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Questionnaire for National Reporters

Private Client and Immigration Working Session

Movement of High Net Worth Individuals

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FACTS

As certain governments around the world struggle with fiscal deficits, their attention has turned to international tax evasion (illegal) and the perceived shortcomings of the international tax system from the point of view of tax avoidance (legal). In other regions we have seen unsettled economies combined with civil unrest. Families are seeking safer, more stable jurisdictions not just for themselves but for future generations as they look for long term security and are increasingly looking overseas for a solution.

How do our immigration, legal and tax systems cope with the realties and complexities of 21st century aging family life and the demand for economic security/stability? What are the particular challenges for practitioners in assisting these families? How does increasing governmental exchange of information and compliance requirements affect strategies for investment, tax planning and personal security. How does the global citizen manage a world of overlapping, often conflicting regulations?

BACKGROUND QUESTIONS

The answers set out below are based on the laws of Ontario and do not reflect the unique aspects of the succession, tax, immigration and real estate regimes in each province and territory of Canada.

1.1 Immigration and Nationality [for Immigration Commission only]

1.1.1 Briefly outline any immigration, residency or citizenship programmes your jurisdiction has to attract high net-worth individuals (HNWIs).

<u>Federal Immigrant Investor Program</u>

Until 2014, Canada's Immigrant Investor Program ("**IIP**") operated to have experienced business people contribute to Canada's growth and long-term prosperity by investing in Canada's economy. In order to qualify for the program, investors had to:

- show that they have business experience;
- have a net worth of at least C$1,600,000 that was gained legally; and
- invest C$800,000.[2]

[2] Citizenship and Immigration Canada, "Investors", online: (accessed 5 February 2014) Government of Canada <http://www.cic.gc.ca/enGlIsh/immigrate/ business/investors/index.asp>.

The investment is guaranteed. Citizenship and Immigration Canada ("**CIC**") returned the investment, without interest, about five years and three months after payment. If an individual's application was approved, that individual was required to make his or her investment before CIC would issue a permanent resident visa. Typically, the investment was required within 30 days of the application being accepted.

Participants in the program were required to undergo a medical exam before coming to Canada.[3] Their family members were also required to undergo medical examinations, even if they were not coming with the investor. A person's application would be rejected if the person's health:

- is a danger to Canada's public health or safety, or
- would cause too much demand on health or social services in Canada.[4]

As of July 1, 2012, CIC ceased accepting new federal IIP applications due to a backlog in applications already submitted, and to allow for a review of the program. Processing times for in-progress applications range from 51 months to 74 months. The moratorium on new applications does not affect Quebec's Immigrant Investor Program.

<u>Start-up Visa</u>

In April 2013, Citizenship and Immigration Canada introduced Canada's new Start-up Visa Program. This program aims to link entrepreneurs with experienced private sector organizations who are experts in working with start-ups.[5]

To be eligible to receive a start-up visa, prospective applicants must:

- convince a designated organization to support the business idea and provide a Letter of Support;
- prove their business venture or idea is supported by a designated organization;
- meet specified language requirements by proving ability in English or French in four areas (speaking, reading, listening and writing);
- meet specified education requirements; and

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[3] Citizenship and Immigration, "After You Apply: Get Next Steps", online: (accessed 5 February 2014) Government of Canada <http://www.cic.gc.ca/english/immigrate/investors/next_steps.asp>.
[4] Citizenship and Immigration, "After You Apply: Get Next Steps", online: (accessed 5 February 2014) Government of Canada <http://www.cic.gc.ca/english/immigrate/investors/next_steps.asp>.
[5] Citizenship and Immigration Canada, "Start-up Visa", online: (accessed 15 February 2014) Government of Canada, <http://www.cic.gc.ca/english/immigrate/business/start-up/index.asp>.

- prove they have sufficient settlement funds (the required amount of money depends on the size of the family).[6]

1.1.2 Are there any proposed changes to the programmes outlined in 1.1.1?

<u>Terminating the Federal Immigrant Investor Program</u>

In April 2012, the Honourable Jason Kenney, then Minister of Citizenship, Immigration and Multiculturalism, announced that Citizenship and Immigration ("**CIC**") was considering using its authority under the amended *Immigration and Refugee Protection Act* ("**IRPA**") to create small short-term programs that will have a greater impact on Canada's economy.[7]

CIC launched consultations to gather input and ideas from stakeholders and the public on how the current federal Immigrant Investor Program ("**IIP**") can be improved and how it could support Government of Canada objectives related to long-term growth and prosperity by:

- Increasing the economic benefit that immigrant investment capital brings to Canada;
- Attracting experienced, international investors with the skills and resources needed to ensure they integrate into Canada's economy; and
- Developing efficient and cost effective ways of delivering and ensuring the integrity of an immigrant investment program.

Citizenship and Immigration Canada published a backgrounder and invited feedback in the form of policy papers/recommendations for the government's consideration.[8]

In the 2014 Budget, released on February 11, 2014, the Government of Canada announced its intention to end the IPP due to underperformance.[9] To eliminate the existing backlog, the

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[6] Citizenship and Immigration Canada, "Start-up Visa", online: (accessed 15 February 2014) Government of Canada, <http://www.cic.gc.ca/english/immigrate/business/start-up/index.asp>.
[7] Citizenship and Immigration Canada, "Backgrounder – Improving The Immigrant Investor Program", online: (accessed 5 February 2014) Government of Canada <http://www.cic.gc.ca/english/department/media/backgrounders/ 2012/2012-07-31a.asp>.
[8] Citizenship and Immigration Canada, "Backgrounder – Improving The Immigrant Investor Program", online: (accessed 5 February 2014) Government of Canada <http://www.cic.gc.ca/english/department/media/backgrounders/ 2012/2012-07-31a.asp>.
[9] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 81, online: <http://www.budget.gc.ca/2014/docs/ plan/pdf/budget2014-eng.pdf>.

Government of Canada intends to return applications and refund associated fees paid by certain applicants who applied on or before the 2014 Budget was released.[10]

The Government also announced its intention to terminate the Federal Entrepreneur Program. This program was introduced in the 1970s and focused on protecting jobs in Canada.[11]

In place of the IPP and the Entrepreneur Program, the Government plans to introduce a new Immigrant Investor Venture Capital Fund pilot project. This project will require immigrants to make a "real and significant investment" in Canada's economy. The Government is also considering a potential Business Skills pilot program.[12]

1.2 Cross-border succession

1.2.1 Is testamentary freedom a right recognised by national law or public policy?

(A) Yes (B) No

In Canada, succession is governed by provincial law. Generally speaking, there is a great deal of testamentary freedom under Ontario law.

At common law, the traditional approach has been that a person has the right to dispose of his or her property at will. However, this right is not absolute.[13] Testamentary freedom is restricted by a testator's obligation to provide support for his or her married spouse and dependants.

Support for Married Spouses

Support for married spouses is governed by section 5 of the *Family Law Act*.[14] This provision does not apply to common law spouses. When a married spouse dies, leaving a will, the surviving spouse can elect to either take under the will or to take the property entitlement he or she would have received in the event the parties divorced. This election must be made within six months of the spouse's death. If the surviving married spouse elects to take under the *Family Law Act*, then any gifts under the will are revoked (unless the will specifies otherwise) and the will is interpreted as if the surviving married spouse predeceased the testator. If a

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[10] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 81, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.

[11] Citizenship and Immigration Canada, "Backgrounder – Terminating the Federal Immigrant Investor and Entrepreneur Programs", online: (accessed 15 February 2015) Government of Canada, <http://www.cic.gc.ca/english/department/media/backgrounders/2014/2014-02-11.asp>.

[12] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 81, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.

[13] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 813.

[14] *Family Law Act*, RSO 1990, c F3, s 5.

married spouse dies intestate, the surviving spouse can elect to take under intestacy pursuant to the terms of the *Succession Law Reform Act* or to take the property entitlement he or she would have received in the event the parties divorced. If the married spouse elects to take under the FLA, the remainder of the estate will be administered as if the married spouse disclaimed the interest.

Dependants' Relief

Support for dependants is governed by Part V of the *Succession Law Reform Act*.[15] Section 58 provides that where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court may order proper provision be paid from the estate.[16] In Ontario, a dependant includes:

- the spouse of the deceased;
- a parent of the deceased;
- a child of the deceased; or
- a brother or sister of the deceased.[17]

The definition of spouse includes common law partners:

> "spouse" means a spouse as defined in subsection 1 (1) and in addition includes either of two persons who,
>
> (a) were married to each other by a marriage that was terminated or declared a nullity, or
>
> (b) are not married to each other and have cohabited,
>
> (i) continuously for a period of not less than three years, or
>
> (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.[18]

1.2.2 Can those entitled to the reserved portion (heirship entitlement), during the life of the donor, waive their rights to a reserved share?

(A) Yes (B) No (C) Not relevant to your country

[15] *Succession Law Reform Act*, RSO 1990, c S26.
[16] *Succession Law Reform Act*, RSO 1990, c S58.
[17] *Succession Law Reform Act*, RSO 1990, c S26, s 57.
[18] *Succession Law Reform Act*, RS0 1990, c S26, s 57.

Ontario does not have forced heirship rules.

1.2.3 Can an individual resident in your country elect the law applicable to his/her succession? If relevant/applicable, please consider your answer in the context of Brussels IV (Regulation (EU) 650/2012) and/or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons.

(A) Yes (B) $\boxed{\text{No}}$

If yes, is this election limited to the law of the deceased's:

(A) Nationality (B) Habitual Residence (C) Other

Canada is not a party to Brussels IV (Regulation (EU) 650/2012) or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons.[19]

Although an individual in Ontario cannot elect the law applicable to his/her succession, it does not follow that Ontario law governs in every case.

