

# Private client law in Canada: overview

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## TAXATION

### Tax year and payment dates

#### 1. When does the official tax year start and finish in your jurisdiction and what are the tax payment dates/deadlines?

Canada's constitutional system is a federal one. Income tax is imposed by the federal government as well as by the provincial and territorial governments. Unless specifically stated otherwise, the answers in this chapter relate to federal laws and when applicable, the laws of the Province of Ontario.

The tax year for individuals and *inter vivos* (lifetime) trusts is the calendar year. As of 2016, the tax year for testamentary trusts (with a few exceptions) is also the calendar year.

Taxes are due as follows:

- Individuals: 30 April of the following year.
- Individuals deceased between 1 November and 31 December: the day that is six months after the day of death, otherwise 30 April of the year following death.
- Trusts: the day that is 90 days after the end of the tax year.

Taxes for individuals and *inter vivos* trusts are payable in quarterly instalments. As of 2016, taxes for testamentary trusts are also payable in quarterly instalments. The instalments are payable on 15 March, 15 June, 15 September and 15 December in each taxation year. Each instalment is one-quarter of either:

- The estimated tax payable for the year.
- The taxpayer's instalment base for the immediately preceding taxation year.

The final instalment is the remainder of the tax and is payable on the due date.

### Domicile and residence

#### 2. What concepts determine tax liability in your jurisdiction (for example, domicile and residence)? In what context(s) are they relevant and how do they impact on a taxpayer?

##### Domicile

The concept of domicile is not relevant for taxation in Canada.

##### Residence

The primary basis for taxation in Canada is the residence of the taxpayer. Residence in Canada is generally determined by factual criteria.

An individual is resident in Canada if Canada is the place where the individual, in the settled routine of their life, regularly, normally or customarily lives. In addition, an individual who sojourns (that is, temporarily resides) in Canada for 183 or more days during a year is

deemed to be resident in Canada throughout that year (*Income Tax Act (Canada)*) (Tax Act).

A taxpayer who is resident in Canada under Canadian domestic law and is also resident in another country under the domestic law of that country may be deemed by a tax treaty to be resident in only one country for tax purposes.

### Taxation on exit

#### 3. Does your jurisdiction impose any tax when a person leaves (for example, an exit tax)? Are there any other consequences of leaving (particularly with regard to individuals domiciled in your jurisdiction)?

An individual who ceases to be resident in Canada is deemed to dispose of and reacquire the property they own (subject to exceptions, including for certain Canadian real estate, business property and registered plans) at fair market value. The resulting capital gain is subject to tax in Canada. Payment of the departure tax can be delayed by posting security to the Canada Revenue Agency.

### Temporary residents

#### 4. Does your jurisdiction have any particular tax rules affecting temporary residents?

The deemed disposition and reacquisition on emigration (see *Question 3*) does not apply to property held by individuals who have been resident in Canada for a period or periods totalling five years or less in the ten years preceding departure, if such property was acquired before the time when the individual last became resident in Canada or was inherited.

Temporary residents are subject to tax on their worldwide income if they meet the residence tests (see *Question 2*).

### Taxes on the gains and income of foreign nationals

#### 5. How are gains on real estate or other assets owned by a foreign national taxed? What are the relevant tax rates?

Non-residents are subject to tax in Canada on gains realised on the disposition of taxable Canadian property (TCP). TCP is generally limited to:

- Real property situated in Canada.
- Assets used in a business carried on in Canada.
- A share of a private corporation, an interest in a trust or an interest in a partnership, more than 50% of the value of which was derived from real or immovable property situated in Canada, Canadian resource property, or timber resource property, at any time in the 60-month period before the disposition of such shares or other interests.



- Units of a mutual fund trust and listed shares of a corporation, where at any time during the 60-month period preceding the disposition, a 25% ownership threshold is exceeded and more than 50% of the value of the units or shares was derived from real or immovable property situated in Canada, Canadian resource property, or timber resource property.

Non-residents are subject to tax in Canada on dispositions of TCP at the same rates as Canadian residents. Capital gains are effectively taxed at half the normal rate, that is, 26.76% in Ontario and 26.66% in Québec (marginal rate in the highest bracket for 2017). Recapture of depreciation is fully taxed at 53.53% in Ontario and 53.31% in Québec. Such gains may be exempt under a tax treaty.

When a non-resident disposes of TCP, the non-resident must obtain a clearance certificate for the disposition, otherwise the buyer is liable to pay 25% (and in some cases 50%) of the purchase price to the Canadian tax authorities, and can withhold that amount on closing. The certificate protects the Canadian government's ability to collect capital gains tax from non-residents. The tax authorities issue the certificate after the non-resident pays 25% of the gain and any tax on recapture (as or on account of tax) or provides security.

There is an exemption from the requirement to obtain a clearance certificate where the property disposed of is listed on a recognised stock exchange or is protected under a tax treaty.

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## 6. How is income received by a foreign national taxed? Is there a withholding tax? What are the income tax rates?

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The principal sources of income of non-residents that are subject to tax in Canada are:

- Income from a business carried on in Canada.
- Income from an office or employment performed in Canada.
- Certain types of passive income, such as dividends paid by a Canadian corporation or rent from Canadian real estate.

Employment and business income is taxed at regular graduated Canadian tax rates. For individuals in Ontario, the combined federal/provincial marginal tax rate at the top end of the rate schedule for 2017 is 53.53% on taxable income above approximately Can\$220,000 less applicable tax credits. Surtaxes of a province can result in elevated effective tax rates.

A person resident (or deemed resident) in Canada who makes a payment to a non-resident in respect of most types of passive income (including dividends, rent and royalties) is generally required to withhold tax equal to 25% of the gross amount of the payment. Interest that is participating debt interest and interest paid or credited by a Canadian resident to a non-arm's length non-resident person is also subject to withholding tax. Conversely, interest other than participating debt interest paid by a Canadian resident to an arm's length non-resident person is exempt from withholding tax.

The 25% withholding rate can be reduced or eliminated under an applicable tax treaty.

### ***Inheritance tax and lifetime gifts***

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## 7. What is the basis of the inheritance tax or gift tax regime (or alternative regime if relevant)?

