

Panel 18: Asian/North American Estate Planning for the Coming Decade - Canada

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This presentation may contain general comments on legal issues of concern to organizations and individuals. These comments are not intended to be, nor should they be construed as, legal advice. Please consult a legal professional on the particular issues that concern you.

Inheritance in Canada

- Governed by provincial law
- No forced heirship, but
 - Dependants may have support claims
 - BC – right to variation of Will
 - Ontario - spousal right to division of property
- Quebec – civil law jurisdiction
 - notarial Wills

Probating Wills

- Executor will generally require probate in the province of residence of deceased in order to deal with assets
 - Will require probate (re-sealing) in province where real estate is located
 - Often use separate Will to deal with real estate
- Probate tax
 - Some provinces charge flat tax; some charge percentage of value of assets
 - Ontario, BC and NS – high percentage
 - → probate planning – use of multiple Wills, *inter vivos* trusts
 - Bare trusts
 - Alter ego and joint partner trusts

Intestate Succession

- Governed by provincial law
- Ontario:
 - Spouse (legally married) entitled to “preferential share” (\$200,000), remainder split with children
- BC:
 - New legislation (WESA) in 2014
 - Preferential share depends on whether the deceased had children from prior relationship
 - Common law spouse entitled on intestacy

Death of non-resident with Canadian assets

- Is the estate resident of Canada?
 - Where does the executor reside?
 - Where is the central management and control?
- Canadian banks holding assets for non-Canadian estates will usually insist on ancillary grant or re-sealing of the probate
- Ancillary grant likely required in order to deal with real estate.
 - entails obtaining an administration bond; or
 - court-order waiving the necessity of the bond.

Taxation in Canada - residency

- Federal law
- Taxation based on residency
 - Factual residency
 - Based on “facts and circumstances”
 - Deemed residency – 183 days
- Factual resident taxed on worldwide income from date establish residency
- Deemed resident taxed on worldwide income for entire calendar year

Taxation on Death

- Deemed disposition of capital property on death
 - Accrued gain becomes taxable (50% of gain included in deceased's income)
 - Some exceptions:
 - Rollover to spouse or qualifying spouse trust
 - Exemption for principal residence (one/couple)
 - Deduction for portion of gain of certain small business corporation shares, farm property, fishing business
- Tax on foreign estate with Canadian assets?
 - Depends on type of asset – TCP or non-TCP

Powers of Attorney and Guardianship

- Governed by provincial legislation
 - Robust legislative regime
 - Ontario – *Substitute Decisions Act*
- Generally, separate POAs for property/financial matters and personal care
- Guardianship may be required where no POA in place or where there's a dispute
 - Ontario – Public Guardian and Trustee is involved

Foreign POAs – Ontario *Substitute Decisions Act*

S. 85

(1) As regards the manner and formalities of executing a continuing power of attorney or power of attorney for personal care, the power of attorney is valid if at the time of its execution it complied with the internal law of the place where,

- (a) the power of attorney was executed;
- (b) the grantor was then domiciled; or
- (c) the grantor then had his or her habitual residence.

Family Law

- Provinces – legislation re division of property, support, custody
 - Different definitions of “spouse” for different purposes
- E.g., Ontario *Family Law Act*
 - On separation or death, spouses entitled to “equalization of net family property” – s. 5 of Ont. *Family Law Act* – but similar scheme in most of the provinces
 - Value is divided, not necessarily the assets
 - In Ontario, currently, only applies to legally married spouses, not common law spouses
- Matrimonial home(s) – special treatment

Marriage contracts

- Marriage contract (“pre-nup” or “post-nup”), cohabitation agreement
 - Can deal with division of property, spousal support
 - Opt out of equalization regime, division of matrimonial home
 - Cannot deal with child support
 - Cannot contract out of possessory right to matrimonial home
- Requirements:
 - In writing, signed and witnessed
 - Full disclosure of assets and liabilities
 - Fulsome independent legal advice
 - No coercion

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Presented by

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