Sections 34-41 of the *Succession Law Reform Act*[20] set out the conflict of laws rules governing wills with multi-jurisdictional aspects. These provisions apply to wills made in or outside of Ontario.[21] The conflicts of law rules concern both the formal and the intrinsic validity of the will.[22] Formal validity concerns matters such as capacity, manner of execution and number of witnesses, whereas intrinsic validity concerns the meaning and effect of the will.[23]

The conflicts of law rules distinguish between two categories of property, using the civil law terms "moveables" and "immoveables".[24] "Immoveables" includes interests in land as well as leasehold interests.[25] "Moveables" include all interests in personal property.[26]

With respect to interests in immoveables (i.e. land), the formal and intrinsic validity of the will is governed by the place where the immoveable property is situated.[27]

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[19] Hague Conference on Private International Law, "Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons", online: (accessed 5 February 2014) HCCH <http://www.hcch.net/index_en.php?act=conventions.status&cid=62>.
[20] *Succession Law Reform Act*, RSO 1990, c S26.
[21] *Succession Law Reform Act*, RSO 1990, c S26, s 35.
[22] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 395.
[23] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 395.
[24] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 395; *Succession Law Reform Act*, RSO 1990, c S26, s 36. Note that the *Succession Law Reform Act* uses the term "land" instead of immoveables.
[25] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 395. Note that this is distinct from the common law term "real property" in that it includes leasehold interests.
[26] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 395.

With respect to moveables, the formal and intrinsic validity of the will is governed by the law of the place where the testator was domiciled at the time of death.[28] Domicile refers to a person's "permanent home".[29] A person's domicile of origin is received by operation of law at birth, while a domicile of choice may be acquired if the person moves to another jurisdiction with the intent to remain indefinitely.[30] Under Ontario law, if a domicile of choice is abandoned, the domicile of origin revives unless a new domicile is acquired by choice.[31] A person can abandon their domicile of choice by actually leaving the jurisdiction and having the intention to abandon the domicile of choice.[32] In Ontario, the evidence necessary to establish abandonment is less than that required to establish acquisition of a domicile of choice.[33]

Canada is a signatory to the *Convention Providing a Uniform Law on the Form of an International Will*.[34] Section 42 of the *Succession Law Reform Act* implements this treaty.[35] This Convention seeks to avoid the conflicts of law problem set out above by providing for a will that will be respected in all signatory countries. The Convention provides that in interpreting and applying a Convention Will, courts should respect its origin and the need for uniformity in its interpretation. However, the Convention is of limited utility because it is only in force in a few jurisdictions.[36] It has not been ratified in British Columbia, Quebec and the territories. While the United States and United Kingdom are both signatories, neither has ratified the treaty.

Another planning tool is the use of multiple wills to deal with assets in multiple jurisdictions. A Canadian will would deal with Canadian assets, while a foreign will would deal with the assets in foreign jurisdictions under their own domestic law.

With respect to international assets in Commonwealth countries, section 52 of the *Estates Act*[37] provides a procedure for having a will that has been granted overseas in a Commonwealth

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[27] *Succession Law Reform Act*, RSO 1990, c S26, s 36(1).
[28] *Succession Law Reform Act*, RSO 1990, c S26, s 36(2).
[29] *Trottier v Rajotte*, [1940] SCR 203, 1939 CarswellQue 47 at para 7 (SCC)
[30] *McCallum v Ryan Estate*, 2002 CarswellOnt 1211 at para 23 (SCJ); *Trottier v Rajotte*, [1940] SCR 203, 1939 CarswellQue 47 at para 13 (SCC); *Re Foote Estate*, 2011 ABCA 1 at paras 20-22, 26.
[31] *McCallum v Ryan Estate*, 2002 CarswellOnt 1211 at para 23 (SCJ).
[32] *McCallum v Ryan Estate*, 2002 CarswellOnt 1211 at para 24 (SCJ).
[33] *McCallum v Ryan Estate*, 2002 CarswellOnt 1211 at para 24 (SCJ).
[34] *Convention Providing a Uniform Law on the Form of an International Will*, Washington, 26 October 1973, Canada accession 24 January 1977, Canada Treaty Series 1978/34. As of February 5, 2014 the parties to the Convention are Belgium, Bosnia and Herzegovina, Canada, Cyprus, Ecuador, Egypt, France, Italy, Lybian Arab Jamahiriya, Niger, Portugal, Slovenia, Yugoslavia.
[35] *Succession Law Reform Act*, RSO 1990, c S26, s 42.
[36] "Status of the Convention Providing a Uniform Law on the Form of an International Will – Signatures, Ratifications" (20 November 2013), online: (accessed 5 February 2014) International Institute for the Unification of Private Law <http://www.unidroit.org/status-successions>.
[37] *Estates Act*, RSO 1990, c E21.

country resealed with the seal of the Superior Court of Justice at which point it is of the like force and effect in Ontario as if it had originally been granted by the Superior Court of Justice.[38]

Finally, if probate is granted in the jurisdiction where the testator is domiciled and most of his or her assets are located there, the Ontario courts may make an ancillary grant to an estate trustee who is recognized by the law of the domicile, without requiring further inquiry, in order to administer assets in Ontario.

1.3 Personal taxation and compliance

1.3.1 Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).

Canada's tax system distinguishes between residents and non-residents. As the *Income Tax Act* does not define "resident", its meaning is derived from common law. The leading decision on the meaning of resident is *Thomson v. Minister of National Revenue*.[39]

Section 2(1) of the *Income Tax Act* sets out the basic framework for tax liability for Canadian residents:

> An income tax shall be paid […] on the taxable income for each taxation year of every person resident in Canada at any time in the year.[40]

"Person" includes individuals and corporations.[41]

For tax purposes, residence "refers to the legal and economic *nexus* that an individual has with Canada."[42] Physical presence may be an indicator of residence, but it is not necessarily conclusive. Similarly, an individual who is located outside of Canada for a considerable period of time may nevertheless be a Canadian resident for income tax purposes.[43]

A person's residence is determined by statutory, common law and (if applicable) international tax treaty rules.

<u>Resident in Canada</u>

A person resident in Canada is taxable on his or her worldwide income. The policy rationale underlying residence as the primary connecting factor to assert domestic tax jurisdiction is that

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[38] *Estates Act*, RSO 1990, c E21, s 52.
[39] *Thomson v Minister of National Revenue*, [1946] SCR 209, 1946 CarswellNat 76.
[40] *Income Tax Act*, RSC 1985, c1, s 2(1).
[41] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 53.
[42] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 54.
[43] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 54.

persons who enjoy the legal, political and economic benefits of associating with Canada should contribute to the costs of association.[44]

The *Income Tax Act* deems an individual to be a resident of Canada if, among others, he or she:

- sojourns in Canada for 183 days or more in a year;
- is a member of the Canadian Forces;
- is a member of the Canadian diplomatic or quasi-diplomatic service;
- performs services in a foreign country under a prescribed international development assistance program of the Canadian government;
- is a member of the Canadian Forces school staff; or
- is a wholly dependent child of a person holding a position referred to in the above categories (other than a sojourner).[45]

Vern Krishna describes the common law rules as "facts and circumstances" tests.[46] Where the links between a person and Canada are sufficiently strong, that person will be a resident for tax purposes. Three residential ties are almost always significant for the purpose of determining residence status are the individual's:

- dwelling place (or places);
- spouse or common-law partner; and
- dependants.[47]

Under subsection 250(3) of the *Income Tax Act*, "resident" includes a person who is "ordinarily resident" in Canada. Ordinarily resident means, "residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application."[48]

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[44] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 53.
[45] *Income Tax Act*, RSC 1985, c1, s 250(1); Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 55.
[46] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 57.
[47] Canada Revenue Agency, "Tax Folio S5-F1-C1: Determining an Individual's Residence Status" at 1.11, online: Government of Canada <http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s5/f1/s5-f1-c1-eng.html>.
[48] *Thomson v Minister of National Revenue*, [1946] SCR 209, 1946 CarswellNat 76 at para 48.

An individual may be resident in Canada for only part of a year, in which case he or she is subject to tax on his or her worldwide income, but only while he or she is resident in Canada.[49]

Non-Resident Persons

Canada uses territorial nexus of source of income to tax non-resident persons. Subject to tax treaties, Canada taxes non-residents on their Canadian-source income.[50] To prevent double taxation of non-residents, who might also pay tax at source on foreign investment income, Canada grants a tax credit for foreign taxes.[51] Non-residents are taxed only on their Canadian-source income. Subsection 2(3) of the *Income Tax Act* provides that a non-resident is taxable in Canada if he or she is employed in Canada, carries on business in Canada or derives a capital gain from the disposition of taxable Canadian property.[52]

During the year in which a taxpayer dies, a taxpayer is generally deemed to have, immediately before death, disposed of capital property for proceeds of disposition equal to the fair market value of the capital property at that time.[53]

1.3.2 Have there been any changes introduced in the last 24 months to the definition of who is a "taxpayer" e.g. "resident", "habitually resident" or "domiciled" in your country?

(A) Yes (B) No

If yes, please briefly summarise the changes.

"Taxpayer" is defined in section 248 of the *Income Tax Act* as "any person whether or not liable to pay tax".[54] There have been no changes to this definition in the last 24 months.

There have been no changes to the provisions of the *Income Tax Act* relating to deemed residence and being "ordinarily resident" in Canada.[55]

However, the Tax Court of Canada recently clarified the meaning of "resident" in the context of Canada's tax treaties. In a recent high profile decision, the Tax Court considered the interaction between the *ITA* and *The Canada-United Kingdom Income Tax Convention*.[56] In that case, the taxpayer had filed his Canadian tax return and reported $800,000 in income from his duties of

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[49] *Income Tax Act*, RSC 1985, c 1, s 114.
[50] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 53.
[51] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 54.
[52] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 54.
[53] *Income Tax Act*, RSC 1985, c 1, s 70(5).
[54] *Income Tax Act*, RSC 1985, c 1, s 248.
[55] *Income Tax Act*, RSC 1985, c 1, s 250(1), 250(3).
[56] *Black v The Queen*, 2014 TCC 12.

offices or employment performed by him in Canada for the 2002 tax year. The taxpayer did not report other remuneration and benefits totalling $5.1 million, including income from duties of offices or employments performed outside of Canada, taxable dividends, shareholder benefits and benefits arising from the use of airplane owned by Hollinger International Inc.