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Unlike most jurisdictions, Canada does not have inheritance tax or gift tax. Instead, on the making of a gift by, or on the death of, a taxpayer, the capital property owned by that taxpayer is deemed to have been disposed of at that time for proceeds equal to the fair

market value of the property. As a result, there is either a capital gain or a capital loss, and in the case of depreciable property, either recapture of capital cost allowance or a terminal loss.

The beneficiary normally acquires the property at a cost corresponding to the deemed proceeds of disposition.

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## 8. What are the inheritance tax or gift tax rates (or alternative rates if relevant)?

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Canada does not have an inheritance or gift tax. The gain that may be triggered on death is taxed at the normal rate for capital gains. In 2017, 50% of capital gains are included in income upon actual disposition or deemed disposition. A principal residence qualifies for an exemption for capital gains and there is a lifetime exemption for capital gains which is Can\$835,176 for 2017 on certain qualified business-use property, such as shares of certain private companies.

When capital property is transferred to a deceased's spouse or common-law partner as a consequence of death, and both the deceased and his or her spouse or common-law partner were resident in Canada immediately before the death of the deceased, the property is deemed to be transferred at its tax cost, so that there is no resulting capital gain. The representative of the deceased can elect out of this spousal rollover (for example, to absorb capital losses or terminal losses in the deceased's terminal year).

The spousal rollover is also available if property is transferred to a trust in favour of a spouse or a common law partner that meets certain conditions.

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## 9. Does the inheritance tax or gift tax regime apply to foreign owners of real estate and other assets?

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The deemed disposition on death (and the resulting capital gain or loss) applies to non-residents who own taxable Canadian property (see Question 5).

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## 10. Are there any other taxes on death or on lifetime gifts?

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After a testator's death or upon intestacy, a probate application or equivalent court process is often necessary to proceed with the administration of the estate. In this process, probate fees are generally imposed by each Canadian province and territory in the form of a flat fee, or a tax based on a percentage of estate assets. While in past years Ontario provincial probate tax rate was the highest at approximately 1.5%, Nova Scotia's now exceeds Ontario's, with a rate of approximately 1.645% on a large estate. Compare these high rates with other Canadian jurisdictions such as Alberta and the Northwest Territories, where fees are capped at a maximum of Can\$525 and Can\$400, respectively. In Québec, probate fees can be avoided entirely through the use of a Québec notarial will.

Particularly in those provinces with a high probate fee structure, the planning technique of creating a second, non-probate will governing private company shares and other assets which do not require a court grant of probate to administer may be available to minimise probate fees and tax.

In Ontario, as of 1 January 2015, applicants are required to file an Estate Information Return, which requires applicants to provide a detailed list of assets and their values. New tax enforcement powers, such as audits, reassessments, and penalties, are available to the government to ensure compliance.

There are no other taxes on death.

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On a lifetime gift of property, the donor is deemed to receive proceeds of disposition equal to fair market value and the donee is deemed to have acquired it at a cost equal to that value. The gift may therefore result in a capital gain taxable at regular rates.

### **Taxes on buying real estate and other assets**

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#### **11. Are there any other taxes that a foreign national must consider when buying real estate and other assets in your jurisdiction?**

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##### **Purchase and gift taxes**

Sales tax (federal and provincial) may apply when assets/property are purchased in Canada. A supply-side tax of 5% on most goods and services, including those made in Canada and imported, and certain property, is levied by the federal government. This goods and services tax applies at all stages of production, subject to an input tax credit for tax paid at an earlier stage. Businesses are responsible for collecting and remitting the tax. The tax has been harmonised with provincial sales tax in five provinces, with combined rates between 13% and 15%. Land transfer tax and other property taxes may apply if land or other interests in real estate are being transferred.

##### **Annual rates**

The harmonised sales tax rate in Ontario in 2017 is 13%.

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#### **12. What tax-advantageous real estate holding structures are available in your jurisdiction for non-resident individuals?**

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If a non-resident individual holds Canadian property that constitutes taxable Canadian property (TCP) (see *Question 5*) through a non-Canadian corporation, the gain on the disposition of the shares of the corporation is exempt from tax in Canada under many of Canada's tax treaties. The corporation can elect to pay tax on rental income associated with such property on a net basis.

Canada's corporate tax rates are substantially lower than its personal tax rates. Accordingly, if a non-resident individual holds TCP through a Canadian corporation or a non-resident corporation, a sale of the property by the corporation is taxed at a lower rate. Branch tax may apply (subject to treaty reduction) to a non-resident corporation if such property was used in carrying on business in Canada. A Canadian corporation is subject to withholding tax (subject to treaty reduction) on dividends to the non-resident individual. Higher personal tax rates apply to ownership by individuals and trusts. Partnerships are treated as flow through entities.

Canada has thin capitalisation rules applicable to Canadian corporations incurring debt directly or through a partnership (and non-resident corporations electing to pay tax on a net basis). These preclude deduction of interest on related party debt that exceeds one and a half times the equity of the corporation with any disallowed interest treated as a dividend.

For land transfer tax purposes in certain provinces, real estate is often held through a nominee corporation which holds legal title.

### **Taxes on overseas real estate and other assets**

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#### **13. How are residents in your jurisdiction with real estate or other assets overseas taxed?**

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Canadian residents are taxed on their worldwide income. Income and capital gains from foreign property are taxed in the same way as income and capital gains from Canadian property. Credits are generally provided for foreign taxes paid.

Canada has a foreign affiliate system. Under this system, the following types of active business income are not taxed in Canada when earned in or repatriated to Canada:

- Income earned by a foreign affiliate resident.
- Business income earned by carrying on business in a treaty country (or country with which Canada has signed a Tax Information Exchange Agreement (TIEA)).

Canada does tax passive income earned in a non-resident corporation that is a controlled foreign affiliate.

Canada also has foreign investment entity rules. Under these rules, income earned by a non-resident entity may be subject to tax in Canada. In certain circumstances, income earned by a non-resident trust is taxable in Canada.

### **International tax treaties**

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#### **14. Is your jurisdiction a party to many double tax treaties with other jurisdictions?**

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Canada has an extensive network of treaties which in part aim to prevent double taxation, with about 90 treaties currently in force. A complete list of Canada's treaties is available at [www.fin.gc.ca/treaties-conventions/in\\_force--eng.asp](http://www.fin.gc.ca/treaties-conventions/in_force--eng.asp).

