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The International Comparative Legal Guide to:

Private Client 2019

8th Edition

A practical cross-border insight into private client work

Published by Global Legal Group with contributions from:

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London SE1 3PL, UK
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
January 2019

ISBN 978-1-912509-52-2
ISSN 2048-6863

Strategic Partners

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FOREWORD

Welcome to the 2019 edition of The International Comparative Legal Guide to Private Client which I am delighted to introduce this year. The Guide covers a comprehensive and diverse range of articles that would pique the interest of any domestic or international practice client adviser. The publication is designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

The Guide is divided into two sections and the first section contains seven general chapters. Each topical chapter is written by a different firm which will be most helpful for advisers with international clients.

The second section contains insightful country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 35 jurisdictions.

As an overview, the Guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work. The articles are provided by some of the most authoritative and respected advisers in the private client industry and I trust that you will find them just as valuable.

George Hodgson, CEO, STEP (Society of Trust & Estate Practitioners)

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1 Connection Factors

1.1 To what extent is domicile or habitual residence relevant in determining liability to taxation in your jurisdiction?

Domicile is generally not relevant to the determination of an individual's Canadian tax liability. Rather, the rationale for imposing Canadian income taxes on individuals is based on the concept of tax residence in Canada (domicile and habitual residence, however, may be relevant in the context of Wills and family law matters).

1.2 If domicile or habitual residence is relevant, how is it defined for taxation purposes?

"Domicile" is not defined under the *Income Tax Act* (Canada) (the "Act") and the concept of habitual residence is only relevant insofar as an individual is resident in Canada for tax purposes. This latter concept is further discussed in questions 1.3 and 1.4, below.

1.3 To what extent is residence relevant in determining liability to taxation in your jurisdiction?

As noted, residence forms the basis for determining an individual's liability to pay income taxes in Canada.

1.4 If residence is relevant, how is it defined for taxation purposes?

Individuals are considered to be residents of Canada if they meet the common law test for Canadian tax residency. The most important common law consideration is whether individuals maintain residential ties to Canada. A dwelling place or places in Canada and a spouse and/or dependants who remain in Canada are indicative of residential ties to the country. Individuals who maintain a significant amount of personal property in Canada, who keep a Canadian driver's licence and maintain social and economic ties to the country may also be considered to have residential ties to Canada, but each case will turn on its own facts and circumstances. Where an individual is determined not to be factually residing in Canada pursuant to the common law test, he or she may still be deemed to be a resident of Canada pursuant to the Act. For instance, under subs. 250(1) of the Act, an individual sojourning in Canada for a total period of 183 days or more during a calendar year will be deemed to be a resident of Canada for the entire calendar year. In certain cases, a tax treaty between Canada and another country will be relevant to the determination of an individual's tax residence.

1.5 To what extent is nationality relevant in determining liability to taxation in your jurisdiction?

On its own, nationality is irrelevant in determining whether a person is liable to pay taxes in Canada. As noted in question 1.3 above, only residence is relevant in determining a person's annual income tax liability. However, if a taxpayer is deemed to be resident in two countries, one of which is Canada, "tie-breaker rules" under international tax treaties may apply to determine the taxpayer's country of residence. Although not a primary consideration, nationality may be a factor that is considered when applying such rules.

1.6 If nationality is relevant, how is it defined for taxation purposes?

Further to question 1.5, nationality is not relevant to the determination of a person's liability to pay Canadian income taxes and is not defined in the Act.

1.7 What other connecting factors (if any) are relevant in determining a person's liability to tax in your jurisdiction?

As residence forms the basis for determining whether a person will be liable to pay tax in Canada, the general connecting factors are those which would be applied to determine Canadian tax residence, as outlined in question 1.4, above.

2 General Taxation Regime

2.1 What gift or estate taxes apply that are relevant to persons becoming established in your jurisdiction?

There are no estate and/or gift taxes in Canada, only provincial probate taxes, as outlined in question 3.1, below. However, when capital assets are transferred by way of gift, any accrued gain generally becomes taxable to the donor of the gift, with some exceptions. On death, the deceased is deemed to have disposed of all capital assets and, again with certain significant exceptions, the gain on such deemed disposition is taxable to him or her.

2.2 How and to what extent are persons who become established in your jurisdiction liable to income and capital gains tax?

Under s. 3 of the Act, both federal and provincial income taxes are payable by all residents of Canada on their total worldwide income, from all recognised taxable sources. The concept of the tax residence for individuals is discussed in question 1.4, above.

Under subs. 38(1) of the Act, taxable capital gains are generally assessed on the basis that half of the value of the gain is to be added to the taxpayer's taxable income in the year in which the gain is realised.

