OWNERSHIP/TRANSFER OF

CANADIAN PROPERTY

New York State Bar Association, Trust and Estates Law Section
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Presented By:

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<u>Taxation in Canada has a number of sources</u>:

1. **Employment Income**
2. **Interest or Royalty Income**
3. **Rental Income**
4. **Capital Gains from the sale or deemed sale of Canadian Taxable Property**

I. <u>Taxable Canadian Property Dispositions:</u>

1. Third Party Sale (actual sale)

2. Non-Arm's Length Transfer (deemed sale):

   -gift
   -divorce/separation
   -to/from a corporation
   -to/from a trust

3. On Death (deemed sale)

II. <u>The Seller/Transferor/Deceased: Capital Gains Tax Consequences:</u>

1. For a Third Party Sale of Capital Property:

   CAPITAL GAIN = Sale Proceeds - Adjusted Cost Base*

2/3. For Non-Arms-Length Transactions <u>OR</u> in the case of Death (deemed dispositions):

   CAPITAL GAIN= Fair Market Value at time of Disposition - Adjusted Cost Base*

   <u>* Note:</u> in the case of Adjusted Cost Base there may be options depending on when the property was acquired by the Seller/Transferor/Deceased:

   For all acquisitions <u>after September 26, 1980</u>:

   ADJUSTED COST BASE = Original Purchase Price + Closing Costs at time of Purchase + Verifiable Capital Improvements

For acquisition prior to September 26, 1980 the US-Canada Tax Treaty provides some relief from the capital gains that would otherwise be applicable and allows the Seller/Transferor/Deceased to increase its "Adjusted Cost Base", in one of two ways:

ADJUSTED COST BASE = December 31, 1984 Fair Market Value of Property + Verifiable Capital Improvements incurred after Dec. 31/84. (The "Fresh Start Rule")

-OR-

ADJUSTED COST BASE = Original Cost (or Dec. 31/71 Fair Market Value if acquired prior to Dec. 31/71) + Verifiable Capital Improvements (between Date of Purchase (or Dec. 31/71 for acquisitions prior to Dec 31/71) + Closing Costs at time of Purchase (for post Dec. 31/71 purchases) + Credit**

**Note: Credit: $\dfrac{\text{\# Months Property Owned Prior to Dec. 31/84}}{\text{\# Months Property Owned}}$ X Capital Gain

III. Tax Deferral in Case of Death of a Spouse:

Where the deceased is survived by a spouse and property is transferred to the surviving spouse by way of joint tenancy or where it is devised to the surviving spouse or a spousal trust by Will, the surviving spouse has the option to exercise an Election to have the deceased's spouse's interest in the property transferred to the spouse at the deceased's Adjusted Cost Base. Capital Gains are then attributable to the surviving spouse when he/she sells or transfers or dies owning the property.

IV. Tax Payable on Capital Gains:

TAXABLE CAPITAL GAIN for a Third Party Sale = 50% of [Capital Gain - Real Estate Commission - Closing Costs at the time of the Sale]

TAXABLE CAPITAL GAIN for a Deemed Sale (non-arms-length transfer or upon Death = 505 of Capital Gain

Tax Rates For Individuals: (i) Graduated Federal Rate:

First $43,953	-	15.0 %
Next $43,953	-	22.0 %
Next $43,953	-	26.0 %
Thereafter	-	29.0 %.

(ii) Plus Provincial Surtax Rate: 48% of Federal Tax

Tax Rates For Corporations: Federal/Provincial rate of 25%.

V. Tax Filings:

1./2. In case of Non-Resident Individual Third Party Sale **OR** a Non-Resident Individual Non-Arms-Length Transaction, there are two CDN tax filings that are necessary:

a) The first is due within 10 days of Sale/Transfer:

T2062 + Closing Documents + Capital Improvement Invoices + Appraisals (if applicable) + WITHHOLDING TAX***

***WITHHOLDING TAX = 25% of CAPITAL GAIN

Note: This first tax filing is done to obtain a Tax Clearance Certificate to clear property and Purchaser of any of tax liability/penalties on account of tax owed by Seller/Transferor.

b) The second is due by April 30th the following year for individuals:

Federal T-1 Tax Return – calculates net income and income tax owing, resulting in a refund of portion of Withholding Tax paid in the first tax filing.

In the case of Non-Resident Corporation, there are are two CDN tax filings that are necessary:

a) The first is due within 10 days of Sale/Transfer:

T2062 + Closing Documents + Capital Improvement Invoices + Appraisals (if applicable) + WITHHOLDING TAX***

***WITHHOLDING TAX = 25% of CAPITAL GAIN

b) The tax is due by February 28th but the second tax filing is due by March 31st the following year for corporations:

Federal T-2 Tax Return - calculates net income and income tax owing, resulting in a refund of portion of Withholding Tax paid in the first tax filing.

3. In the case of **Death** of Non-Resident Individual:

Only on tax filing necessary: by April 30th the following year:
Federal T-1 Final Tax Return – calculates net income on taxable capital gain.

VI. Use of US Resident Corporations:

a) Advantages: -Estate Planning Purposes - avoidance of Canadian deemed disposition rules when transferring shares to family members either intervivos or on death.
-Sheltering property appreciation (capital gain) in Corporation until Corporation disposes of property.

b) Disadvantages: -Costs involved in Incorporation, obtaining Ontario Extra Provincial Licence, maintaining resident agent in State of Incorporation, maintaining resident agent in Ontario, US/State filings/franchise taxes, filing annual Ontario Corporate Tax and Annual Returns.