Due to differences in the internal taxation law of treaty nations, however, there may be matters not addressed in the treaties (such as mismatches in tax credits and timing). Canada's tax treaties feature tie-breaker rules regarding tax residency for treaty purposes, and reduce the withholding tax required from income relating to non-residents (often to 15% from 25%, and in certain cases to 0%).

Canada has also entered into several Tax Information Exchange Agreements (TIEAs). A list of Canada's TIEAs and information on the status of TIEA negotiations is available at [www.fin.gc.ca/treaties-conventions/tieaerf-eng.asp](http://www.fin.gc.ca/treaties-conventions/tieaerf-eng.asp).

### **WILLS AND ESTATE ADMINISTRATION**

#### **Governing law and formalities**

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#### **15. Is it essential for an owner of assets in your jurisdiction to make a will in your jurisdiction? Does the will have to be governed by the laws of your jurisdiction?**

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Although it is desirable, it is not essential for an owner of assets in Canada to make a will dealing with those assets. Without a will, the respective intestacy rules of each province and territory apply.

A will made under the law of a foreign jurisdiction can apply to assets in Ontario. However, the terms of the will must be consistent with applicable law (see *Question 18*).

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#### **16. What are the formalities for making a will in your jurisdiction? Do they vary depending on the nationality, residence and/or domicile of the testator?**

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Each province and territory will have its own formal requirements for making a valid will. Under Ontario law, a will must be in writing and signed at its end by the testator. It is then valid if either:

- It is signed by the testator in the presence of two witnesses who each sign the will in the presence of the testator.
- The will is wholly in the handwriting of the testator (that is, a holograph will).

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If a witness to the will is a beneficiary or a spouse of a beneficiary the gift to the witness may be invalidated, even though the will's execution will be valid.

A will is considered valid as to formality if it is made in compliance with the internal law of the place where one of the following applies:

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

### **Redirecting entitlements**

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#### **17. What rules apply if beneficiaries redirect their entitlements?**

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A beneficiary can disclaim a gift by will and an entitlement on intestacy. A disclaimer, and a release or surrender in certain circumstances, is not considered to be a disposition for tax purposes. Otherwise, a variation effected by agreement is generally considered to effect a disposition.

### **Validity of foreign wills and foreign grants of probate**

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#### **18. To what extent are wills made in another jurisdiction recognised as valid/enforced in your jurisdiction? Does your jurisdiction recognise a foreign grant of probate (or its equivalent) or are further formalities required?**

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For the recognition of the validity of a will in respect of formal requirements, see *Question 16*.

A testator can generally choose the governing law regarding construction and interpretation of the will.

The material or essential validity of a will in respect of an:

- Interest in immovables such as land, is governed by the internal law of the place where the land is situated.
- An interest in movables is governed by the internal law of the place where the testator was domiciled at the time of their death.

### **Validity of foreign grants of probate**

As a practical matter in many cases, where a foreign grant of probate (or equivalent) has been obtained, it is necessary to obtain resealing (where the foreign grant was made in the UK, another province or territory of Canada or any British possession) or an ancillary grant in order to administer assets in each Canadian province or territory.

### **Death of foreign nationals**

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#### **19. Are there any relevant practical estate administration issues if foreign nationals die in your jurisdiction?**

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There are no particular practical issues if foreign nationals die in Canada.

If a foreign national dies and leaves assets in a Canadian jurisdiction, generally each province and territory will allow an original grant of probate to be made in respect of a deceased even though the deceased was not resident or domiciled there.

If the foreign national named a foreign personal representative in their will (depending on the jurisdiction), the foreign personal representative may be required to first post a bond to obtain either

an original grant or an ancillary grant. The court generally has discretion to dispense with the posting of a bond. Applications for a grant can be made by the applicant or by way of a nominee.

### **Administering the estate**

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#### **20. Who is responsible for administering the estate and in whom does it initially vest?**

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### **Responsibility for administering**

The personal representative is responsible for administering the estate.

The personal representatives are either executors, who are appointed by the will, or administrators, who are appointed by the court.

The role of the personal representatives is, subject to the terms of the will, to:

- Collect in the assets of the deceased and manage them until distribution.
- Pay the debts of the deceased from the estate.
- Pay the taxes of the deceased and of the estate as well as the estate administration costs from the estate.
- Distribute the remaining assets in accordance with the terms of the will (or the intestacy rules to the extent there is no applicable will).

Where trusts are created by the terms of a will, the same persons are commonly (but not necessarily) appointed as both executors and trustees.

### **Vesting**

The deceased's estate vests in the personal representatives on the death of the deceased. Where there is a will, an executor's authority derives on death of the testator from the will and probate is the proof of that authority and that the will is valid.

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#### **21. What is the procedure on death in your jurisdiction for tax and other purposes in relation to:**

- **Establishing title and gathering in assets (including any particular considerations for non-resident executors)?**
  - **Paying taxes?**
  - **Distributing?**
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### **Establishing title and gathering in assets**

When a testator dies, the personal representative typically submits the will to probate or equivalent court process, where it is validated and the executors' appointment as legal representatives is confirmed. Through the probate process, the will and supporting documents, which may include a detailed asset listing, become public. In some provinces, particularly those with a high rate structure to probate a will, the technique of creating a second, non-probate will which governs private company shares and other assets which do not require probate to administer is often used to minimise probate fees and tax. In Ontario, probate of a will is called a certificate of appointment of estate trustee with a will (Certificate).

Legislative measures were enacted in Ontario under the Estate Administration Tax Act in 2011, permitting the Minister of Finance to assess estates for payment of additional Estate Administration Tax. No practical means or process for determining which estates to assess was put in place until 1 January 2015 when, with little forewarning, a new regulation under the Act came into effect. The changes introduced a new reporting regime that is triggered by

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applying for and receiving a certificate of appointment of estate trustee. In addition to the paperwork relating to the certificate, estate representatives must now provide an estate information return to the Ministry of Finance within 90 calendar days of the court issuing the certificate of appointment. Most significantly, the return (an approved form of which is available from the Ministry) requires detailed information about each estate asset and its date of death fair market value. The estate representative must be able to corroborate the reported asset values. Penalties include fines and even imprisonment for failing to file a return or where the information filed was false or misleading. Amending returns must be filed within 30 days of discovering a prior return was incorrect or incomplete, except where the value previously provided for an estate asset has been determined to be incorrect and more than four years have passed since the issuance of the certificate of appointment. The Ministry has broad audit powers in conducting its review of the returns, including assessment of further tax if the estate date of death value is determined to be higher than originally reported.