The taxpayer was not domiciled in the United Kingdom, and was therefore only subject to tax in the U.K. on the portion of his non-U.K. source income that was remitted to or received in the U.K. The taxpayer argued that, by virtue of his "deemed" U.K. residency, these amounts were not taxable in Canada. The Canada Revenue Agency disagreed and alleged that notwithstanding his status as a deemed resident of the U.K. for the purposes of the Convention, the taxpayer was subject to Canadian tax on income and benefits that were not covered by the Convention. The Tax Court held that a taxpayer could be a deemed resident for the purposes of the Convention and also be a resident of Canada for the purposes of the *ITA*. The Tax Court held that the Convention provided a preference to the taxing authority of the U.K, but did not extinguish Canada's claim to tax.

Although this case does not change the definition of resident, it clarifies tax treaties will not operate to allow a person resident in Canada to avoid paying taxes on certain income, but rather operate as a "tie-breaker" to allocate tax between two countries on an item-by-item basis.[57]

1.3.3 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for residents?

(A) Yes (B) No

If yes, please briefly set out the key provisions.

This is not an exhaustive list of all new taxes or reporting requirements. This is based on a review of Department of Finance Press Releases and archived "What's New" notices for 2012, 2013 and 2014.

On June 26, 2013, the Government of Canada passed legislation requiring disclosure of reportable transactions to the Canada Revenue Agency.

A reportable transaction is a specific type of tax avoidance transaction and includes any transaction undertaken alone or as part of a series of transactions in order to avoid paying taxes.

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[57] Holly Cunliffe, "Taxable in Canada? Not a Black and White Situation" (24 January 2014), online: Dentons Tax Litigation <http://www.canadiantaxlitigation.com/taxable-in-canada-not-a-black-and-white-situation>.

Reportable transactions are entered into by, or for the benefit of, a person and have at least two of the following three features:

- the promoter or advisor, including any non-arm's-length party, is entitled to a fee that is:
  - based on the amount of the tax benefit from the transaction;
  - contingent upon obtaining a tax benefit that results from the transaction; or
  - attributable to the number of persons participating in the transaction (or similar transaction) or who have been provided access to advice from the promoter or advisor about the tax consequences of the transaction (or similar transaction;
- the promoter or advisor of the transaction obtains "confidential protection" for the transaction;
- the taxpayer, the person who entered into the transaction on behalf of the taxpayer (including any non-arm's-length party), or the promoter or advisor has or had "contractual protection" for the transaction (other than as a result of a fee described in the first feature).[58]

Serious penalties can result from a failure to report a reportable transaction, including a monetary penalty, suspension of the tax benefit, and an extended reassessment period.[59]

1.3.4 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for non-residents with assets located in your country?

(A) Yes (B) No

If yes, please briefly set out the key provisions.

<u>U.S. *Foreign Account Tax Compliance Act*</u>

[58] Department of Finance, "New reporting requirements: reportable transactions", online: (accessed 16 February 2014) Government of Canada <http://www.cra-arc.gc.ca/nwsrm/fctshts/2013/m08/fs130830-eng.html>.
[59] Department of Finance, "New reporting requirements: reportable transactions", online: (accessed 16 February 2014) Government of Canada <http://www.cra-arc.gc.ca/nwsrm/fctshts/2013/m08/fs130830-eng.html>.

Canada and the United States have signed an agreement under the existing Canada-U.S. Tax Convention in response to the U.S. enacting the *Foreign Account Tax Compliance Act* ("**FATCA**") in March 2010.[60] FACTA would require non-U.S. financial institutions to report to the U.S. Internal Revenue Service ("**IRS**") any accounts held by U.S. taxpayers. Failure to comply could result in sanctions, including U.S. withholding taxes on payments from the U.S.

Under the agreement between the U.S. and Canada:

- financial institutions in Canada will not report information directly to the IRS, but will instead report relevant information on accounts held by U.S. residents and U.S. citizens to the Canada Revenue Agency, which will then exchange information with the IRS through the existing Canada-U.S. Tax Convention;
- the IRA will provide the CRA with enhanced and increased information on accounts of Canadian residents held at U.S. financial institutions;
- certain accounts are exempt from FATCA and will not be reportable, including Registered Retirement Savings Plans, Registered Retirement Income Funds, Registered Disability Savings Plans, Tax-Free Savings Accounts, and others;
- smaller deposit-taking institutions, such as credit unions, with assets of less than $175 million will be exempt from FATCA; and
- the 30 per cent withholding tax will not apply to clients of Canadian financial institutions, and can apply to a Canadian financial institution only if the financial institution is in significant and long-term non-compliance with its obligations under the agreement.

Residency of a Trust

Garron Family Trust (Trustee of) v R, a 2012 decision of the Supreme Court of Canada, changed the test for determining the tax residency of a trust.[61] In Canada, the principal basis for

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[60] Department of Finance, "Canada and U.S. Reach Agreement on *Foreign Account Tax Compliance Act*" (5 February 2014), online: (accessed 16 February 2014) Government of Canada <http://www.fin.gc.ca/n14/14-018-eng.asp>.
[61] *Garron Family Trust (Trustee of) v R,* (sub nom *St Michael Trust cop, as trustee of Fundy Settlement v R*), 2012 SCC 14.

imposing income tax is residency.[62] Although the *ITA* contains certain deeming rules with respect to residency, determining residence is generally a question of fact.[63]

In *Garron Family Trust (Trustee of) v. R.*, the Supreme Court of Canada adopted the central management and control test as the proper manner to determine the tax residency of a trust under the *ITA*.[64] In *Garron*, the trust was settled by an individual resident in St. Vincent and the trustee was resident in Barbados. The Supreme Court of Canada, upholding the Tax Court of Canada's factual finding that the main beneficiaries exercised the central management and control of the trusts in Canada, held that the trust was resident in Canada.[65]

Following *Garron*, where Canadian resident beneficiaries of a trust exercise central management and control of the trust, the trust will be resident in Canada.

<u>Tax on Trust Distributions to Non-Residents</u>

Part XIII of the *Income Tax Act* advances a 25 per cent withholding tax payable on certain trust distributions to non-residents, unless a treaty reduction applies.[66]

Generally, this withholding tax applies on:

- amounts that would be taxable under Part I of the *Income Tax Act* if the beneficiary had been resident in Canada, less amounts captured under section 104(21) (which provides that an amount paid to a non-resident will generally fall within section 104(21) if it is a taxable capital gain of a mutual fund trust and the prescribed designation is made); and

- capital dividends from a Canadian company.[67]

There exemptions from Part XIII tax. Bill C-48, which received Royal Assent on June 26, 2013, added an exemption for a dividend or interest received by a trust that is created under certain compliance reinsurance trust agreements, so long as no tax would have been payable under

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[62] *Garron Family Trust (Trustee of) v R*, (sub nom *St Michael Trust cop, as trustee of Fundy Settlement v R*), 2012 SCC 14 at para 7.
[63] *Garron Family Trust (Trustee of) v R*, (sub nom *St Michael Trust cop, as trustee of Fundy Settlement v R*), 2012 SCC 14 at para 7.
[64] *Garron Family Trust (Trustee of) v R*, (sub nom *St Michael Trust cop, as trustee of Fundy Settlement v R*), 2012 SCC 14.
[65] *Garron Family Trust (Trustee of) v R*, (sub nom *St Michael Trust cop, as trustee of Fundy Settlement v R*), 2012 SCC 14 at para 15.
[66] *Income Tax Act*, RSC 1985, c 1, Part XIII.
[67] Andrea Tratnik, "Tax on Trust Distributions to Non-Residents: An Introduction" (13 January 2014), online: (accessed 16 February 2014) Ontario Bar Association Estates and Trusts Law <http://www.oba.org/Sections/Trusts-and-Estates-Law/Articles/Articles-2014/January-2014/Tax-on-Trust-Distributions-to-Non-Residents-An-Int>.

Part XIII in respect of any such amounts if they had been paid directly to the non-resident beneficiary instead of the trust.[68]

1.3.5 Has your country undertaken (or proposed the introduction of) any legislative steps in the last 24 months to promote transparency in tax reporting obligations and to combat international tax evasion in the context of private wealth?

(A) Yes (B) No

If yes, please briefly set out the key measures.

See also the discussion of FACTA, above at Section 1.3.4.

Canada has taken several legislative and policy steps in the last 24 months to promote transparency in tax reporting and especially to combat international tax evasion. A few of these steps are highlighted below, however this is not an exhaustive list of all legislative changes.

Exchange of Information Agreements

On January 26, 2014, the agreement between Canada and Liechtenstein for the Exchange of Information on Tax Matters came into full force. This is Canada's latest tax information exchange agreement ("**TIEA**"). TIEAs set out a legal framework to enable tax authorities in Canada and the other signatory country to exchange information relevant to the administration and enforcement of their respective domestic tax laws. The Minister of Finance, the Honourable Jim Flaherty, labelled this latest TIEA programs as "another significant step in [Canada's] fight against international tax evasion".[69]

The standard was developed by the Organisation for Economic Co-Operation and Development, and is meant to promote transparency and fight international tax evasion. As of February 15, 2014, Canada has 18 TIEAs in force, 4 TIEAs signed but not yet in force, and 8 TIEAs under negotiation.[70] In 2012, Canada entered into TIEAs with the following countries: Costa Rica, Saint Lucia, Kingdom of the Netherlands in Respect of Aruba and Dominica.[71] In

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[68] Andrea Tratnik, "Tax on Trust Distributions to Non-Residents: An Introduction" (13 January 2014), online: (accessed 16 February 2014) Ontario Bar Association Estates and Trusts Law <http://www.oba.org/Sections/Trusts-and-Estates-Law/Articles/Articles-2014/January-2014/Tax-on-Trust-Distributions-to-Non-Residents-An-Int>.
[69] Department of Finance, "Canada Signs Tax Information Exchange Agreement with Liechtenstein" (31 January 2013), online: Government of Canada <http://www.fin.gc.ca/n13/13-014-eng.asp>.
[70] Department of Finance, "Canada Signs Tax Information Exchange Agreement with Liechtenstein" (31 January 2013), online: (accessed 15 February 2014) Government of Canada <http://www.fin.gc.ca/n13/13-014-eng.asp>; Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 360, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.
[71] Department of Finance, "Tax Information Exchange Agreements: Notices of Developments", online: (accessed 15 February 2014) Government of Canada <http://www.fin.gc.ca/treaties-conventions/tieaaerf-eng.asp>.