2.3 What other direct taxes (if any) apply to persons who become established in your jurisdiction?

Canadian provinces may only levy direct taxation, and do so most commonly in the form of income taxes imposed on persons. Under the *Canada Pension Plan* and the *Employment Insurance Act* (Canada), individuals who work in Canada as employees are also required to make periodic pension and employment insurance contributions. Under the Act, these, along with federal and provincial income taxes, must be withheld and remitted by employers in the form of payroll deductions.

Canadian municipalities also collect property taxes from taxpayers who own real property. The amount of property taxes payable in a year depends on the municipality's assessment of the property's value. The tax rates applicable to properties differ amongst provinces and municipalities. In Ontario, purchases of real property in and around Toronto by non-residents are now subject to a 15% Foreign Buyer's Tax. The tax paid may, in general, be refunded to an individual purchaser who becomes a permanent resident of Canada within a specified timeframe. Similarly, in 2018, the British Columbia government announced its intention to introduce a new Speculation Tax imposed on owners of unoccupied residential properties in certain parts of the province. The annual tax would apply to owners that hold unoccupied properties in certain urban centres with higher rates applicable to foreign owners. This proposed Speculation Tax would be in addition to a similar surtax imposed by the city of Vancouver on owners of vacant homes.

2.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in your jurisdiction?

The federal government of Canada, under the *Excise Tax Act* (Canada) (the "ETA"), requires all merchants to collect a value-added tax of 5%, known as the Goods and Services Tax ("GST"), applicable to the supply of all goods and services in Canada, with the exception of goods and services that are either exempt or zero-rated. In the provinces of Ontario, Nova Scotia, Newfoundland, New Brunswick and Prince Edward Island, the GST is harmonised with provincial sales taxes of varying rates and collected by the Federal Government in the form of a Harmonized Sales Tax ("HST"), which functions in the same manner as the GST. The other provinces, other than Alberta, levy their own provincial sales taxes ("PST"), which vary in rates and application.

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

2.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in your jurisdiction?

Non-resident trust ("NRT") rules were enacted in June 2013 as amendments to s. 94 of the Act. These rules may apply to offshore trusts that have Canadian-resident contributors or beneficiaries. S. 94.1 of the Act also provides rules that apply to portfolio investments held by foreign investment entities ("FIEs"), while s. 94.2 of the Act contains rules regarding investments in non-resident commercial trusts by Canadian residents or other particular persons.

Under the NRT rules, an offshore trust may be subject to taxation in Canada if a Canadian-resident taxpayer has, at any time, made a contribution to the trust, or if the trust has at least one Canadian-resident beneficiary and a "connected contributor". A "connected contributor" is, in general, an individual who was a Canadian-resident taxpayer at the time he or she made contributions to the trust or at any time in the preceding or subsequent 60 months. If an offshore trust is subject to the NRT rules, it will be deemed resident in Canada and liable to pay annual income taxes on the portion of its income that relates to contributions made by resident or "connected" contributors.

The FIE rules generally apply to non-resident entities that hold portfolio investments and may, in certain circumstances, also apply to non-resident trusts. Beneficiaries of such arrangements may be subject to the annual payment of Canadian income taxes on the income generated by their investments that are held by the non-resident entity. The FIE rules may be applied in circumstances where Canadian-resident taxpayers hold an interest in a non-resident entity and one of the main reasons for holding the interest is to pay less tax than otherwise payable under the Act. For taxpayers who hold interests in certain non-resident commercial trusts, s. 94.2 of the Act may also deem them to hold a controlling interest in a controlled foreign affiliate (generally resulting in annual Canadian income taxation on an accrual basis) with regard to their beneficial interest in the non-resident trust.

2.6 Is there any general anti-avoidance or anti-abuse rule to counteract tax advantages?

S. 245 of the Act provides a general anti-avoidance rule (the "GAAR") to counteract tax advantages obtained through a transaction or a series of transactions when more specific anti-avoidance provisions in the Act may be inapplicable or do not suffice. In general, transactions or a series of transactions that result in a:

(a) reduction, avoidance or deferral of income tax;

(b) direct or indirect tax benefit that can reasonably be considered to not have been undertaken or arranged for *bona fide* purposes other than to obtain a tax benefit; and

(c) direct or indirect misuse of the provisions of the Act, the *Regulations* under the Act and/or a tax treaty,

may trigger the application of the GAAR.

If the GAAR applies, the Canada Revenue Agency (the "CRA") has broad powers under subs. 245(5) of the Act to disallow deductions, allocate income or a loss to any person, re-characterise the nature of a payment or amount, and ignore any tax effects that would otherwise have been obtained under the Act. The CRA has applied the GAAR in a variety of cases and the provision has been litigated at all levels of the Canadian federal courts, including before the Supreme Court of Canada.