VII. The Purchaser/Transferee: Tax Consequences:

a) Ontario Land Transfer Tax:

-Payable by Purchaser on PURCHASE PRICE
-Payable by Transferee on CONSIDERATION GIVEN to Transferor
-Deeming Rule at FMV in case of transfer between Corporation and Shareholder or between Shareholder and Corporation where shares are issued in exchange.

Rates:	First $55,000	-	0.005 %	
	$55,001 - $250,000	-	0.010 %	- $275
	$250,001 - $400,000	-	0.015 %	- $1525
	$400,001 and over	-	0.020 %	- $3525

b) Harmonized Sales Tax (HST):

-Payable by Purchaser on vacant land being sold by a Corporation and on new home construction or newly renovated home.

Rate: 13%

VIII. Estates:

A) Dying Testate- With a Will:

Ontario will recognize Wills prepared and executed in accordance with the laws of the State of New York:

a) If the Canadian Real Property was acquired by a deceased Non-Resident prior to the property being converted into the Province of Ontario Land Titles Qualified System (1999 in most places in Ontario), then the Estate will be exempt in most cases from having to obtain Ancillary Appointment of the Estate Trustee (Executor), if this is the first dealing with the title to the Real Property since the time of conversion. U.S. Executor will have authority to sign Transfer/Deed to convey title to Real Property.

b) If the Canadian Real Property was acquired after the property being converted, then the Executor of the Estate will be required to obtain Ancillary Appointment of Estate Trustee. Once obtained, U.S. Executor will have authority to sign Transfer/Deed. Bonding may be necessary.

B) Dying Intestate - Without a Will:

A U.S. Administrator of a U.S. Estate does not have the authority to execute a Deed/Transfer of Property in Ontario.

a) If the dealing with the property is within 3 years of the date of death, then the U.S. Administrator must nominate an Ontario Resident to act as its Ontario Estate Trustee Without a Will by way of Court Application (similar to Ancillary Estate (Probate) Application) and the Nominee will have the authority to deal with the Ontario assets.

b) If the dealing with the property is after 3 years of the date of death, then: estate can proceed with the process in a) above, or:

I) the U. S. Administrator can proceed in accordance with a) above, or If property is in Land Titles Absolute/Land Titles Qualified System: The Heirs at Law can have title transferred to them by filing a Transmission Application and Indemnity with the Land Registrar.

II) the Heirs at Law can apply to the Land Registrar to have to the Real Property registered in their name by providing an Indemnity.

C) Estate Administration Tax (Probate Fees) Charged by Ontario Superior Court of Justice:

0.005% on the First $50,000.00
$15.00 per $1,000.00 thereafter.

Calculated on the Ontario assets only.

D) Estate Tax: NIL for non-residents, only deemed disposition of capital property.

SAMPLE TAX CALCULATIONS FOR TAX FILINGS FOR DISPOSITION OF CDN PROPERTY:

EXAMPLE #1: Where Seller/Transferor acquired property post September 26, 1980.

SELLER: Joe Shabaadnick

BUYER: Sandra Shmengi

CLOSING DATE: August 18, 2015

PART "A" - CALCULATION OF CAPITAL GAIN			
	(i) Sale Proceeds (or FMV as of August 18, 2015) whichever is applicable		$425,000.00
	(ii) Less: Original Cost (iii) Less: Closing Costs on Purchase (iv) Less: Capital Improvements		125,000.00 2,000.00 40,000.00
	Capital Gain		$258,000.00
PART "B" - PAYMENT ON ACCOUNT OF WITHHOLDING TAX TO REVENUE CANADA			
	$258,000.00	25% =	**$64,500.00**

PART "C" - INCOME TAX RETURN CALCULATIONS

(i)	Capital Gain	$258,000.00
(ii)	Less: Sale Closing Costs	3,000.00
(iii)	Less: Real Estate Commission	27,000.00
		$228,000.00

Taxable Capital Gain = 50% x $228,000.00 = $114,000.00
Income Tax Liability = $ 34,109.00
Tax Refund = $64,500.00-$34,109.00 = $ 30,391.00

SAMPLE TAX CALCULATIONS FOR TAX FILINGS FOR DISPOSITION OF CDN PROPERTY:

EXAMPLE #2:	Where Seller/Transferor acquired property pre- September 26, 1980 (eg February 17, 1969)
SELLER:	Joe Shabaadnick
BUYER:	Sandra Shmengi
CLOSING DATE:	August 18, 2015

PART "A" - CALCULATION OF CAPITAL GAIN		
1. Using Fresh Start Rule		
	(i) Sale Proceeds (or FMV as of August 18, 2015) whichever is applicable	$425,000.00
	(ii) Less: December 31, 1984 FMV (iii) Less: Capital Improvements Post December 31, 1984	235,000.00 30,000.00
	Capital Gain	**$160,000.00**
2. Using Credit Method		
	(i) Sale Proceeds (or FMV as of August 18, 2015) whichever is applicable	$425,000.00
	(ii) Less: December 31, 1971 FMV (iii) Less: Capital Improvements Capital Gain (iv) Exempt Portion of Gain 156 / 523 X $230,000.00 = (v) Capital Gain $230,000.00 - $68,604.21 =	135,000.00 60,000.00 $230,000.00 $ 68,604.21 **$161,395.79**

PART "B" PAYMENT ON ACCOUNT OF WITHHOLDING TAX TO REVENUE CANADA

$160,000.00 x 25% $40,000.00