2013, Canada entered into TIEAs with the following countries: Panama, Bahrain, British Virgin Islands, Brunei and Uruguay.[72]

Tax Treaties

Canada has also expanded its tax treaties "to reduce tax barriers to international trade and investment, combat tax evasion and avoidance, strengthen Canada's bilateral economic relationships, and create enhanced opportunities for Canadian businesses abroad."[73] Since the 2012 Budget and as of March 1, 2013, Canada has expanded its tax treaties as follows:

- A new tax treaty with Colombia has come into force;
- A protocol to update the tax treaty with Singapore has come into force;
- New tax treaties with Hong Kong, New Zealand, Poland and Serbia have been signed;
- A protocol to update the tax treaty with Luxembourg has been signed;
- An agreement concerning the exchange of information provisions of the Canada-Switzerland Tax Treaty has been signed;
- Tax information exchange agreements with Aruba, Costa Rica and Saint Lucia have come into force; and
- Tax information exchange agreements with Liechtenstein and Uruguay have been signed.[74]

Since tabling the 2013 Budget and as of February 1, 2014, Canada has expanded its tax treaties as follows:

- New tax treaties with Hong Kong, Poland and Serbia have come into force;
- Protocols to update tax treaties with Austria, Barbados, France and Luxembourg have come into force;

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[72] Department of Finance, "Tax Information Exchange Agreements: Notices of Developments", online: (accessed 15 February 2014) Government of Canada <http://www.fin.gc.ca/treaties-conventions/tieaaerf-eng.asp>.
[73] Department of Finance, "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2013" (Ottawa: 21 March 2013) at 155, online: <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.
[74] Department of Finance, "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2013" (Ottawa: 21 March 2013) at 155, online: <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.

- An agreement concerning the exchange of information provisions of the Canada-Switzerland tax treaty has come into force;

- The Convention on Mutual Administrative Assistance in Tax Matters has been ratified by Canada;

- Tax information exchange agreements (TIEAs) with Liechtenstein and Panama have come into force; and

- TIEAs with Bahain, the British Virgin Islands and Brunei have been signed.[75]

As of Canada's 2014 Budget, Canada had 92 tax treaties in force, 3 tax treaties signed but not yet in force, and 8 tax treaties and protocols under negotiation.[76]

<u>Propositions to Increase Transparency and to Combat Tax Evasion</u>

The 2013 Budget proposed to:

- Require certain financial intermediaries, including banks, to report international electronic funds transfers over $10,000 to the CRA;

- Extend the normal reassessment period by three years for a taxpayer who has failed to report income from a specified foreign property on their annual income tax return and failed to properly file the Foreign Income Verification Statement (Form T1135);

- Revise Form T1135 reporting to provide more detailed information including the names of specific foreign institutions and countries where offshore assets are located and the foreign income earned on those assets; and

- Streamline the process for the CRA to obtain information concerning unnamed persons from third parties such as banks.[77]

Several of these proposals are discussed below.

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[75] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 360, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.
[76] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 360, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.
[77] Canada, Department of Finance, "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2013" (Ottawa: 21 March 2013) at 155, online <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.

Amendments to the *Income Tax Act*

The *Economic Action Plan 2013 Act, No. 1* received royal assent on June 26, 2013.[78] Among other things, the legislative changes sought to improve the fairness of the tax system.[79]

The *Economic Action Plan 2013 Act, No. 2* received royal assent on December 12, 2013.[80] Among other things, the legislative changes sought to close tax loopholes and combat tax evasion by:

- introducing new administrative monetary penalties and criminal offences to deter the use, possession, sale and development electronic suppression of sales software designed to falsify records for the purpose of tax evasion; and

- extending, in certain circumstances, the period during which the Canada Revenue Agency can reassess a taxpayer who fails to report income from foreign property.[81]

In relation to the extension of the reassessment period, on June 25, 2013, the Canada Revenue Agency released a revised Form T1135. This form is prescribed under section 2333.3(3) of the *Income Tax Act* for the reporting of specified foreign property.[82] A failure to report specified foreign property correctly on the form can now result in the extension of the normal reassessment period by an additional three years.[83]

The extended reassessment period is triggered if two conditions are met:

- the taxpayer (or a partnership of which the taxpayer is a member) fails to file the return as required or files the return but fails to properly report required information relating to the specified foreign property; and

- the taxpayer fails to report in his or her income tax return an amount in respect of the specified foreign property that must be reported.[84]

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[78] *Economic Action Plan 2013 Act, No 1*, 2013, c 33 (*Bill C-60*).
[79] Department of Finance, "Canada Positioned to Create More Jobs and Growth With Royal Assent of the *Economic Action Plan 2013 Act, No 1*" (26 June 2013), online: Government of Canada <http://www.fin.gc.ca/n13/13-090-eng.asp>.
[80] *Economic Action Plan 2013 Act, No 2*, 2013, c 40 (*Bill C-4*).
[81] Department of Finance, "Minister Flaherty Welcomes Royal Assent of the *Economic Action Plan 2013 Act, No 2*" (12 December 2013), online: Government of Canada < http://www.fin.gc.ca/n13/13-166-eng.asp>.
[82] *Income Tax Act,* RSC 1985, c 1, s 233.3(3).
[83] Pamela Cross, "Canada's New Requirements for Foreign Property Reporting are a Significant Change for Taxpayers and Their Advisors" (January 2014) 13 STEP Inside 1 at 4.
[84] Pamela Cross, "Canada's New Requirements for Foreign Property Reporting are a Significant Change for Taxpayers and Their Advisors" (January 2014) 13 STEP Inside 1 at 4.

The extended reassessment period applies to all taxation matters in the year, even those which have no connection to the foreign income or information in question.[85]

The specified property which must be reported includes:

- funds held outside Canada;
- shares of non-resident corporations (other than foreign affiliates);
- indebtedness owed by non-residents (other than foreign affiliates);
- interests in certain non-resident trusts;
- real property situated outside Canada (other than personal property and real property used in an active business); and
- other types of foreign property such as intangible property not used in a business and certain rights under contract.[86]

Stop International Tax Evasion Program (SITEP)

Canada's 2013 Budget ("**2013 Budget**") announced the CRA's intention to launch the "Stop International Tax Evasion Program" ("**SITEP**"). SITEP is a whistleblower program under which the CRA will pay rewards to persons who provide information that identifies major international tax non-compliance. This represents a new tool in the CRA's arsenal for combatting international tax evasion. SITEP allows the CRA to target high-income taxpayers who attempt to evade or avoid tax using complex international legal arrangements.[87] The reward will not be available to individuals who have been convicted of tax evasion in connection with the non-compliance.[88] In the past, while the CRA accepted information under the Informant Leads Program, including information provided anonymously, it did not provide payment for the information.[89]

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[85] Pamela Cross, "Canada's New Requirements for Foreign Property Reporting are a Significant Change for Taxpayers and Their Advisors" (January 2014) 13 STEP Inside 1 at 5. Note that Cross reports this was confirmed by the Canada Revenue Agency at the Canadian Tax Foundation's 65th Annual Conference CRA Roundtable on November 27, 2013.
[86] Pamela Cross, "Canada's New Requirements for Foreign Property Reporting are a Significant Change for Taxpayers and Their Advisors" (January 2014) 13 STEP Inside 1 at 5.
[87] Canada, Department of Finance, "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2013" (Ottawa: 21 March 2013), online <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.
[88] Canada, Department of Finance, "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2013" (Ottawa: 21 March 2013), online <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.
[89] Gabrielle MR Richards, online: "International Aggressive Tax Avoidance and Tax Evasion" (7 May 2013) 4 McCarthy Tetrault Tax Update 4 <http://news.mccarthy.ca/en/news_template.asp?pub_code

Related Party Initiative

The CRA introduced the Related Party Initiative (the "**RPI**") which focuses on high net-worth individuals and families with net assets of $50 million or more, and who have thirty or more related economic entities.[90] These entities include, among others, trusts, corporations, partnerships, joint ventures and private foundations.

Domestic Trust Audit Program

Canada has also implemented a domestic trust audit program.[91]

The Federal Court of Appeal's 2010 decision in *Antle v. Canada*[92] suggests that auditors will be concerned with the particulars of how a trust was set up. In *Antle*, the trust in question lacked validity because of irregularities in the documents relating to the trust's creation and its ability to accept transfers of property. The trust was also invalid because parties involved in business dealings with the trust were blind to its existence.[93]

In addition, the CRA is concerned with trusts being maintained on an ongoing basis. The CRA will be looking at whether or not a trust's tax returns are filed within the requisite timeframes and if the provisions of the ITA are being followed. In the event of infractions, the CRA may perform reassessments of trusts and beneficiaries for income tax, interest and penalties.[94]

1.3.6 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for holding structures with assets or "beneficiaries" located in your country?

(A) $\boxed{\text{Yes}}$ (B) No

If yes, please briefly set out the key measures.

See also the discussion of FACTA, above at Section 1.3.4.

=6259&news_code=1936&single_page=1#page=1>; Canada, Department of Finance, "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2013" (Ottawa: 21 March 2013), online <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.

[90] Ian M Hull et al, "A Year in Review: Various Topics in Trusts and Estates" (17 January 2013), online: Hull and Hull LLP at 6 <http://www.hullandhull.com/Breakfast-Series/January-17-2013-A-Year-in-Review.pdf>.

[91] Ian M Hull et al, "A Year in Review: Various Topics in Trusts and Estates" (17 January 2013), online: Hull and Hull LLP at 6 <http://www.hullandhull.com/Breakfast-Series/January-17-2013-A-Year-in-Review.pdf>.

[92] *Antle v Canada*, 2010 FCA 280.