2.7 Are there any arrangements in place in your jurisdiction for the disclosure of aggressive tax planning schemes?

The public can report a lead on suspected tax cheating in Canada to the CRA to assist in identifying taxpayers who are violating tax laws. Members of the public can report suspected tax evasion over the Internet on the CRA's website or by contacting the National Leads Centre by phone, mail or fax.

In addition, s. 237.1 of the Act seeks to ensure that promoters of investments in property that are considered a "tax shelter" (as defined in subs. 237.1(1) of the Act) obtain an identification number from the CRA through a registration regime before offering the investment for sale to potential investors. There are serious consequences for both the promoter and any investor who acquires an interest in an unregistered tax shelter.

Taxpayers who deliberately make false or misleading statements to the CRA, or who negligently or fraudulently misrepresent their tax circumstances to the CRA, may face the possibility of civil and/or criminal penalties and sanctions under the Act. Penalties may also be levied under the Act against unscrupulous, dishonest or highly negligent tax preparers. In certain circumstances, charges may also be laid against taxpayers who fraudulently misrepresent their tax circumstances under the *Criminal Code* (Canada).

The GAAR generally provides that where a transaction or a series of transactions results in a reduction, avoidance, or deferral of taxes owing, and the transaction or the series of transactions are only being attempted for the tax benefits, the transaction or transactions themselves may be invalidated. The GAAR is discussed in greater detail in question 2.6, above.

3 Pre-entry Tax Planning

3.1 In your jurisdiction, what pre-entry estate and gift tax planning can be undertaken?

Canada is a partial tax haven with respect to federal estate and gift taxes. Under Canadian income tax law, there are no specific estate or gift taxes. However, where a gift of appreciated property is made, the donor will generally be taxable on the capital gain. Exemptions and deferrals are available, depending in part on who receives the gift (e.g., a spouse) and the type of property (e.g., shares of certain corporations, farm property). Pre-entry planning may accordingly involve a consideration of the disposition of property prior to immigration which may otherwise give rise to potential double taxation.

3.2 In your jurisdiction, what pre-entry income and capital gains tax planning can be undertaken?

Until recently, "immigration trusts" offered certain tax advantages to Canadian immigrants and were a central feature of pre-entry income tax planning. However, as a result of amendments to the Act announced in the 2014 Federal Budget, planning involving immigration trusts is no longer available for future taxation years.

Immigrants to Canada should consider disposing of any property that is likely to give rise to the possibility of double taxation before establishing residency. If prospective immigrants have made contributions to non-Canadian trusts, they should also determine whether any such trusts may be subject to the NRT rules in s. 94 of the Act. The NRT rules are discussed in greater detail in question 2.5, above.

3.3 In your jurisdiction, can pre-entry planning be undertaken for any other taxes?

Income taxes, including tax on capital gains, are the most basic and important form of taxation in Canada. Under s. 128.1 of the Act, individuals are deemed to have disposed of and reacquired all of their capital property at its fair market value immediately prior to immigrating to Canada. Consequently, individuals who become residents of Canada will be liable to pay Canadian tax only on the gains accrued after their arrival in Canada when an asset is sold or otherwise disposed of. Nonetheless, certain immigrants to Canada might wish to dispose of their capital property prior to establishing residency or, subject to the application of the NRT rules and/or the foreign accrual property income ("FAPI") rules, to transfer their capital property to a trust or corporation before they arrive in Canada to avoid the possibility of double taxation on its later disposition.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to tax on the acquisition, holding or disposal of, or receipt of income from investments in your jurisdiction?

Generally, there are no direct taxes in Canada on the remittance of funds into the country. To the extent that capital investments are held in Canada, capital gains taxes will only become payable when such investments are disposed of or deemed to be disposed of under the Act. Annual income generated from the investments is generally subject to income taxation in Canada. If such income is paid to a non-resident of Canada, non-resident withholding taxes are generally imposed on such income under Part XIII of the Act at a general rate of 25%, although a lower rate may apply depending on the characterisation of the income and the terms of any tax treaty between Canada and the jurisdiction in which the recipient is resident.

Particular tax rules apply to investments which constitute "taxable Canadian property" ("TCP") under the Act. TCP generally consists of real property situated in Canada, Canadian resource properties or corporate shares which primarily derive their value from Canadian real or resource properties. Non-residents who dispose of TCP are required to comply with the provisions of s. 116 of the Act, which may include obtaining a clearance certificate from the CRA in respect of the disposition.

4.2 What taxes are there on the importation of assets into your jurisdiction, including excise taxes?

Under s. 212 of the ETA, every person who is liable under the *Customs Act* to pay duty on goods imported into Canada is also required to pay the GST applicable to the goods. These goods are outlined in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*.