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

A Québec notarial will need not be submitted to probate in that province.

#### Procedure for paying taxes

Generally, probate fees are either levied in the form of a flat fee, or tax based on a percentage of estate assets. In Ontario, the tax is called estate administration tax (EAT) and is calculated at about approximately 1.5% of the gross value of the estate (deducting only amounts secured by mortgage and excluding real property situated outside Ontario). This amount is payable to obtain the certificate. Where a foreign probate is re-sealed or an ancillary grant is obtained, the tax is in respect of the property situated in Ontario. While Ontario once had the highest provincial probate tax rate, Nova Scotia's has surpassed it in recent years with a current rate of approximately 1.645% on a large estate. This is an increase of over 30% since 2000 on a Can\$5 million estate and significantly greater than equivalent fees in other Atlantic provinces.

Since the increase in what is now the EAT in the early 1990s in Ontario, practitioners typically attempt to avoid or minimise payment of EAT. Strategies include:

- Using multiple wills (one will to deal with assets for which a Certificate is expected to be needed and one for assets for which a Certificate is expected not to be needed).
- Using *inter vivos* trusts (particularly trusts satisfying certain requirements under the Tax Act, known as alter ego trusts and joint partner trusts).
- Making *inter vivos* gifts.
- Placing property in joint ownership (so that the right of survivorship applies).

In addition, designations can be made under insurance policies and various savings and pension plans so that the entitlements pass outside the estate.

The personal representative must also file any prior-year income tax returns that are due or overdue and the terminal tax return. Overdue prior-year income tax returns and the associated tax should be filed and paid as soon as possible to avoid further penalties and interest. The terminal tax return and associated tax is due on 30 April of the year following death if the deceased died between 1 January and 31 October or on the day that is six months after the date of death if the deceased died between 1 November and 31 December. If the estate of the deceased earns any income,

an estate tax return and any associated tax may also be required to be filed and paid.

#### Distributing the estate

Before distributing the estate, the personal representatives should consider:

- Obtaining clearance certificates from the Canada Revenue Agency in respect of taxes of the deceased and of the estate. If property is distributed without a clearance certificate, the personal representatives are personally liable for any unpaid taxes, penalties, and interest.
- Advertising for creditors.
- Obtaining releases and/or indemnities from beneficiaries or, if satisfactory releases cannot be obtained, the personal representative can go through a process known as passing his or her accounts in the court (this may also be required to obtain a court order providing for the personal representative's remuneration).

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#### 22. Are there any time limits/restrictions/valuation issues that are particularly relevant to an estate with an element in another jurisdiction?

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A clearance certificate is required where a Canadian estate makes a distribution to a non-resident beneficiary in satisfaction of the beneficiary's capital interest in the estate if the interest is taxable Canadian property (see *Question 5*).

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#### 23. Is it possible for a beneficiary to challenge a will/the executors/the administrators?

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The validity of a will can be challenged on the basis of the following:

- Non-compliance with formality requirements.
- Lack of mental capacity.
- Undue influence.
- Lack of knowledge and approval of the terms of the will.
- Forgery or fraud.

The administration of the estate by personal representatives can be challenged by those with an interest in the estate. Where this occurs, it is usually dealt with in the passing of accounts procedure (see *Question 21*), which can be initiated by the beneficiaries as well as the personal representatives. Beneficiaries can file notices of objections to the accounts of the personal representatives which are determined by the court if not settled consensually.

It may also be possible for non-beneficiaries to challenge the distribution of an estate (for example, when certain persons are excluded from a will or have been left inadequate shares of the estate assets pursuant to a will or under the intestacy rules). In all provinces, a dependant can claim support from the deceased's estate, provided he or she stands in a certain relationship with the deceased (typically including a spouse, de facto spouse or minor child) and the deceased was providing him or her with support or had a support obligation at the time of death (see *Question 24*). The matrimonial property regimes of most provinces and territories also give a surviving spouse property rights on a first spouse's death (see *Question 24*). In addition to the various provincial statutory claims that may alter the distribution of an estate from the original terms set out in a will or pursuant to the intestacy rules, certain persons may have other claims against a deceased's property. Such claims may arise under legal principles that ensure fairness, such as under the legal doctrine of unjust enrichment and

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the equitable claim of proprietary estoppel, or where will provisions offend public policy.

## SUCCESSION REGIMES

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### 24. What is the succession regime in your jurisdiction (for example, is there a forced heirship regime)?

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Succession to property on death is generally a matter within the jurisdiction of the provinces and territories in Canada. Of Canada's ten provinces and three territories, 12 are governed under the common law, and one, the province of Québec, under the civil law. For aboriginal Canadians who are subject to the Indian Act, succession to property falls within the federal government's jurisdiction. However, certain First Nations have entered into self-governing agreements that permit enactment of individualised laws, including those relating to succession. These latter two scenarios are beyond the scope of this article.

There is no forced heirship in Canada. In all provinces, a dependant can claim support from the deceased's estate by applying to the court if the will or intestacy rules did not make adequate provision for their support, provided the applicant stands in a certain circumscribed relationship with the deceased (typically including a spouse, *de facto* spouse or minor child) and the deceased was supporting them or was under a legal obligation to do so at the time of death. The amount of support is determined circumstantially and through judicial discretion, usually taking into account needs and means. Courts in some provinces, such as British Columbia, recognise a moral entitlement to share in a deceased's estate and will vary the distribution in a will or award support on this basis, including with respect to a claim made by an adult independent child.

Several provincial matrimonial property regimes provide a surviving spouse with certain property rights on the first spouse's death. For example, in Ontario and in the case of married spouses, on the death of one of them, the survivor is also entitled to elect to take equalisation of net family property, in place of the provision made by the deceased's will or the intestacy rules. Generally, the equalisation of net family property entitles the survivor to an amount equal to one half of the increase in value of the spouses' property during the marriage, excluding gifts and inheritances. If such an equalisation claim is made, he or she usually loses entitlements, if any, under the deceased spouse's will and certain other benefits.