[93] Ian M Hull et al, "A Year in Review: Various Topics in Trusts and Estates" (17 January 2013), online: Hull and Hull LLP at 6 <http://www.hullandhull.com/Breakfast-Series/January-17-2013-A-Year-in-Review.pdf>.

[94] Ian M Hull et al, "A Year in Review: Various Topics in Trusts and Estates" (17 January 2013), online: Hull and Hull LLP at 6 <http://www.hullandhull.com/Breakfast-Series/January-17-2013-A-Year-in-Review.pdf>.

As discussed above in Section 1.3.4, the 2012 decision of the Supreme Court of Canada in *Garron Family Trust (Trustee of) v R* has changed the test for determining the tax residency of a trust.[95] Following *Garron*, where Canadian resident beneficiaries of a trust exercise central management and control of the trust, the trust will be resident in Canada and will make the trust subject to taxes and reporting requirements imposed on Canadian resident trusts.

Where a person resident in Canada contributes property to a non-resident trust, deemed resident rules may apply to treat the non-resident trust as resident in Canada. Currently, a 60-month exemption from the deemed residence rules applies if the contributors to the trust are individuals, each of whom is resident in Canada for a total period of not more than 60 months (i.e. newcomers to Canada). Where this exemption applies, the trust is not subject to Canadian taxation on its foreign-source income. The 2014 Budget proposes to eliminate the 60-month exemption.[96]

1.4 Mental capacity of adults

1.4.1 What system is in place in your country to deal with an individual who has lost capacity?

Under Ontario law, capacity is decision specific and time specific.

Several statutes address loss of capacity in Ontario: *Substitute Decisions Act, 1992*;[97] *Health Care Consent Act, 1996*;[98] and the *Mental Health Act*.[99]

The *Substitute Decisions Act, 1992*[100] governs the requisite capacity for certain decisions. It divides substitute decision making into two broad categories: decision making for property and decision making for personal care.[101]

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[95] *Garron Family Trust (Trustee of) v R*, (sub nom *St Michael Trust cop, as trustee of Fundy Settlement v R*), 2012 SCC 14.
[96] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 331, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.
[97] *Substitute Decisions Act*, *1992*, SO 1992, c30.
[98] *Health Care Consent Act,, 1996*, SO 1996, c2, Sched A.
[99] *Mental Health Act*, RSO 1990, c M7.
[100] *Substitute Decisions Act, 1992*, SO 1992, c30, as amended.
[101] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].

Guardianship of Property

With respect to property, the *Substitute Decisions Act, 1992* provides for three types of substitute decision makers: an attorney appointed pursuant to a continuing power of attorney for property, a statutory guardian appointed under the *Substitute Decisions Act, 1992* and a court-appointed guardian of property.[102]

When a certificate is issued under the *Mental Health Act* certifying that a person who is in a psychiatric facility is incapable to manage property, that finding will automatically, by operation of law, result in statutory guardianship of the individual's property by the Public Guardian and Trustee ("**PGT**").[103] The PGT can be replaced by a family member under section 17 of the *Substitute Decisions Act, 1992*.[104]

Powers of attorney are discussed below in question 1.4.2.

Statutory Guardians

A finding of incapacity to deal with property can be arrived at in two ways.

First, a person can be found incapable as a result of a voluntary assessment of the individual's capacity under section 16 of the *Substitute Decisions Act, 1992*.[105] A section 16 assessment can be requested by any person, including the individual him or herself. If the request is made by a person other than the individual whose capacity is at issue, the request must:

- confirm that the requester has reason to believe that the individual is incapable of managing property;
- confirm that the requester has made reasonable inquiries and has no knowledge of the existence of any attorney under a continuing power of attorney for property; and
- confirm that the requester has made reasonable inquiries and has no knowledge of any spouse, partner or relative of the other person who intends to make an

[102] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].
[103] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].
[104] *Substitute Decisions Act, 1992*, SO 1992, c30, s 17.
[105] *Substitute Decisions Act, 1992*, SO 1992, c30, s 16.

> application under section 22 for the appointment of a guardian of property for the individual.[106]

The request is submitted to a capacity assessor. Capacity assessors are members of a class of persons who are designated by the regulations under the *Substitute Decisions Act, 1992* to conduct capacity assessments. The regulations specify that the capacity assessor must be either a physician, psychologist, social worker, occupational therapist or nurse who has successfully completed a training course for assessors given or approved by the Attorney General. The assessors are independent fee-for-service contractors, not agents of the Ministry of the Attorney General.[107]

The assessor employs the definition of incapacity set out in section 6 of the *Substitute Decisions Act, 1992*:

> Incapacity to manage property
>
> 6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.[108]

Second, a person may be found incapable as a result of an involuntary assessment that takes place when the person is admitted to a psychiatric facility.[109] Such an assessment is mandatory, except where a guardian or continuing power of attorney for property is already in place.[110] In order for this finding of incapacity to persist after the person is discharged from the psychiatric facility, the attending physician must examine the patient within 21 days before the discharge and find that the patient is incapable.[111] On finding a patient is incapable, the attending physician must issue a notice of continuance to the PGT.

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[106] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].
[107] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].
[108] *Substitute Decisions Act, 1992*, SO 1992, c30, s 6.
[109] *Mental Health Act*, RSO 1990, c M7, s 54.
[110] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].
[111] *Mental Health Act*, RSO 1990, c M7, s 57(1).

Court Appointed Guardians

Section 22 of the *Substitute Decisions Act, 1992* permits any person to apply to the court to appoint a guardian of property for a person who is incapable of managing property.[112] The PGT may also bring an application under section 27 of the *Substitute Decisions Act, 1992*, which imposes a duty on the PGT to investigate any allegation that a person is incapable of managing property.[113]

An applicant for a court-appointed guardianship is not required to use a capacity assessor as an expert, but this is common practice.[114]

1.4.2 Does your country provide for Powers of Representation/Lasting Powers of Attorney/Mandats de protection future in relation to an incapacitated adult's personal welfare and/or property and affairs?

(A) Personal welfare only (B) Property and affairs only (C) Both personal welfare and property and affairs

Continuing Power of Attorney for Property

The *Substitute Decisions Act* provides for continuing powers of attorney for property. A continuing power of attorney for property survives the incapacity of the grantor.[115] It is important to differentiate continuing powers of attorney from general powers of attorney granted under the *Powers of Attorney Act*.[116] General powers of attorney which are no longer effective once the grantor becomes incapable.[117]

Pursuant to the *Substitute Decisions Act*, a power of attorney for property will be continuing if it says so, or if it expresses the intention that the attorney may act on behalf of the grantor during the grantor's incapacity to manage property.[118] The legal requirements of a valid continuing power of attorney for property are:

- a grantor capable of granting the power;
- a named attorney or attorneys;

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[112] *Substitute Decisions Act, 1992*, SO 1992, c30, s 22.
[113] *Substitute Decisions Act, 1992*, SO 1992, c30, s 27.
[114] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].
[115] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 954.
[116] *Powers of Attorney Act*, RSO 1990, c P20.
[117] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 954.
[118] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 954.

- a statement that the attorney has the power to make property decisions on the grantor's behalf;
- the grantor's signature;
- the date; and
- the signature of two qualifying witnesses in each other's presence and in the presence of the grantor.[119]

A continuing power of attorney can be as flexible or restrictive as the grantor directs, and can cover all or only part of the grantor's property.[120] If there are no specified terms on the continuing power of attorney for property, the attorney is authorized to "do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will."[121]

A valid continuing power of attorney for property is considered to be in effect when the original, signed document is in the hands of the attorney, and the attorney, in accordance with any conditions or restrictions in the document, is acting on behalf of the grantor.[122] If there is an event that triggers the power of attorney (such as incapacity), the attorney cannot act until the grantor is found incapable.[123] The statutory provisions of the *Substitute Decisions Act, 1992* and the *Mental Health Act* governing such circumstances are discussed above under Section 1.4.1.

The *Substitute Decisions Act, 1992* sets out the duties of a continuing power of attorney for property.[124]

A continuing power of attorney for property terminates, without exception, on the grantor's death.[125] Section 12 of the *Substitute Decisions Act, 1992* lists the circumstances in which a continuing power of attorney is terminated:

- when the attorney dies, becomes incapable of managing property or resigns, unless another attorney is authorized to act under subsection 7(5) or the power of attorney provides for the substitution of another person and that person is able and willing to act;

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[119] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 955; *Substitute Decisions Act*, *1992*, SO 1992, c 30, ss 7, 9-10.
[120] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 955, 958-959.
[121] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 7(2).
[122] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 960.
[123] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 9; *Mental Health Act*, RSO 1990, c M7, s 54.
[124] *Substitute Decisions Act, 1992*, SO 1992, c 30, ss 32-38.
[125] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 12(1)(f).

- when the court appoints a guardian of property for the grantor under section 22;
- when the grantor executes a new continuing power of attorney, unless the grantor provides that there shall be multiple continuing powers of attorney;
- when the power of attorney is revoked; and
- when the grantor dies.[126]

<u>Continuing Power of Attorney for Personal Care</u>

A power of attorney for personal care permits the grantor to name the person she or he chooses to make personal care decisions on her or his behalf when the grantor is no longer capable of making those decisions.[127] The grantor can include directions and statements of principles and beliefs in the document, which provides some direction about how decisions should be made.[128]

The legal requirements for a power of attorney for personal care are few:

- a grantor capable of granting the power;
- a named attorney or attorneys;
- a statement that the attorney has the power to make personal care decisions on the grantor's behalf should she be incapable of doing so;
- the grantor's signature;
- the date; and
- the signature of two qualifying witnesses who are present at the same time as the grantor.[129]

A well-drafted continuing power of attorney for personal care will go beyond the minimum requirements, and will name who is to act as substitute decision-maker, specify how the attorney or attorneys are to act, specify how capacity of the grantor will be assessed to determine whether the continuing power of attorney for personal care is effective, and specify how the power of substitute decision-making should be used.

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[126] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 12.
[127] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 979.
[128] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 979.
[129] *Substitute Decisions Act, 1992*, SO 1992, c 30, ss 46 & 48.