The amount of tax payable is presently 5% of the value of the goods after the customs duty has been applied. Some categories of imported goods are not subject to GST. These include goods outlined in Schedule VII of the ETA, as well as services and intangible property used exclusively (90% or more) in a commercial activity.

The ETA also requires excise tax to be paid on the importation of goods, such as automobiles designed primarily for use as passenger vehicles, and on jewellery. Excise duty is also payable on tobacco and alcohol products.

4.3 Are there any particular tax issues in relation to the purchase of residential properties?

Purchases of residential properties may be subject to land transfer taxes, depending on the province and municipality in which they are situated. The tax is generally payable at the time a property transfer is registered and may vary based on the value of the property in question. As noted in the answer to question 2.3, above, in the provinces of British Columbia and Ontario, residential properties purchased by foreign buyers may be subject to a 15–20% additional land transfer tax, depending on where the property is located. Depending on the province, first-time home buyers may be eligible for a refund of all or part of the applicable provincial land transfer taxes.

Municipalities may levy additional land transfer taxes. Generally, Canadian municipalities also levy property taxes, as discussed in question 2.3, above. Residential properties located in Canada also constitute "taxable Canadian property" for the purposes of the Act. Thus, Canadian residential properties disposed of by non-residents of Canada are subject to capital gains taxes in Canada. Clearance certificates must be obtained from the CRA under s. 116 of the Act to ensure payment of such capital gains tax.

5 Taxation of Corporate Vehicles

5.1 What is the test for a corporation to be taxable in your jurisdiction?

Under subs. 250(4) of the Act, corporations are deemed to be resident in Canada throughout a taxation year if they are incorporated in a Canadian jurisdiction after April 26, 1965. Corporations that were incorporated in Canada before April 27, 1965 are also deemed to be resident in Canada if they carried on business in Canada or were otherwise resident in Canada at any time in a taxation year ending after April 26, 1965.

Corporations that are not incorporated in Canada will be considered to be resident in Canada if they meet the common law test for corporate residency (based on central management and control).

Corporations that are not resident in Canada may nevertheless be subject to Canadian taxation if they carry on business in Canada (subject, however, to applicable tax treaties which normally require a permanent establishment in Canada). Corporations will generally be held to be "carrying on business in Canada" if they have an operation in Canada during a taxation year from which profits arise. S. 253 of the Act contains, however, an extended definition of "carrying on business". Corporations will be deemed to be "carrying on business in Canada" if they:

- produce, create or manufacture goods in Canada;
- solicit orders or offer anything for sale in Canada through an agent or servant; or
- dispose of Canadian resource property, timber property or real property that is not capital property.

5.2 What are the main tax liabilities payable by a corporation which is subject to tax in your jurisdiction?

Under the Act, Canadian-resident corporations are subject to taxation on their annual revenues in a similar manner to other persons. Corporate tax rates vary across the country depending on the province or territory where the corporation has permanent establishments, but are generally lower than individual or trust tax rates, making it advantageous in many cases to defer the payment of taxes at high rates through the use of corporations. Dividends paid by one Canadian corporation to another are, in general, entitled to a full deduction under s. 112 of the Act, such that they may be received tax-free by the recipient corporation (subject to the anti-avoidance provisions in subs. 55(2) of the Act).

Unless otherwise exempt under the ETA, corporations carrying on business in Canada are required to report and remit GST (or HST in certain provinces) if they sell goods or provide services to Canadians. Corporations also face the same or similar tax liabilities in respect of goods imported into the country and real properties beneficially owned by them as described in questions 4.2 and 4.3.

5.3 How are branches of foreign corporations taxed in your jurisdiction?

Foreign corporations are subject to Canadian corporate income taxes on the income derived from their branches located in Canada. In addition, they may be subject to "branch tax" under Part XIV of the Act. Subject to applicable treaty provisions, foreign corporations are taxed at a rate of 25% on their after-tax earnings from Canadian branches that are not re-invested in Canada. Earnings that are not repatriated to the branch's home base are considered to have been reinvested in Canada.

Foreign corporations that want to expand to Canada might consider establishing a branch before incorporating a Canadian subsidiary to potentially benefit from the losses incurred by the branch in its first years of operation. This may reduce the foreign corporations' taxable income in their own jurisdictions.

6 Tax Treaties

6.1 Has your jurisdiction entered into income tax and capital gains tax treaties and, if so, what is their impact?

Canada has entered into income tax and capital gains tax treaties with many countries. The impact of the treaties is to limit, to the greatest extent possible, the possibility of double taxation for persons who are liable to pay taxes in two international jurisdictions. The treaties also address and limit the rate of withholding tax otherwise applicable at source in respect of, *inter alia*, dividends, royalties, rent and/or interest payments to recipients outside of Canada.

