance ministers entered into the agreement to strengthen beneficial ownership transparency, which included a commitment on the part of the provinces to make legislative changes to require provincially incorporated corporations to maintain information on beneficial owners. Some of the provinces have forged ahead with legislative changes that contain similar requirements to those under the new federal legislation, including Manitoba and Prince Edward Island. British Columbia also implemented corporate legislation on 1 October 2020, but it differs from the federal legislative changes. Saskatchewan and Nova Scotia both have bills that have been assented to but not yet proclaimed in force at the date of writing. In the autumn of 2019, Quebec began corporate transparency consultations, and in the 2020–2021 budget, the government introduced measures that would require enterprises to obtain information on beneficial owners for disclosure to the publicly accessible Registraire des enterprises du Quebec, and to make it possible to do research on an enterprise using the name and address of a natural person. A bill has since been introduced in Quebec, which passed second reading on 14 April 2021 and at the date of writing is under study by the Quebec National Committee.

On the real estate front, British Columbia's Land Owner Transparency Act together with the Land Owner Transparency Regulation came into force on 30 November 2020, which created a new public registry for beneficial ownership of real estate in the province. Corporations, trustees and partners will be required to provide specified information on those who have a beneficial interest in land, a significant interest in a corporation that owns land or own an interest in land through a partnership, with certain restrictions. The stated intention of the registry is to prevent tax evasion, fraud and money laundering by ending anonymous or hidden ownership of real estate. The new registry opened to the public on 30 April 2021. It remains to be seen whether this initiative will head east and roll out through other Canadian jurisdictions. In Quebec, in February 2019, a regulation was published that aimed at identifying non-resident purchasers of residential property. There is speculation that this is the first step towards a tax on non-residents, as currently exists in certain designated areas of British Columbia and Ontario. In Ontario, since May 2017, additional disclosure has been required in making a real estate transfer pursuant to the Land Transfer Act, which includes disclosure of the beneficial ownership of the transferred property; however, this information is not publicly available.

With respect to trusts, as previously noted, new trust reporting and disclosure rules came into effect on 1 January 2021. All Canadian resident trusts with very limited exceptions will be required to file an annual T3 trust tax and information return whether or not the trust earned income in any year. The provision of this information erodes privacy in the use of trusts and will provide substantial information to the government that was previously not available to it.

V OUTLOOK AND CONCLUSIONS

When dramatic change occurs, there are winners and there are losers. The Darwinian principle resonates: 'It is not the strongest of the species that survives, nor the most intelligent. It is the one that adapts to change.' The pandemic has harshly tested each of us in our ability to adapt at both the professional level and in the most personal way. We have probably surprised ourselves on how well we have done. Private client practice has stayed the course.

The fallout from the pandemic will create fundamental changes in society, in tax legislation, and in the social contract between the state and the individual. In the Canadian context, there is the near certainty of increased levels of taxation, and new taxes may be introduced, including a wealth tax, inheritance tax or estate tax. We will need to come to terms with the impact the enormous intrusion government has had on our lives due to the pandemic and how, as ordinary times return, the role of government will need to be normalised and recalibrated. Private clients are fearful of the overwhelming dominance the state has, and they will need our services more than ever to advise them on wealth management and preservation solutions. At the same time, demographic change and an aging population are causing an organic increase in demand for private client advice. The future for private client work could not look rosier.

Appendix 1

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Margaret O'Sullivan practises estate planning with a focus on high-net-worth domestic and multijurisdictional trust and estate issues, estate litigation, advising executors, trustees and beneficiaries, and the administration of trusts and estates. Prior to establishing an independent trusts and estates boutique firm in 1998, 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 of 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 of *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 is author of the Canada chapter of *International Succession Laws* (Tottel) and *Practical Law Private Client Global Guide* (Thomson Reuters) and contributing author to *Widdifield on Executors and Trustees* (Carswell), *The International Comparative Legal Guide to Private Client 2018* (Global Legal Group), and *Practice Advisor Canada – Wills, Trusts and Estates* (Ontario) (LexisNexis), and is a frequent writer and speaker on trust and estate issues. 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 was called to the Ontario Bar in 1983.

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Marly's practice includes all aspects of estate and trust planning, estate administration and estate dispute resolution. She helps domestic and international clients with Canadian connections organise their financial affairs during their lifetime through creative estate planning strategies that balance each client's unique needs with corresponding Ontario estate administration tax and Canadian income tax considerations.

Marly is currently completing the diploma programme of the Society of Trust and Estate Practitioners and is a member of Junior Trust and Estate Practitioners, a Toronto-based discussion forum for junior trust and estate lawyers.

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