A continuing power of attorney for personal care is only effective where the grantor is incapable of making the personal care decision. The method for determining whether the grantor is or is not incapable depends on the decision to be made and the legislation that addresses that particular decision.[130]

1.4.3 Will your country recognise and enforce a form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity valid in the state in which it is prepared?

(A) Yes (B) No

Where a continuing power of attorney for property comes into effect on incapacity, but does not specify the triggering event for the transfer of power, the attorney cannot begin acting until the grantor is found incapable of making a property decision.[131]

Subsection 9(3) of the *Substitute Decisions Act, 1992* provides that if the continuing power of attorney provides:

> Determining incapacity
>
> (3) If the continuing power of attorney provides that it comes into effect when the grantor becomes incapable of managing property but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when,
>
> > (a) the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or
> >
> > (b) the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act*.

An assessor is defined in the *Substitute Decisions Act, 1992* as "a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity".[132]

Section 54 of the *Mental Health Act* provides that on a patient's admission to a psychiatric facility, a physician shall examine him or her to determine whether the patient is capable of managing property.[133] If the physician determines that the patient is not capable of managing

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[130] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 984; *Substitute Decisions Act, 1992*, SO 1992, c 30, s 49; *Health Care Consent Act, 1996*, SO 1996, c 2, Sched A;
[131] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 960-961.
[132] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 9.
[133] *Mental Health Act*, RSO 1990, c M7, s 54.

property, he or she shall issue a certificate of incapacity, which will be transmitted to the Public Guardian and Trustee.[134] Subsection 54(6) provides that the section does not apply if the patient's property is under guardianship under the *Substitute Decisions Act, 1992* or if the physician believes on reasonable grounds that the patient has a continuing power of attorney under the Act that provides for the management of the patient's property.[135]

A continuing power of attorney for personal care is only effective where the grantor is incapable of making the personal care decision in question. Capacity is decision specific, as is the method for determining capacity.[136]

Section 50 of the *Substitute Decisions Act, 1992* provides for binding powers of attorney for personal care. Sometimes referred to as "Ulysses agreements", this type of power of attorney for personal care can be helpful for persons who suffer episodic psychiatric disorders, which may lead such a person to deny the treatment needed to recover.[137]

With respect to powers of attorney granted in other jurisdictions, powers of attorney for property are generally accepted in most common law jurisdictions and many civil law jurisdictions. Subsection 85(1) of the *Substitute Decisions Act, 1992* provides that the foreign grant is valid if at the time of execution it complied with the internal law of the place where it was executed, where the donor was domiciled or where the grantor had his or her habitual residence.[138]

When multiple jurisdictions are involved, it may be helpful to have a power of attorney prepared in accordance with the rules of the jurisdiction where land is located, so that the forms the regulatory and registration bodies are familiar with are in use.[139] However, care must be taken to ensure that the document contains language specifically preventing revocation.[140] Otherwise a new power of attorney, albeit in a foreign jurisdiction, will effectively revoke any earlier power of attorney granted in Ontario (subsection 12(1)(d) of the *Substitute Decisions Act, 1992*). Conversely, a later grant under the *Substitute Decisions Act, 1992* will serve to revoke all

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[134] *Mental Health Act*, RSO 1990, c M7, s 54(4).
[135] *Mental Health Act*, RSO 1990, c M7, s 54(6).
[136] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 984; *Substitute Decisions Act, 1992*, SO 1992, c 30, s 49; *Health Care Consent Act, 1996*, SO 1996, c 2, Sched A;
[137] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 50; Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 980.
[138] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 85.
[139] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].
[140] Jan Goddard, "Consent and Capacity Legislation" (paper, delivered at the Ontario Bar Association Continuing Legal Education Conference on Consent, Capacity and substitute Decisions: Helping Practitioners Navigate Rough Terrain, 11 December 2008), [unpublished].

foreign grants (although section 12 of the *Substitute Decisions Act, 1992* would be of no effect when presented in a jurisdiction that does not recognize such powers).[141]

1.4.4 Are there proposals for legislative change in the field of mental capacity?

(A) Yes (B) No

If yes, what are the proposals?

The Law Commission of Ontario ("**LCO**") is presently reviewing Ontario's laws in the field in mental capacity. The LCO's mandate is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government, though it is funded in part by the Ontario Ministry of the Attorney General.

In April 2012, the LCO released its final report in its project on older adults, entitled "A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice".[142] In September 2012, the LCO released its final report in its sister project, "The Law as It Affects Persons with Disabilities".[143] The LCO intends to apply the results of these projects to a law reform project focussed on Ontario's laws related to capacity and guardianship. This project commenced in 2012. The LCO is currently undertaking preliminary consultations to shape the parameters of its project, "Legal Capacity, Decision-making and Guardianship". This project will serve to examine and update Ontario's current legislative scheme, which is made up of three interlocking statutes: the *Health Care Consent Act, 1996*, the *Substitute Decisions Act, 1992*, and the *Mental Health Act*. The limitations on the project's scope include:

- the project will focus on legal capacity, decision-making and guardianship as primarily legislated through the *Health Care Consent Act, 1996* and the *Substitute Decisions Act, 1992*, but provisions of the *Mental Health Act* will also be considered to maintain the coherence of the three statutes;

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[141] Natalia R Angelini, "Foreign Powers of Attorney for Property" (3 May 2011), online: Hull & Hull LLP Toronto Estate Law Blog <http://estatelaw.hullandhull.com/2011/05/articles/topics/power-of-attorney/foreign-powers-of-attorney-for-property/>.
[142] Law Commission of Ontario, *A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: April 2012), online: <http://www.lco-cdo.org/older-adults-final-report.pdf>.
[143] Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012), online: <http://www.lco-cdo.org/persons-disabilities-final-report.pdf>.

- the project will focus on the statutory core of the *Substitute Decisions Act, 1992* and the *Health Care Consent Act, 1996*;

- the project will not specifically address issues in the criminal justice system; and

- the project will focus on the broader issues associated with legal capacity and decision-making, not on specific issues such as capacity to consent to sexual activity or substitute decision-making and reproductive rights.[144]

1.4.5 Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000?

(A) Yes (B) No

Canada is not a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2009.[145]

1.4.6 Is your country a party to the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol 2006?

(A) Yes (B) No

Canada signed the UN Convention on the Rights of Persons with Disabilities on 30 March 2007. Canada ratified the UNCRPD on 11 March 2010.[146]

Canada is not a signatory to the Optional Protocol 2006.[147]

QUESTIONS FOR CASE STUDIES

2. Case Study A: Roberta and Paul

Roberta and Paul married in the Netherlands in 2008. Roberta is Brazilian and Paul is Dutch. Roberta, an IT specialist, was offered a job with Pear Inc in Silicon Valley and she and Paul moved to California (USA) in 2011. The family grows with twin boys and life is good.

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[144] Law Commission of Ontario, “Project Scope: Summary”, online: <http://lco-cdo.org/en/capacity-guardianship-project-scope>.
[145] Hague Conference on Private International Law, “Convention of 13 January 2000 on the International Protection of Adults”, online: HCCH <http://www.hcch.net/index_en.php?act= conventions.statusprint&cid=7>.
[146] “Status: Convention on the Rights of Persons with Disabilities” (6 February 2014), online: United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-15&chapter=4&lang=en>.
[147] “Convention and Optional Protocol Signatures and Ratifications: Countries and Regional Integration Organizations” online: United Nations enable <http://www.un.org/ disabilities/countries.asp?id=166>.

Roberta's mother, Gloria, who is in her 70s, wants to live with Roberta (her only child) and Paul so that she can spend more time with her grandchildren. Interested in moving to your country, Roberta and Paul come to see you for advice.

2.1 Immigration law [for Immigration Commission only]

2.1.1 Roberta and Paul are exceptionally wealthy. What immigration categories (e.g. investor type programmes) might apply to HNWIs such as Roberta and Paul to:

> ***(a) move firstly to the US (please omit this if you do not advise on US immigration law);***
>
> ***(b) and then secondly to your country?***

If your advice would change if Paul was not a Dutch national, please explain.

2.1.2 What immigration options does Gloria have to move to your country on a long term basis?

2.1.3 What, if any, are the residency requirements for a long term move to your country for Roberta, Paul and Gloria?

2.1.4 Are there are any long term requirements that the family should be aware of in order to maintain their immigration status in your country?

2.1.5 Will any of the members of the family be able to acquire citizenship of your country?

Section 2.1 is not applicable.

Now settled into the hustle and bustle of life in your capital city, Roberta and Paul (who are very happy together and, incidentally, exceptionally wealthy), having purchased rental properties in Brazil and invested wisely in stocks and bonds, they are looking to buy a US$ 20 million Penthouse Duplex in the hipster district of your capital city. They believe it is time to consider tax and estate planning opportunities and come to see you.

During the meeting you are also told that:

- **Roberta is likely to inherit family assets - principally artwork - from Gloria. The family want to ensure that upon Gloria's death, the family assets will not be considered a "matrimonial asset" and that the assets, to the extent possible, can pass to the grandchildren (the Inheritance).**

- **Paul's father has been diagnosed with a degenerative medical condition, which may lead to a loss of mental capacity. Paul has been told that the condition is likely to be hereditary.**

2.2 Real estate planning

2.2.1 What structuring and/or tax planning opportunities should Paul and Roberta consider with respect to the purchase of the Penthouse Duplex (i.e. to mitigate taxation in your country)?

Some options to consider are as follows.

<u>Principal Residence</u>

Paul and Roberta should designate their penthouse as their principal residence for tax purposes. In Canada, if a property qualifies as a taxpayer's principal residence, he or she can use the principal residence exemption to reduce or eliminate any capital gain otherwise occurring on the disposition or deemed disposition of the property.[148]

A principle residence is defined in section 54 of the *Income Tax Act*. The following types of property can qualify as a principal residence:

- a "housing unit", which can be:
    - a house;
    - an apartment or unit in a duplex, apartment building or condominium;
    - a cottage;
    - a mobile home;
    - a trailer; or
    - a houseboat;
- a leasehold interest in a housing unit; or

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[148] *Income Tax Act*, RSC 1985 c 1 (5th Supp), s 40(2)(b).