6.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

Tax treaties between Canada and other nations generally follow the OECD model convention or the United Nations model tax treaty. The *Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital* is the treaty most commonly referred to in Canada and is based on the OECD model convention. Canadian courts have recognised the importance of the commentary to the OECD model convention in interpreting tax treaties, most particularly in *Crown Forest Industries Ltd. v. The Queen*, 1995 2 SCR 802 (SCC).

6.3 Has your jurisdiction entered into estate and gift tax treaties and, if so, what is their impact?

Since there are no specific estate and/or gift taxes in Canada, generally most treaties do not address the impact of double taxation with respect to estate and gift tax. However, the Canada-U.S. Tax Convention provides for a system of foreign tax credits for estates that are subject to capital gains taxes on the deemed disposition of capital assets on death in Canada, and estate taxes in the United States.

6.4 Do the estate or gift tax treaties generally follow the OECD or another model?

Further to question 6.3 above, since Canada does not have any specific estate and/or gift taxes, apart from the Canada-U.S. Tax Convention, no other treaties or treaty provisions deal significantly with estate or gift taxes.

7 Succession Planning

7.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in your jurisdiction?

In Canada, the conflict of law rules governing succession pursuant to a Will have been largely codified in provincial estates and succession legislation. Most of the provinces are signatories to the *Convention Providing a Uniform Law on the Form of an International Will*. For Wills, the determination of which jurisdiction's law governs depends on the classification of the property in question as "movable" or "immovable".

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

7.2 Are there particular rules that apply to real estate held in your jurisdiction or elsewhere?

The Wills and succession legislation in each province provides that succession of real estate pursuant to a Will is governed by the law of the place where the property is located. While there is no universal requirement in Canada to probate a Will, the transmission of real estate generally requires a grant of probate as court authentication affords protection to the executor and third parties. Probate fees and charges vary widely among Canadian provinces.

7.3 What rules exist in your jurisdiction which restrict testamentary freedom?

The Supreme Court of Canada has generally recognised that testamentary freedom should not be interfered with unless otherwise required by law (*Tataryn v. Tataryn Estate*, [1994] 2 SCR 807 (SCC)). Canadian courts have subjected testamentary freedom to certain limitations, including: statutory rights of dependants to seek adequate provision from a testator's estate; conditions that violate public policy; and various contractual or equitable obligations of the testator.

Legislation in most Canadian provinces allows for certain persons related to the deceased to apply to court to vary the terms of a Will or seek an allowance from the estate if adequate provision was not made for them. Laws vary significantly by jurisdiction. This is discussed further in question 8.3 below.

Testamentary freedom may also be restricted where conditions imposed on gifts are illegal or contrary to public policy (e.g. conditions which are intended to interfere with family relations, or are discriminatory). This was recently the source of debate in Ontario, with the Court of Appeal having upheld a Will which (although it contained no racially charged or motivated language) disinherited a child despite extrinsic evidence that the testator was actuated by racism in so doing (*Re Spence Estate,* 2016 ONCA 196).

Certain contractual obligations may also limit testamentary freedom, such as the common law doctrine of mutual wills, which may impose a contractual obligation on a surviving spouse to refrain from modifying their Will after the first spouse's death. Examples also include marriage contracts and other domestic agreements.

Persons seeking to challenge a Will may also make certain equitable claims against an estate including: proprietary estoppel claims; quantum meruit claims; and resulting or constructive trust claims based on the common law doctrines of restitution and unjust enrichment.

8 Trusts and Foundations

8.1 Are trusts recognised/permitted in your jurisdiction?

With the exception of Quebec, all other Canadian provinces and territories recognise the English law of trusts. In each province, trusts, including *inter vivos* and testamentary trusts, are governed under a combination of trustees' legislation and the common law. Trustees' duties and powers are also governed by provincial legislation, in addition to the common law applicable to fiduciary relationships.

In the province of Quebec, the legal system governing property and civil rights is based on French civil law rather than English common law. The *Civil Code of Quebec* contains rules governing trusts that are very distinct from the common law concept of the trust and are designed to fit with the civil law system. The *Civil Code of Quebec* does not define the trust but rather describes how a trust is created. It describes the Quebec trust as resulting from an act by which a person (the settlor) transfers property to the control of another person (the trustee) for the benefit of a person (the beneficiary) or for a defined purpose. What is unique is that Quebec's civil law views the trust as a patrimony containing property that is appropriated to a purpose rather than adopting the common law notion of the division of "fiduciary ownership". The *Civil Code of Quebec* depersonalises the trust by making it juridically independent from the patrimonies of the settlor, the trustee and the beneficiary, and upon which no one of them has any real rights or rights *in rem*. The *Civil Code of Quebec* also contains the rules governing fiduciary duties.