#### **Forced heirship regimes**

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### 25. What are the main characteristics of the forced heirship regime, if any, in your jurisdiction?

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Not applicable.

#### **Real estate or other assets owned by foreign nationals**

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### 26. Are real estate or other assets owned by a foreign national subject to your succession laws or the laws of the foreign national's original country?

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Succession to movables is generally determined by the internal law of the place of domicile of the deceased at his or her death. Succession to immovables is generally determined by the internal law of the place where the property is located (its *situs*).

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### 27. Do your courts apply the doctrine of *renvoi* in relation to succession to immovable property?

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Where succession issues concern immovable property, Ontario courts apply the internal law of the place where the property is situated, including the case when conflict of laws rules of the place would apply Ontario law.

## INTESTACY

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### 28. What different succession rules, if any, apply to the intestate?

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Each Canadian province and territory provides for its own statutory scheme of property division on an intestacy: typically between the testator's surviving spouse and children, if any, failing which to other relatives as specified.

In some provinces, the surviving spouse is allotted a preferential share prior to dividing the estate between spouse and children. In this context, spouses are married spouses including same-sex married spouses and in some provinces and the territories also *de facto* spouses providing certain conditions are met.

In Ontario:

- Where the deceased is survived by a married spouse and no issue, the spouse obtains the entire estate.
- Where the deceased is survived by a married spouse and children (including the issue of a deceased child):
  - the spouse receives Can\$200,000;
  - the spouse receives one half of the balance (where there is only one child) or one-third of the balance (where there are two or more children);
  - the children (or issue representing deceased children) share the rest equally.
- Where the deceased is survived by children (or issue representing deceased children), and no spouse, the children share equally.
- Where the deceased is not survived by a spouse or issue and is survived by one or both parents, the parents are entitled.
- Where the deceased is not survived by a spouse, issue or parents, siblings share equally (with a child of a deceased sibling representing the deceased sibling).
- Where none of the above survive the deceased, the deceased's estate is distributed "among the next of kin of equal degree of consanguinity to the intestate equally without representation".
- A court process for letters administration or equivalent provides for the appointment of estate trustees on intestacy.

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### 29. Is it possible for beneficiaries to challenge the adequacy of their provision under the intestacy rules?

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This is possible (see *Question 24*).

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## TRUSTS

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### 30. Are trusts (or an alternative structure) recognised in your jurisdiction?

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#### Type of trust and taxation

Trusts are recognised in Canada. In the Canadian provinces other than Québec, the trust is based on common law principles. In Québec, which is a civil law jurisdiction and therefore does not distinguish between legal and beneficial ownership, the trust constitutes a patrimony by appropriation (that is, a distinct patrimony appropriated to a particular purpose). None of the settlor, trustee or beneficiary have any real rights in the trust property. Instead, the trustee has the control and exclusive administration of trust property.

Trusts can be testamentary or *inter vivos*, personal or commercial.

Trusts are generally taxed as individuals. *Inter vivos* trusts are taxed at the highest marginal rate for individuals. As of 2016, the graduated rates for individuals generally no longer apply to testamentary trusts, which are now taxed at the top marginal rate. An estate that qualifies as a "graduated rate estate" will be taxed at graduated rates for 36 months from the deceased's date of death, as will certain testamentary trusts for the benefit of persons eligible for the Disability Tax Credit.

Transfer of property to a trust is usually a taxable disposition (there are exceptions for some kinds of trusts, such as spousal trusts, joint partner trusts and alter ego trusts, which permit rollover of capital property on a tax-deferred basis, as opposed to triggering capital gains provided certain conditions are met). A trust is only subject to tax on its income to the extent that the income is not paid or is not payable to a beneficiary. The capital of the trusts can normally be rolled out tax free to Canadian resident beneficiaries.

Trusts are generally deemed to dispose of and reacquire their capital property at fair market value every 21 years, unless all interests are vested indefeasibly.

#### Residence of trusts

A decision of the Supreme Court of Canada (*Fundy Settlement v Canada*, 2012 SCC 14, also known as *Garron Family Trust* and *St Michael's Trust Corp*), has established that a trust is resident where its central management and control takes place, a significant change from the former focus on a trustee's residence. In certain circumstances, the Tax Act deems certain non-resident trusts to be resident in Canada, for example where a Canadian resident has transferred property to the trust.

In *Discovery Trust v Canada (National Revenue)* (2015 NLTD(G) 86 CanLII), the court confirmed that the residency of a trust for provincial tax purposes is to be determined in accordance with the Supreme Court of Canada's decision in *Fundy Settlement v Canada*. The decision also provides a useful examination of some of the factors to be considered in determining whether the trustee maintained "central management and control" over the trust.

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### 31. Does your jurisdiction recognise trusts that are governed by another jurisdiction's laws and are created for foreign persons?

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Canadian law recognises trusts created under the laws of another jurisdiction for foreign persons.

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### 32. What are the tax consequences of trustees (for example, of an English trust) becoming resident in/leaving your jurisdiction?

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A trust can be immigrated to or emigrated from Canada by changing the place where central management and control is exercised. This generally involves changing its trustees or changing the residence of the existing trustees.

On both immigration to and emigration of a trust from Canada, the taxation year of the trust ends and the trust is deemed to dispose of most of its property and reacquire it at fair market value (FMV). The result is that on immigration the cost basis of trust property is stepped up or down to FMV, and on emigration a capital gain or loss is realised.

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### 33. If your jurisdiction has its own trust law:

- Does the law provide specifically for the creation of non-charitable purpose trusts?
  - Does the law restrict the perpetuity period within which gifts in trusts must vest, or the period during which income may be accumulated?
  - Can the trust document restrict the beneficiaries' rights to information about the trust?
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#### Purpose trusts

In Ontario, statute provides that a specific non-charitable purpose trust takes effect as a power for 21 years.

#### Perpetuities and accumulations

The common law perpetuity rule applies, modified by a statutory "wait and see" rule in Ontario. Three provinces have abolished rules against perpetuities entirely (Manitoba, Saskatchewan and, most recently, Nova Scotia).

Accumulations are restricted in Ontario by a statute based on the English Accumulations Act.