- a share of the capital stock of a co-operative housing corporation, if the share is acquired for the sole purpose of obtaining the right to inhabit a housing unit owned by that corporation.[149]

To qualify for favourable tax treatment as a principle residence, the property must be owned, whether jointly or otherwise, and must be ordinarily inhabited in the year by the taxpayer or by his or her spouse or common-law partner, former spouse or common-law partner, or child.[150]

Joint Tenancy

Paul and Roberta should register as joint tenants with respect to their ownership of the Penthouse Duplex. This will eliminate certain taxes on the death of either Paul or Roberta, as discussed further below in section 2.3.3.

Matrimonial Home

Paul and Roberta should consider the family law implications of purchasing the Penthouse Duplex. In particular, because they are legally married, Paul and Roberta must consider the law governing matrimonial homes.

In Ontario, the matrimonial home is considered special and is treated differently from other assets. Section 18 of the *Family Law Act* defines a matrimonial home as “Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence”.[151]

Even if Paul and Roberta decide not to own the Penthouse Duplex as joint tenants, if it meets the definition of a matrimonial home then during the marriage, the spouse legally owning the home cannot sell it or encumber it without the consent of his or her spouse.[152]

If Paul and Roberta separate, both spouses have an equal right to possession of the matrimonial home, regardless of ownership, and the spouse with title to the home cannot change the locks or force the other spouse to move out.[153]

2.3 Succession law and mental capacity

2.3.1 What would you advise with respect to the Inheritance?

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[149] *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 54.
[150] Canada Revenue Agency, “Income Tax Folio S1-F3-C2: Principal Residence”, online: (accessed 15 February 2014) Government of Canada <http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s1/f3/s1-f3-c2-eng.html>.
[151] *Family Law Act*, RSO 1990, c F3, s 18.
[152] *Family Law Act*, RSO 1990, c F3, s 21.
[153] *Family Law Act*, RSO 1990, c F3, s 19.

Pursuant to section 4(2) of the *Family Law Act*, property (other than the matrimonial home) acquired by gift or inheritance after the date of the marriage does not form part of the spouse's net family property.[154] As such, the value of the Inheritance would not be available to Paul if he elected to take under the *Family Law Act* instead of under the terms of Roberta's will or if the parties divorced. However, if Robert put money from her inheritance into the matrimonial home, it will need to be excluded by marriage contract.

2.3.2 What steps can Paul take to ensure that Roberta has full authority to take decisions on his behalf and deal with their assets in the event that Paul loses his mental capacity?

Paul can grant a continuing power of attorney for property to Roberta under the *Substitute Decisions Act, 1992*. A valid power of attorney for property is effective when the original, signed document is in the hands of the attorney and the attorney, in accordance with any conditions or restrictions in the document, is acting on behalf of the grantor.[155] In cases where there is sufficient trust between the grantor and the attorney, this permits the attorney to assume more and more responsibility as the need arises, eventually assuming full control if the grantor becomes incapable of making a property decision.[156] This may be an ideal route for Paul and Roberta if there is uncertainty with respect to when Paul may lose capacity as a result of his possible hereditary degenerative disease. If there are concerns about a potential abuse of power, Paul should consider possible strategies, including keeping the document with the drafter until the grantor indicates the power should be released, or some agreed upon event occurs or including instructions in the power of attorney for determining incapacity.[157]

A continuing power of attorney for property does not authorize Roberta to make a will on Paul's behalf.[158]

2.3.3 More generally, with a shared wish to keep matters "simple", what estate and succession planning opportunities should Roberta and Paul consider?

<u>Spousal Trusts</u>

Paul and Roberta should consider the potential benefits of a spousal trust. A spousal trust can be established as a testamentary trust under subsection 70(6) of the *Income Tax Act* or as an *inter vivos* trust under subparagraph 73(1.01)(c)(i) of the *Income Tax Act*.[159]

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[154] *Family Law Act*, RSO 1990, c F3.
[155] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 960.
[156] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 957, 960.
[157] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 957.
[158] *Substitute Decisions Act, 1992*, s 7(2).
[159] *Income Tax Act*, RSC 1985, c 1, ss 70(6), 73(1.01)(c)(i).

There are two income tax advantages to setting up a qualifying spousal trust:

- capital assets can be inserted into a spousal trust on a rollover basis; and
- the twenty-one year deemed realization rule does not apply to a qualifying spouse trust during the lifetime of the spouse beneficiary.[160]

In order to qualify as a spousal trust, the spouse or common-law partner of the settlor must be entitled to all of the income of the trust during their lifetime and no other person can receive or otherwise obtain the use of any income or capital from the trust during their lifetime.[161] Where a trust is established for the benefit of a spouse or common-law partner but fails to meet the strict requirements of a spousal trust (e.g. by allowing a person other than the spouse to access or benefit from income from the trust during the spouse's lifetime), the trust is said to be tainted. While some tainted trusts can be cured, others cannot be cured even with a variation application to the courts.[162]

The long-term tax advantages of establishing a testamentary spousal trust were affected by the 2014 Budget. Before the 2014 Budget, testamentary trusts were taxed at lower, graduated rates. Provided the proposals contained in the 2014 Budget are implemented, the top marginal tax rate will now apply to trust income earned by testamentary trusts, other than trusts whose beneficiaries are eligible for the disability tax credit.[163] In addition, testamentary trusts can no longer elect any taxation year end. Testamentary trusts that do not already have a calendar year-end will be deemed to have a taxation year end on December 31, 2015.[164]

Joint Tenancy

If they have not already done so, Roberta and Paul should consider creating a joint tenancy for all real property they own. It is necessary to state expressly in the deed that the title is taken in joint tenancy, otherwise a tenancy in common is created.[165] A key estate and succession planning technique is for spouses to place assets in joint-ownership. One of the leading reasons this is done is to avoid estate administration tax. When title is taken by two persons in

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[160] John E S Poyser, Larry H Frostiak and Grace Chow, *Taxation of Trusts and Estates: A Practitioner's Guide 2014* (Toronto: Carswell, 2013) at 69.
[161] John E S Poyser, Larry H Frostiak and Grace Chow, *Taxation of Trusts and Estates: A Practitioner's Guide 2014* (Toronto: Carswell, 2013) at 69.
[162] John E S Poyser, Larry H Frostiak and Grace Chow, *Taxation of Trusts and Estates: A Practitioner's Guide 2014* (Toronto: Carswell, 2013) at 70.
[163] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 329-330, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.
[164] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 330-331, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.
[165] *Conveyancing and Law of Property Act*, RSO 1990, c C24, s 13.

joint tenancy, the enter interest in the property passes automatically to the survivor.[166] The property does not pass to personal representatives first, but goes directly to the survivor.[167] As a result, the property does not form part of the deceased's estate and is not subject to estate administration tax.

Designating Beneficiaries

If Robert and Paul have any life insurance policies, they should name a designated beneficiary other than their estate. The main advantage of naming a designated beneficiary is that it provides some protection for the life insurance proceeds from the claims of creditors.[168] If Roberta and Paul designate a beneficiary other than their estate, the proceeds of insurance will not form part of their estates and will instead pass directly to the beneficiary.[169] As a result, they do not form part of the estate for the purpose of calculating estate administration fees.[170] An insured may designate a beneficiary by contract of insurance, by declaration,[171] or by will.[172] Where a designation is made by will, it may be valid even though the instrument is itself invalid as a well.[173] However, any later designation renders the designation in the will ineffective and if the will containing the designation is subsequently revoked, the resignation is also revoked.[174]

3. Questions for Case Study B

3.1 Case Study B: Bruce and Megan

Bruce, who has been given your contact details from an AIJA member, comes to see you for advice. Bruce gives you his background:

- **30 years old;**
- **Australian resident, national (and, if relevant to your country, "domiciled in a state of Australia");**
- **Single;**

[166] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 116.
[167] *Estates Administration Act*, RSO 1990, c E22, s 2.
[168] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 120-121. Note that there are some exceptions to the protection from creditors. For example, section 72 of the *Succession Law Reform Act*, RSO 1990, c S26, deems amounts payable under a life insurance contract are deemed to be part of the testator's estate for the purposes of determining the value of the estate in a dependants' relief claim.
[169] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 120.
[170] Albert H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Carswell, 2011) at 120-121.
[171] *Insurance Act*, RSO 1980, c I8, s 190.
[172] *Insurance Act*, RSO 1990, c I8, s 192.
[173] *Insurance Act*, RSO 1990, c I8, s 192.
[174] *Insurance Act*, RSO 1990, c I8, s 192.

- **Commodities trader;**
- **Family wealth from mining opals;**
- **Bruce has an Aus$15 M portfolio in Switzerland;**
- **Bruce also has shares in family mining company in Australia.**

Bruce is looking to move to your country for 3-5 years.

3.2 Pre-arrival planning

3.2.1 What pre-arrival tax planning opportunities would you advise?

The issue in this question is the reporting requirements of Canadian residents regarding foreign held property. Bruce must report his shares in the family mining company if they are valued at over $100,000. He also must report his $15M portfolio. In order to avoid double taxation, we would need to consult an Australian tax lawyer in order to ensure Bruce is doing everything to sever his ties to Australia. This could mean anything from notifying banks, filing income tax returns as a non-resident, acquiring Canadian health coverage, quit all memberships and clubs in Australia etc. Bruce can also set up an immigration trust, which would be used to hold foreign investment assets. It is not taxable in Canada for the first five years of Canadian residency. The trust can be established prior to Bruce becoming a resident of Canada or at any time within the first 60 months of Canadian residency. The tax free period is maximized if the trust is created before becoming a resident.[175]

3.2.2 What are Bruce's tax, residence or other reporting obligations upon becoming resident in your country?

Special tax rules apply to a newcomer to Canada. These rules apply only for the first year that a person is a new resident of Canada for income tax purposes. After the first tax year, a person is no longer considered a newcomer for tax purposes.[176]

As noted above, taxation in Canada is determined by residency. A new resident to Canada may be a protected person, a person who has applied for or received permanent resident status, or a

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[175] Please note that the 2014 Federal Budget changed the taxation of immigrant trusts, which is now being abolished. The new rules mean that existing trusts that have been benefiting from the exemption will be taxed as of January 1, 2015.