8.2 How are trusts/settlors/beneficiaries taxed in your jurisdiction?

A trust is considered to be an "individual" under subs. 104(2) of the Act and is subject to income tax in Canada if resident or deemed resident in the country. The common law test for determining the residence of a trust is where its central management and control actually abides, including control over investment decisions, the administration of trust property, the responsibility for banking and financial arrangements and the power to enter into contracts on behalf of the trust (*Fundy Settlement v. R.*, 2012 SCC 14).

The disposition of assets to a Canadian *inter vivos* trust is often a taxable event to the contributor if the assets have accrued unrealised capital gains. Income that arises on assets held in an *inter vivos* trust is generally taxable at the maximum individual tax rate for the year; consequently the income is usually made payable to the beneficiaries and taxed in their hands. In addition, settlors of and contributors to *inter vivos* trusts may be subject to the various attribution rules in the Act, such as subs. 75(2) (for trusts factually resident in Canada).

As of January 1, 2016, testamentary trusts, like *inter vivos* trusts, are taxed at the maximum individual tax rates for the year. Exceptions apply, including limited exceptions for the first three years of an estate and for testamentary trusts established for certain disabled beneficiaries, which are taxed like individuals at graduated rates.

Both testamentary and *inter vivos* trusts may also be subject to subs. 104(4) of the Act, which deems a trust to have disposed of and immediately reacquired all of its capital property upon its 21st anniversary, at fair market value.

8.3 How are trusts affected by succession and forced heirship rules in your jurisdiction?

There are no forced heirship rules in Canada but dependants' relief and support legislation in each province allows dependants of a deceased who dies without making adequate provisions for them, to apply to the courts for proper maintenance and support. If the application is granted, the court may impose a different distribution of assets than provided in the Will or pursuant to beneficiary designations.

In some provinces, a spouse has an inherent right to elect a division of property under family law legislation, rather than take under the deceased spouse's Will. In others, a spouse or child can apply to vary the Will of the deceased, even if not financially dependent on the deceased. *Inter vivos* trusts are often used to avoid such Wills variations.

8.4 Are private foundations recognised/permitted in your jurisdiction?

Foundations are only recognised and used in the charitable sector in Canada. S. 149.1 of the Act recognises public and private charitable foundations. Canada does not permit the use of foundations for private family assets and planning. As such, foundations established in European countries may be treated as trusts or as corporations in Canada, depending on the facts and circumstances (*Sommerer v. The Queen*, 2012 FCA 207).

8.5 How are foundations/founders/beneficiaries taxed in your jurisdiction?

As registered charities, an exemption from income tax is provided under s. 149.1 of the Act for charitable foundations. Individual and corporate donors may also receive tax benefits proportionate to the value of their donations under ss. 118.1 and 110.1 of the Act. Corporate donors receive "tax deductions", which are calculated as an amount deductible from their total taxable income. By contrast, individual donors receive "tax credits", which are calculated as an amount deductible from their total tax payable.

8.6 How are foundations affected by succession and forced heirship rules in your jurisdiction?

As Canadian law does not recognise the use of foundations for private family assets and planning, foundations are generally not affected by applicable succession rules. For charitable foundations, Canadian intestate succession legislation does not provide for charities to receive funds on intestacy. If a Will provides a bequest to a charity that is subsequently found to be invalid, such that an intestacy results, the charity would not receive the bequest.

9 Matrimonial Issues

9.1 Are civil partnerships/same-sex marriages permitted/recognised in your jurisdiction?

Same-sex marriages are permitted and recognised in all Canadian jurisdictions. Civil partnerships (generally referred to as "common law relationships" in Canada) are common between heterosexual and same-sex couples.

9.2 What matrimonial property regimes are permitted/recognised in your jurisdiction?

Matrimonial property regimes are generally provided for under Canadian provincial family law legislation. In some provinces, such as British Columbia and Manitoba, matrimonial property regimes apply equally to common law spouses who have lived together for a minimum prescribed period. In jurisdictions where the matrimonial property statute does not apply to common law couples, such as Alberta, on a relationship breakdown, an individual may look to the courts for remedies with respect to the division of property at the end of a common law relationship including through the application of constructive trusts and the law of unjust enrichment.

Similar matrimonial property regimes exist across Canada's common law provinces. In Ontario, the *Family Law Act* (Ontario) currently provides that spouses share in the growth in their respective "net family property" during marriage, being generally the accumulation and growth in value of assets owned by each spouse during marriage, with deductions provided for the value of assets owned by a spouse at the date of marriage. In general, an "equalisation" of net family property is applied as of the date of separation or marriage breakdown to determine the amount, if any, payable by one spouse to the other as a result of marriage breakdown. Special protections are also provided in most provinces for inherited and gifted property, and for married spouses' matrimonial home(s), which generally results in an equal division in the value of such home(s) between spouses following a marriage breakdown.