#### Beneficiaries' rights to information

It is unclear to what extent a beneficiary's right to information can be modified by the terms of the trust instrument. It would likely be held that the total exclusion of the trustees' obligation to account for their administrations of the trust would be ineffective as being contrary to the core principles of a trust.

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### 34. Does the law in your jurisdiction recognise claims against trust assets by the spouse/civil partner of a settlor or beneficiary on the dissolution of the marriage/partnership?

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In Ontario, on the termination of a marriage by separation, divorce or decree of nullity as well as on death, each party is entitled to equalisation of the value of net family property (subject to the effect of any marriage contract). In general terms, net family property is the increase in value of the property owned by each party during the marriage, excluding property acquired by gift or inheritance after the marriage. Such property may include the value of an interest in a trust. The court has a wide range of powers (including making orders for transfer of property) to enable the entitlement to equalisation to be satisfied. Unless the trustees could be made parties, it is questionable what ability there would be to make a court order directly against trust assets.

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In Ontario and some other provinces, equalisation applies on the death of a spouse to enable the surviving spouse to obtain equalisation (see *Question 24*).

Equalisation of net family property in Ontario only applies to married spouses (including same-sex married spouses), although support obligations apply to both legal spouses and to *de facto* spouses, provided certain conditions are met.

British Columbia's Family Law Act is the first Canadian family law statute to expressly address discretionary trust interests in the division of family property by categorising certain beneficial interests in property, which are held in discretionary trusts, as excluded property. The increase in value of the spouse's beneficial interest in a discretionary trust will be subject to division on separation. Valuation of these interests on separation will continue to remain a live and litigious issue in this province and throughout Canada, as evidenced by recent reported decisions from several provinces.

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### 35. To what extent does the law of your jurisdiction allow trusts to be used to shelter assets from the creditors of a settlor or beneficiary?

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#### Setting aside of trust settlements

A transfer at an undervalue (including settlement of a trust) can be set aside (*Federal Bankruptcy and Insolvency Act*) in certain circumstances.

#### Transferee dealing at arm's length with the debtor

The transfer can be set aside if all the following apply:

- The transfer occurred within one year of the bankruptcy.
- The debtor was insolvent at the time of the transfer or was made insolvent by it.
- The debtor intended to defraud, defeat or delay a creditor.

#### Transferee not dealing at arm's length with the debtor

The transfer can be set aside if either:

- The transfer occurred within one year of the bankruptcy.
- The transfer occurred within five years of the bankruptcy and:
  - the debtor was insolvent at the time of the transfer or was made insolvent by it; or
  - the debtor intended to defraud, defeat or delay a creditor.

Every conveyance of property (including the settlement of a trust) is liable to be set aside if made with intent to "defeat, hinder, delay or defraud creditors or others" of their claims (*Ontario Fraudulent Conveyances Act*).

Subject to the above provisions, a trust can be used to shelter assets from the creditors of a beneficiary. Such a trust typically involves an interest determinable on insolvency, bankruptcy and other possible events or a discretionary interest, or a combination of these interests.

## CHARITIES

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### 36. Are charities recognised in your jurisdiction?

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Charities are recognised in Canada and a common law definition of the term "charity" derived from English case law is used.

Under the Tax Act, a registered charity is defined to include both charitable organisations and charitable foundations that have been registered under the Act. There are two types of charitable foundation under the Act:

- Public foundation.
- Private foundation.

The governing law is the Tax Act. However, if a charity is established as some form of not-for-profit corporation (see *Question 37*), it will also generally be subject to the applicable federal or provincial legislation in that regard.

To access important advantages (such as tax-exempt status under the Tax Act and the ability to issue official donation receipts to donors for gifts (see *Question 38*), charities must first apply for and be granted registered charity status by the Canada Revenue Agency.

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### 37. If charities are recognised in your jurisdiction, how can an individual donor set up a charity?

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Generally, the two main ways in which individual donors can establish a charity are through either the incorporation of some type of a "not-for-profit" or "public benefit" corporation under provincial or federal legislation, or by settling a trust. Once established, the corporation or trustee(s) must apply to the Canada Revenue Agency (CRA) for charitable registration.

The CRA maintains a central public registry of charities and is the charity regulator at the federal level for tax purposes and for granting and maintaining charitable status. Charities are also subject to oversight and regulation in their respective province (for example, Ontario is regulated by the Public Guardian and Trustee).

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### 38. What are the benefits for individuals when setting up charitable organisations?

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Generally, an individual setting up a charity can make a gift of money or certain other property to the charity once registered, and can claim certain federal and provincial/territorial non-refundable tax credits upon filing an annual tax return, provided the individual has received an official donation receipt from the registered charity.

The tax credit is based on the eligible amount of the gift, as defined by the Tax Act. Generally, an individual can claim all or part of the eligible amount up to a maximum of 75% of the individual's net income for the year. Donations in excess of the annual limit can be carried forward and claimed in the five succeeding years.

A registered charity is exempt from paying income tax under Part I of the Tax Act.

Other benefits of charitable registration include:

- The ability to issue official donation receipts for received gifts, which may reduce a donor's payable annual income tax.
- Eligibility to receive gifts from other registered charities (for example, private foundations).
- Exemption from applying goods and services tax/harmonised sales tax to certain goods and services provided by the charity.
- Partial rebates in certain situations for goods and services tax/harmonised sale tax paid by the charity.

Charities established in other jurisdictions outside Canada are unable to access these benefits.



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## OWNERSHIP AND FAMILIAL RELATIONSHIPS

### Co-ownership

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#### 39. What are the laws regarding co-ownership and how do they impact on taxes, succession and estate administration?

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Co-ownership consists of joint tenancy and tenancies in common. Joint tenancy usually involves a right of survivorship, so that on the death of one joint tenant, the right of survivorship to the property applies in favour of the surviving joint tenant(s), and the property does not pass into the estate of the deceased joint tenant.

The Supreme Court of Canada in two companion cases, *Pecore v Pecore* and *Madsen Estate v Saylor* (both decisions released simultaneously in 2007), clarified the common law presumptions of resulting trust and advancement, which are legal presumptions rebuttable on the civil standard of proof. The court clarified that a recipient of gratuitously transferred personal property is generally presumed to hold it on resulting trust for the donor (or the donor's estate in the case of a deceased donor). The presumption that the property so transferred is advanced to the donee which has historically applied to certain family relationships, now applies only to transfers between a parent and minor child (not from husband to wife or from parent to adult child). The court also canvassed issues of evidence. In *Pecore*, the court found that a father who had placed financial accounts into joint names with his daughter, had an actual intention to gift these, whereas in *Madsen* the opposite result prevailed.