[176] Canada Revenue Agency, "Newcomers to Canada (immigrants)", online: Government of Canada <http://www.cra-arc.gc.ca/tx/nnrsdnts/ndvdls/nwcmr-eng.html>.

person who has received an "approval-in-principle" from Citizenship and Immigration Canada to stay in Canada.[177]

Newcomers to Canada must file a tax return if they owe tax (i.e. if they earned income) or wish to claim a refund. For the part of the tax year that Bruce was not resident in Canada, he must report:

- income from employment in Canada or from a business carried on in Canada;
- taxable capital gains from disposing of taxable Canadian property; and
- taxable part of scholarships, bursaries, fellowships, and research grants received from Canadian sources.[178]

For the part of the year Bruce is considered a Canadian resident, he must report his income from all sources both inside and outside of Canada.[179]

When you next meet Bruce 3 years later, life is looking good. He has met fellow Australian Kylie and they are expecting their first child (Jason). Bruce is looking to start his own commodities business and wants to know whether he can invest part of his foreign income or gains in the target company.

Bruce also tells you that his grandfather died in 2011 and that he (together with his 3 cousins) is a beneficiary of a trust structure with a bank account in a sun kissed jurisdiction. The bank account has not been reported in his tax return and he now wonders whether it should have been.

3.3 Lifetime matters

3.3.1 With respect to the commodities business, how would you advise Bruce in relation to:

(a) the most tax efficient way to make the inward investment?

(b) any planning and structuring opportunities (including the use of double tax treaties) that Bruce should consider in order to minimise any tax leakage?

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[177] Canada Revenue Agency, "Newcomers to Canada (immigrants)", online: Government of Canada <http://www.cra-arc.gc.ca/tx/nnrsdnts/ndvdls/nwcmr-eng.html>.
[178] Canada Revenue Agency, "Newcomers to Canada: 2013" at 14-15, online: Government of Canada <http://www.cra-arc.gc.ca/E/pub/tg/t4055/t4055-13e.pdf>.
[179] Canada Revenue Agency, "Newcomers to Canada: 2013" at 13-14, online: Government of Canada <http://www.cra-arc.gc.ca/E/pub/tg/t4055/t4055-13e.pdf>.

(c) eventually exiting the business. In particular, are there any structuring or other opportunities that Bruce should consider either at the inception of the business or in the run-up to an exit?

3.3.2 As to the unreported bank account:

(a) what would you advise Bruce?

Under the Canada Revenue Agency's Voluntary Disclosures Program ("**VDP**"), taxpayers are encouraged to come forward and correct their tax affairs.

Taxpayers can file a disclosure to correct inaccurate or incomplete information, or to provide information the taxpayer did not provide previously to the Canada Revenue Agency. Among other things, a taxpayer can report unreported person or business income from sources outside of Canada, such as a foreign bank account. By filing a voluntary disclosure, Bruce may only have to pay only the taxes owed plus interest and can avoid penalties and potential prosecution.

To qualify for the VDP, a disclosure must meet four conditions:

- the disclosure must be voluntary (i.e. the disclosure must be made before the taxpayer becomes aware of any compliance action initiated by the Canada Revenue Agency with respect to the disclosed information);
- the disclosure may involve a penalty;
- the disclosure must include information that is generally more than one year overdue; and
- the disclosure must be complete.[180]

Bruce must also consider whether the trust is in fact a Canadian resident trust. The law regarding the residency of trusts is discussed above in Sections 1.3.4 and 1.3.6.

In addition, if a person resident in Canada contributes property to a non-resident trust, the deemed residence rules may apply to treat the non-resident trust as resident in Canada.[181]

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[180] Canada Revenue Agency, "Voluntary Disclosure Program", online: (accessed 15 February 2014) Government of Canada <http://www.cra-arc.gc.ca/gncy/nvstgtns/vdp-eng.html>.
[181] Department of Finance, "Economic Action Plan 2014: The Road to Balance: Creating Jobs and Opportunities" (Ottawa: 11 February 2014) at 331, online: <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf>.

(b) what are the Trustee's reporting obligations in your country?

Assuming the trust is a non-resident trust, the Trustee's reporting obligations would be governed by the law of the trust's resident jurisdiction, subject to the terms of any tax treaty with Canada.

However, Bruce would have to report any interests he has in non-resident trusts. For a deemed resident trust, the non-resident trustee remains liable for the trust's Canadian tax obligations. Should the trustee fail to pay the trust's taxes, each Canadian resident contributor is jointly liable with the trust without limit for the unpaid tax, unless the contributor elects to be taxed on their proportionate share of the income and gains of the trust.

Tragically, some years later still resident - and wealthy - in your country, Bruce dies without making a Will.

3.4 Succession law

3.4.1 Do Kylie and Jason have a financial claim against Bruce's estate?

The statutory provisions of the *Succession Law Reform Act* govern intestate succession in Ontario and provide for the distribution of an intestate estate.[182]

Kylie

It is unclear whether Bruce and Kylie are married or common-law partners. In Ontario, persons must be married in order to share on each other's intestacy.[183]

If Kylie and Bruce are married, Kylie is entitled to a "preferential share" of Bruce's estate.[184] The preferential share is set by regulation. At present, the preferential share in Ontario is $200,000.[185] After the preferential share, the surviving spouse is entitled to a distributive share, which varies with the number of children or issue surviving.[186] Where a person dies intestate and leaves a married spouse and one child, the spouse is entitled to one-half of the residue of the estate after payment of the preferential share.[187]

In the alternative, Kylie could elect to take a share of the estate through an equalization payment under the *Family Law Act*. Under the *Family Law Act*, a surviving spouse is entitled to an equalization payment of one-half the difference between the net family property of each

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[182] *Succession Law Reform Act*, RSO 1990, c S26.
[183] *Succession Law Reform Act*, RSO 1990, c S26, s 1.
[184] *Succession Law Reform Act*, RSO 1990, c S26, s 45.
[185] O Reg 54/95.
[186] *Succession Law Reform Act*, RSO 1990, c S26, s 46.
[187] *Succession Law Reform Act*, RSO 1990, c S26, s 46(1).

spouse, if the net family property of the deceased is larger than the net family property of the surviving spouse.[188]

If Kylie and Bruce were not legally married but were in a common law marriage, Kylie can apply for dependants' relief under Part V of the *Succession Law Reform Act*.[189] The definition of spouse contained in Part V includes a common law spouse.[190]

However, an Ontario court has *in personam* jurisdiction and would need to enforce a dependants support order in the jurisdiction where the assets are located.

Jason

Jason's entitlement on an intestacy will depend on whether Kylie and Bruce were married. If they were married, then Jason will take subject to Kylie's preferential and distributive shares. If Kylie and Bruce were not married, then Jason will inherit the residue of Bruce's estate.[191]

3.4.2 What inheritance or estate tax (if any) is to be paid and by whom? What steps could Bruce and Kylie have taken in order to mitigate/reduce this tax charge?

In Ontario, the administration of an estate, whether testate or intestate, is in the hands of the deceased's personal representative. Under section 2 of the *Estates Administration Act*, when a person dies, all his or her property, except that held in joint tenancy, vests in the person's personal representative in trust to pay debts and funeral expenses and then to distribute what remains among the persons beneficially entitled.[192] The personal representative is responsible for paying any taxes.[193] The *Income Tax Act* imposes personal liability on a personal representative for failing to discharge the estate's tax liability.

While there is no estate tax in Ontario, certain rules have the effect of increasing the scope of income tax in the year of death.

First, when a person dies, income earned or deemed to be earned between the end of the last taxation year and death is included in the person's T1 tax return due in respect of the year of death. This is sometimes referred to as a "terminal" return. The day after the person dies is the first day of the first fiscal period for a new tax payer, the estate of the deceased, which is taxed

188 *Family Law Act*, RSO 1990, c F3.
189 *Succession Law Reform Act*, RSO 1990, c S26, ss 57-79.
190 *Succession Law Reform Act*, RSO 1990, c S26, s 57.
191 *Succession Law Reform Act*, RSO 1990, c S26, s 47(1).
192 *Estates Administration Act*, RSO 1990, c E2, s 2.
193 *Income Tax Act*, RSC 1985, c 1, s 150(3).

in accordance with the principles applicable to the taxation and trusts and which files a special tax return known as a T3 trust return.[194]

Second, in the year of death, income that was payable periodically is deemed to accrue to a taxpayer on a daily basis.[195]

Third, death triggers a "deemed realization immediately before death" of certain property, including non-depreciable capital property,[196] depreciable capital property and registered retirement savings plans.[197]

When a person dies intestate, the Ontario Superior Court of Justice must appoint a person or persons as estate trustee(s), in accordance with Part II of the *Succession Law Reform Act*.[198] A certificate of appointment of estate trustee without a will acts as conclusive evidence that the person (or persons) to whom the certificate was granted has the right to it. Before the Ontario Superior Court of Justice issues a certificate, the estate administration tax must be paid. This tax is calculated at a rate of $5 per $1,000 for the first $50,000 of estate value, and $15 per $1,000 for estate value over $50,000. As a general rule, rule 74.13 of the *Rules of Civil Procedure* requires the tax to be paid at the time of the application for a certificate of appointment.[199]

There may be taxes owing on Bruce's foreign assets. By way of example, Canadians owning assets with a United States *situs*, e.g. real estate located in the United States, may be subject to U.S. estate taxes on the value of those assets. Bruce's personal representative should seek tax advice regarding the foreign assets.

[194] Vern Krishna, *Income Tax Law*, 2d ed (Toronto: Irwin Law, 2012) at 516-517.
[195] *Income Tax Act*, RSC 1985, c 1, s 70(1)(a).
[196] *Income Tax Act*, RSC 1985, c 1, s 70(5).
[197] *Income Tax Act*, RSC 1985, c 1, s 146(8.8).
[198] *Succession Law Reform Act*, RSO 1990, c S26, ss 44-49.
[199] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 74.13.