In Quebec, the family patrimony and matrimonial regimes are the two fundamental concepts of the law of family property. The *Civil Code of Quebec* provides that marriage entails the establishment of a family patrimony of certain property of the spouses regardless of which of them owns the property. Residences, furniture and motor vehicles used by the family are included in the family patrimony, as well as benefits accrued under retirement plans. Other assets of the spouses are governed by the specific matrimonial regime chosen by the spouses. Three possible matrimonial regimes are recognised: the "separation as to property" regime, the "partnership of acquests" regime (which is the default regime for spouses who have not otherwise fixed their matrimonial regime by a marriage contract) and a "community of property" regime. There is also the concept of a formal "civil union" under the *Civil Code of Quebec* (rarely used) which entails the same effects as marriage. The civil union contemplated by the *Civil Code of Quebec* is not to be confused with a *de facto* conjugal relationship (i.e., a common law relationship), which is quite common in Quebec. *De facto* spouses are not recognised under the *Civil Code of Quebec* and are not subject to the family patrimony and matrimonial property regimes described above.

9.3 Are pre-/post-marital agreements/marriage contracts permitted/recognised in your jurisdiction?

Domestic agreements in the form of marriage contracts and

Canada

cohabitation agreements are generally recognised across Canada's provinces, including under the *Family Law Act* (Ontario). Marriage contracts may be entered into before or after the date of a couple's marriage and generally allow spouses to agree on the matrimonial property regime or the division of assets which is to apply in the event of a marriage breakdown. Contract law and other legal principles may be applied to invalidate a marriage contract following a marriage breakdown. A fulsome disclosure of assets by each spouse and independent legal advice from competent legal practitioners are therefore important in order to ensure that the terms of a marriage contract are as enforceable as possible.

9.4 What are the main principles which will apply in your jurisdiction in relation to financial provision on divorce?

In general, under the *Divorce Act* (Canada), married spouses may apply for a divorce one year after their separation. As discussed in question 9.2 above, the financial implications of separation are a matter of provincial law and are accordingly dealt with under provincial family law legislation. Under the *Family Law Act* (Ontario), the financial implications of separation may cause one spouse to make an equalisation payment to the other, as well as possible future or ongoing spousal and child support payments. Separating spouses may enter into a written separation agreement in order to document their agreement regarding, *inter alia*, the division of assets and other financial matters arising as a result of the separation.

10 Immigration Issues

10.1 What restrictions or qualifications does your jurisdiction impose for entry into the country?

To enter Canada, under the *Immigration and Refugee Protection Act* (Canada) and *Regulations*, individuals must:

- have valid travel documents (e.g., a passport);
- be in good health;
- establish that they have ties that will take them back to their country of origin;
- establish that they will leave Canada at the end of their visit; and
- have enough funds for their stay in Canada.

Depending on individuals' countries of origin, they may also require a temporary resident visa. In some cases, a medical examination and a letter of invitation from someone in Canada may also be necessary.

Individuals may be inadmissible to Canada for a variety of reasons, including national security, human rights violations or criminality. However, if otherwise inadmissible individuals can establish a compelling reason to travel to Canada, they may be issued a temporary resident permit.

10.2 Does your jurisdiction have any investor and/or other special categories for entry?

In Canada, "investor" and "entrepreneur" classes are outlined in the *Immigration and Refugee Protection* Regulations. However, the federal Immigrant Investor Venture Capital ("IIVC") programme, which enabled high-net-worth individuals to immigrate to Canada, has not accepted new applications since December 31, 2015. Alternatively, many provincial jurisdictions have programmes whereby entrepreneurs and investors who establish a business in the province can be nominated for permanent residency status.

Other categories for entry into Canada include: the Federal Skilled Trades Class, for immigrants qualified in a skilled trade; the Federal Skilled Worker, for immigrants with at least one year experience in an eligible occupation; the Canadian Experience Class, for temporary foreign workers who wish to gain permanent residency status; and the Family class, which aims to reunite families in Canada.

10.3 What are the requirements in your jurisdiction in order to qualify for nationality?

Under the *Citizenship Act* (Canada) and *Regulations*, foreign individuals may become Canadian citizens if they:

- are 18 years of age;
- have permanent resident status in Canada;
- have lived in Canada for at least three out of the four years prior to making the citizenship application;
- have adequate knowledge of either English or French;
- do not have a criminal history; and
- understand Canada's history, values, institutions and symbols, as well as the rights and responsibilities of citizenship.