In *Bradford v Lyell*, a Saskatchewan court subsequently held that where an *inter vivos* transfer of a condo property into joint ownership by a grandmother to her granddaughter was found to be intended as a gift of the right of survivorship at the time of the transfer, both the legal and equitable title vested when the joint title was created such that the gift was complete at that time, and the grandmother was unable to later change her mind in her will. This entitled the granddaughter to the beneficial ownership of the property upon the grandmother's death.

The Ontario Court of Appeal's decisions in *Sawdon Estate* and *Mroz v Mroz* added further outcomes to gratuitous transfers of property into joint ownership. In *Sawdon*, the court found that evidence of intention regarding the transfer may not only show that the presumption of a resulting trust has been rebutted, but also that a transfer of personal property into joint names created a trust of the beneficial right of survivorship for certain beneficiaries in addition to the surviving joint owners (two of the deceased's children) such that the property passed outside the deceased's estate and was divided equally among all five of the deceased's children.

In *Mroz*, the court reviewed a mother's transfer of her home into joint ownership with her daughter where the mother's will directed that the proceeds of sale from the home be used to fund legacies to her grandchildren. Based on the findings of the trial judge regarding the mother's intentions at the time of the transfer, the court held that the daughter had not rebutted the presumption of resulting trust, held the property as trustee and the property was to be dealt with in accordance with her mother's will. *Mroz* was distinguished from *Sawdon* given that the trust obligation in *Sawdon* arose at the time of the transfer (it was *inter vivos*) and in *Mroz* the trust obligation was not to arise until after the mother's death. It appears from these two decisions that trust obligations must take effect prior to a joint owner's death for the result in *Sawdon* to occur.

Even more recently in Ontario, the Court of Appeal in *Andrade v Andrade* found that the presumption of resulting trust applied where a mother purchased a property using funds provided to her by her children. They lived in the home with her and their funds were applied to the down payment, mortgage and expenses, but the property was held in the names of two of her seven adult children at any given time. The court held that the trial judge had

been mistaken in finding that the mother had not contributed any of her own funds to the home. Once her children had provided funds to their mother, the funds became hers. The court also noted that while the tax treatment of the asset post-transfer is one factor to be considered in determining intention at the time of a transfer of a property, it is not conclusive of the transferor's intention. In this case, units in the home had been rented out to third parties over the years and the title-holders had reported the rental income on their returns, while their mother had actually received the rent.

The 2015 Alberta Queen's Bench decision in *Re Morrison Estate* adds a further dimension to the presumption of resulting trust. Among other matters, the court considered whether the presumption applies when a person designates a beneficiary of a retirement plan (or other financial products capable of being designated). The judge ultimately avoided deciding the issue by finding evidence of the deceased's intention on a balance of probabilities to gift the retirement plans proceeds to his son as the named beneficiary. This leaves the question open for future judicial determination.

Tenants in common own "undivided shares", so that on the death of a tenant in common his or her interest passes to his or her estate.

### Familial relationships

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#### 40. What matrimonial regimes in trust or succession law exist in your jurisdiction? Are the rights of cohabitants/civil partners in real estate or other assets protected by law?

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In Ontario, equalisation of net family property applies on separation or termination of a marriage of married spouses which includes death (see *Question 24* and *Question 34*). The Ontario property division rules apply if the parties had their habitual residence in Ontario and support obligations (lifetime and on death) also apply to persons who have cohabited for at least three years. A matrimonial home cannot be disposed of in Ontario without spousal consent where spouses are married and a legal spouse cannot contract out of his or her possessory rights in a matrimonial home.

Canada recognises a limited subset of legal rights for unmarried de facto spouses. They are treated similarly to married spouses for various purposes, including taxation and certain government benefits, but substantial gaps remain with respect to property rights on relationship breakdown and death, although this varies by province and territory. De facto spouses frequently make claims based on unjust enrichment.

The Supreme Court of Canada in *Kerr v Baranow* and *Vanasse v Seguin* (both dated 2011) restated the principles of unjust enrichment and resulting trust that apply to de facto spouses on relationship breakdown. The requirements for a claim are enrichment of one spouse, the corresponding deprivation of another, and absence of a juristic reason (such as a contract). Remedies may consist of constructive trusts and monetary awards, including amounts relating to value received. In the appropriate circumstances, the claimant will be treated as a co-venturer in a joint family venture in order to share in the couple's mutual gains. Indicators of joint family venture include mutual effort, economic integration, intention and priority to the family. A link between contribution and wealth accumulated must also be present. A monetary award is not limited to a value-received approach, and in *Vanasse* the Court upheld a monetary remedy granted at trial to a partner who had cared for a young family as well as given up career opportunities during a 12-year relationship.

A new Family Law Act came into force in British Columbia in early 2013, reforming property division in the province by granting equal status to married and de facto spouses (that is, common law couples who have lived together in a marriage-like relationship for a continuous period of at least two years) upon separation under

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the property and pension division provisions. This is a marked departure from the prior statutory regime.

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**41. Is there a form of recognised relationship for same-sex couples and how are they treated for tax and succession purposes?**

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There is no special relationship for same-sex couples, who are treated the same as different-sex couples. In 2005, Canada legalised same-sex marriage. As a result, a broad array of statutory and common law rights are now available to same-sex married spouses, including any rights to property division that may exist under provincial family law statutes and under tax legislation. Cohabitation of same-sex couples has the same legal consequences as cohabitation by different-sex couples.

Québec also solemnises a civil union for same-sex or opposite-sex couples which confers similar rights to marriage.

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**42. How are the following terms defined in law:**

- **Married?**
- **Divorced?**
- **Adopted?**
- **Legitimate?**
- **Civil partnership?**

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**Married**

This is defined as the lawful union, in accordance with the form prescribed by the federal Marriage Act, of two persons to the exclusion of all others. Consequently, persons of the same sex, as well as different sex, can marry.

**Divorced**

The dissolution of a marriage is by decree of the court, based on the breakdown of the marriage, under the federal Divorce Act. Typically, the breakdown is established by at least one year's separation.

**Adopted**

A child can be adopted under Ontario law according to a court order. The adopted child is treated as the child of the adopting parents and ceases to be considered the child of the natural parents.

**Legitimate**

This is no longer a relevant term in Ontario law, since there is no distinction in law between persons born out of wedlock and those born within wedlock.

**Civil partnership**

This is not a relevant term in Ontario law (see *Question 41*).

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**Minority**

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**43. What rules apply during the period when an heir is a minor? Can a minor own assets and who can deal with those assets on the minor's behalf?**

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The age of majority is a matter within provincial and territorial jurisdiction. The age of majority in Ontario is 18 years.

If a minor becomes entitled to property on the death of another, the terms of the applicable will usually provide for a trust for the minor's benefit. If the entitlement arises on intestacy or the will

does not include any trust provisions, the minor's property must generally be paid into court, where it is invested for the minor's benefit until he or she attains the age of majority or it may be paid to his or her legal guardian under court appointment. A government official, called the Children's Lawyer, is responsible for protecting minors' interests.

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**CAPACITY AND POWER OF ATTORNEY**

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**44. What procedures apply when a person loses capacity? Does your jurisdiction recognise powers of attorney (or their equivalent) made under the law of other jurisdictions?**

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If a person who becomes incapable had previously created a power of attorney which survives incapacity, the attorneys, subject to the terms of the power, have authority to deal with the incapable person's property.

In Ontario, if there is no continuing power of attorney, a guardian of property can be either appointed under a statutory procedure, involving the office of a public official called the Public Guardian and Trustee, or by court order. In the event of a dispute, the court can appoint a guardian of property.

In Ontario, a continuing power of attorney is valid relating to form if it complies with the internal law of the place where it was executed or where the grantor of the power was domiciled or habitually resident.

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**PROPOSALS FOR REFORM**

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**45. Are there any proposals to reform private client law in your jurisdiction?**

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The western provinces of British Columbia (whose new legislation, the Wills Estates and Succession Act, came into effect on 31 March 2014) and Alberta (whose new Wills and Succession Act came into effect on 1 February 2012) have recently modernised their succession laws, which affects private client law in these jurisdictions. There are additional pending proposals in Alberta that have not yet come into force.

The Uniform Law Conference of Canada (ULCC), in August 2012, approved the Uniform Trustee Act, which is meant to serve as a model to the provinces and territories for the purpose of modernising trust law. It would reform both the common law and statutory rules relating to a variety of matters, including the duties and powers of trustees as well as trustee remuneration and the variation, termination and resettlement of trusts. Aside from certain mandatory provisions considered essential to the operation of trusts, a trust deed can exclude and override the operation of the Act's provisions which function as default rules where the trust deed is silent. Each province and territory must now individually consider adopting and implementing the Act and British Columbia initiated a public consultation in this regard in 2014.

In August 2015, the ULCC also adopted the Recognition of Substitute Decision-Making Documents Act (Uniform Act). The Uniform Act was a joint project of the ULCC and the Uniform Law Commission of the United States (ULC), which was undertaken to promote cross-border portability and utility of substitute decision-making documents for property and personal care. It will now be up to each Canadian province and territory to consider adopting and implementing the Uniform Act. The ULC adopted its version of the Uniform Act in July 2014 and likewise the US states can consider enacting it internally.

In March, 2017 the Law Commission of Ontario released its final *Report on Legal Capacity, Decision-Making and Guardianship*. It sets out a timely and fundamental review of Ontario's laws on these matters, and makes many significant recommendations for reform, including measures to:

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- Increase public education.
  - Restructure the adjudication and dispute resolution processes.
  - Increase the accountability of those acting under power of attorney documents.
  - Modernise the assisted decision-making framework.

## ONLINE RESOURCES

### Canadian Legal Information Institute

W [www.canlii.org/en](http://www.canlii.org/en)

**Description.** The Canadian Legal Information Institute provides a link to the Income Tax Act and other referenced legislation, as well as some referenced court decisions. The website is available in both French and English.

### Department of Finance Canada

W [www.fin.gc.ca/treaties-conventions/in\\_force--eng.asp](http://www.fin.gc.ca/treaties-conventions/in_force--eng.asp)

**Description.** The website provides a list of Canadian tax treaties. It is available in both French and English.

### Tax Information Exchange Agreements (TIEA)

W [www.fin.gc.ca/treaties-conventions/tieaaerf-eng.asp](http://www.fin.gc.ca/treaties-conventions/tieaaerf-eng.asp)

**Description.** The website provides TIEAs and information on the status of TIEA negotiations. It is available in both French and English.

### Supreme Court of Canada

W <http://scc.lexum.org/decisia-scc-csc/scc-csc/en/nav.do>

**Description.** The website provides a searchable database for the referenced Supreme Court of Canada cases. It is available in both French and English.

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## Practical Law Contributor profile

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**Areas of practice.** Estates; trusts.

**Recent transactions.** Regularly advises on:

- All aspects of estate planning.
- Will and trust planning with a focus on high net worth, cross-border and multi-jurisdictional planning.
- Incapacity planning.
- Estate litigation.
- Advising executors, trustees and beneficiaries.
- Administration of trusts and estates, including domestic, cross-border and multi-jurisdictional matters.

#### Professional associations/memberships

- Past Deputy Chair and past member of the Board of Directors and Council for the Society of Trust and Estate Practitioners (STEP) Worldwide.
- Member of the Canadian Bar Association, the American Bar Association, the New York State Bar Association, the International Bar Association and the Canadian Tax Foundation.
- Elected Fellow, American College of Trust and Estate Counsel, 1995.
- Academician of The International Academy of Estate and Trust Law.

#### Publications

- Author of *Engineering a Trust* and *Trust and Estate Management* (Trust Institute of the Institute of Canadian Bankers).
- Co-author of Chapter on Canada, *International Succession Laws*, *Tottel*, 2009.
- Contributing author to Widdifield on Executors and Trustees, *Carswell*, 2002; *The Private Wealth & Private Client Review*, *Law Business Research*, 2017; *The International Comparative Legal Guide to: Private Client 2017*, *Global Legal Group*, 2017.