10.4 Are there any taxation implications in obtaining nationality in your jurisdiction?

Further to question 1.6 above, there are no taxation implications, *per se*, in obtaining Canadian citizenship. However, further to questions 1.4 and 1.5 above, to the extent that individuals are resident in Canada when they become citizens, they will be liable to pay income taxes under the Act. Citizens of Canada may cease to be tax residents of the country and may also be considered or deemed to be resident in another country, for tax purposes, including under a tax treaty.

10.5 Are there any special tax/immigration/citizenship programmes designed to attract foreigners to become resident in your jurisdiction?

As discussed in question 10.2, above, the federal IIVC programme has not accepted new applications since December 2015. However, many provincial jurisdictions have introduced programmes whereby entrepreneurs and investors who establish a business in a province can be nominated for permanent residency status.

In Ontario, the Ontario Immigrant Nominee Program's ("OINP") Entrepreneur Stream helps individuals from outside Canada start a business in Canada or purchase an existing business. Applicants must first register an online Expression of Interest ("EOI"), and then may be invited by the province to apply to the OINP Entrepreneur Stream. If the application is approved, the applicant will enter a Performance Agreement outlining the commitments made in their EOI, and will receive a temporary work permit to establish their business in Ontario. If the applicant meets the commitments in their Performance Agreement, they are eligible to be nominated by the OINP for permanent residence status within six months of the nomination.

Similar programmes exist in British Columbia, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon and the Northwest Territories.

11 Reporting Requirements/Privacy

11.1 What automatic exchange of information agreements has your jurisdiction entered into with other countries?

Canada has entered into numerous tax treaties and tax exchange agreements with OECD Member States and other countries, as well as with jurisdictions such as Liechtenstein, Jersey, the Isle of Man and certain Caribbean states which were previously (and may still be) considered as "tax havens" or highly favourable jurisdictions from an income tax perspective. As of July 2017 (with the reporting obligation having commenced in May 2018), Canada implemented the OECD Common Reporting Standard (CRS) regarding the automatic exchange of tax and financial information with other participating global jurisdictions, by way of the introduction of a new Part XIX to the Act.

11.2 What reporting requirements are imposed by domestic law in your jurisdiction in respect of structures outside your jurisdiction with which a person in your jurisdiction is involved?

Under s. 233.3 of the Act, Canadian residents are required to file an annual report (in CRA form T1135) outlining the "specified foreign property" owned by them during the year if the total cost amounts of such "specified foreign property" at any time during the year exceeded $100,000. "Specified foreign property" includes funds held outside of Canada, shares of a non-resident corporation and debts payable by a non-resident person. Form T1135 was revised in 2015. The changes allow taxpayers who hold specified foreign property with a total cost amount of less than $250,000 throughout the year to report under a new simplified reporting method. The previous detailed reporting method continues to apply to taxpayers who, at any time during a year, held specified foreign property with a total cost of $250,000 or more.

Canadian residents who own or control foreign subsidiaries or corporations during a taxation year may be required to report such foreign subsidiaries or corporations in CRA form T1134 and include the FAPI, if any, attributable to such subsidiaries or corporations in their incomes for the taxation year.

Canadian beneficiaries of non-resident trusts who receive distributions of property from, or are indebted to, such non-resident trusts must report these distributions or indebtedness in CRA form T1142. Canadian resident contributors to non-resident trusts must also report the contributions in CRA form T1141 as part of their annual tax filing obligations.

11.3 Are there any public registers of owners/beneficial owners/trustees/board members of, or of other persons with significant control or influence over companies, foundations or trusts established or resident in your jurisdiction?

There is no public register for private trusts in Canada (testamentary or *inter vivos*) and no general ability to publicly search for the names of shareholders of Canadian corporations and limited partners of Canadian (provincial) limited partnerships. The names of the directors and officers of corporations incorporated under Canadian federal or provincial laws are publicly available, as are the names of the directors of foundations which are registered Canadian charities. For reporting issuers (e.g. publicly traded companies), securities laws impose shareholder ownership disclosure requirements for directors, senior officers, and insiders (generally those who hold more than 10% of voting rights). This information is publicly available through an online system established by Canadian securities regulators.

In 2018, the provincial government of British Columbia announced its intention to implement a new reporting regime for beneficial ownership of real estate in the province under the proposed *Land Owner Transparency Act* (the "LOTA"). The LOTA would establish a public registry of beneficial ownership of land in the province. Corporations, trusts and partnerships (unless exempted) who are registered owners of real property in the province will be required to identify individual shareholders, beneficiaries and partners. Comments on the proposed legislation were solicited from the public and formal legislation is expected to be introduced.

Acknowledgment

The authors wish to thank their colleagues Wendi Crowe and Dwight Dee for their assistance in the preparation of this chapter.

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The authors also thank Kathryn Gullason for her assistance in updating this chapter.

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