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Advisory

Multijurisdictional estate administration highlights

This Advisory will discuss common issues that can arise when a person dies and his or her estate has connections with one or more jurisdictions outside of Canada. Some of the issues arising for an estate with cross-border Canada-U.S. connections also arise for an estate with multijurisdictional connections and are explored in our Advisory "[Cross-border Canada-U.S. Estate Administration Highlights](#)".

In this Advisory, we use the term "estate trustee", the term used for the legal representative of an estate under the Ontario *Rules of Civil Procedure*. The term executor (where the deceased died with a will) or administrator (where the deceased died without a will) are the traditional terms used for this role.

A multijurisdictional estate can have many complications, as well as being subject to special legal rules which determine which jurisdiction's laws will apply in a specific case. Issues will arise where an Ontario estate (the deceased died or had most of his or her assets in Ontario) has a foreign connection, or where a foreign estate (the deceased died or had most of his or her assets outside of Canada) has some Ontario connection. While this Advisory focuses on Ontario legal matters, many of the issues discussed are equally applicable to other Canadian provinces and territories.

PRACTICAL CHALLENGES ARISING IN MULTIJURISDICTIONAL ESTATE ADMINISTRATION OR AN ESTATE WITH FOREIGN AFFILIATIONS

No matter where a deceased person lived or held assets during his or her lifetime, and which legal system(s) his or her estate is subject to, when his or her estate has multijurisdictional or foreign connections a number of practical challenges can arise, including:

- Locating assets in various jurisdictions and creating a comprehensive asset list;
- Locating the last will and determining whether the deceased had more than one will, such as separate situs wills to deal with assets in a particular jurisdiction, and if so, whether they are valid;

- Carefully considering the assets of each estate under each will, in particular where multiple wills do not provide for the same set of beneficiaries or the same entitlement for each beneficiary;
- Determining the deceased's debts and tax liabilities in all jurisdictions and who has the obligations to pay them: the estate and/or the beneficiaries;
- Determining which jurisdictions require advertising for creditors, which make it desirable as a protection for the estate trustee, in which place to advertise, and the costs of doing so;
- Dealing with foreign language and translation challenges, such as obtaining official translations of any documents as necessary, and efficiently communicating between estate trustees, beneficiaries, creditors, asset holders, professional advisors, including managing time zone challenges, courts, etc.;
- Managing expectations in regards to administration timelines and delays associated with foreign processes, as well as potential increased costs, both for the estate and beneficiaries;
- Understanding different legal rules and processes regarding reporting and handling of estate funds;
- Navigating foreign documentation requirements and certification of copies of documents – some jurisdictions will require a Court-certified copy of a document or an “apostille” (an internationally recognized type of certified copy), and will not accept notarial copies of documents as proof of authenticity. Canada recently joined the 1961 Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents (“the Hague Apostille Convention”) on May 12, 2023, which came into effect on January 11, 2024, and therefore documents no longer have to be authenticated by the Government of Canada and foreign embassy or consulate which previously involved additional steps.

ONTARIO ESTATE WITH FOREIGN CONNECTIONS

An Ontario estate can face complications due to the presence of any of the following: a person died and had a different citizenship (or additional citizenship) or place of birth, the beneficiaries have foreign residency, or the person owned foreign assets.

Ontario Estate if Deceased is a Foreign Citizen, Emigrated from Another Jurisdiction or Retains Other Ties to Another Jurisdiction

The U.S. and Eritrea are the only two countries in the world that tax based on both residence and citizenship. Other countries tax worldwide income of a person that resides in the country, but not citizens residing in another country.

A person who emigrated from another jurisdiction may still have ties to his or her country of origin which must be considered. For example, the deceased may have relatives or friends whom he or she wishes to benefit who live there or may still have assets or debts in his or her country of origin or in another country in which he or she has lived; or there may be foreign laws which affect the deceased's estate and its beneficiaries. It is important to investigate such matters to ensure that nothing is overlooked.

Ontario Estate With Foreign Resident Beneficiaries

Practical Issues

Practical issues such as managing foreign currency and exchange issues, in particular when gathering in assets and making distributions to non-resident beneficiaries, and additional complexities of making distributions where sending a cheque by mail or hand-delivering personal effects is unwise or unavailable, arise where an estate has foreign beneficiaries.

Income Tax Issues

Income tax issues relating to distributions to non-resident beneficiaries can include:

- Withholding tax issues - income which is paid or payable to a non-resident beneficiary is subject to non-resident withholding tax under Canada income tax rules. The estate trustee is liable to withhold the appropriate rate of tax of 25% (unless reduced by treaty) and complete certain tax filings;
- No rollover - there is generally no "rollover" of capital gains when a Canadian resident estate distributes property to a non-resident beneficiary which can result in capital gains being triggered and payable by the estate on post-death capital gains, although a rollover will apply if "taxable Canadian property" (see definition below) is distributed;

- Section 116 certificate requirements - section 116 of the *Income Tax Act* (Canada) imposes an obligation on a non-resident person who disposes of property which falls within the definition of “taxable Canadian property” to obtain a clearance certificate. Taxable Canadian property includes:
 - Real property located in Canada;
 - Assets used in a business in Canada;
 - Shares in a private Canadian corporation where more than 50% of the value of the shares is derived from Canadian real property or certain Canadian resource property;

A distribution to a beneficiary of a capital interest in a trust (which includes an estate for purposes of the *Income Tax Act*) will qualify as a disposition under these rules if the value of the trust/estate within the 60 months previous to the distribution was more than 50% derived from Canadian real property. Practically speaking, if the distribution is being made with cash from the estate, there will be no taxable gain and generally only the filing of certain forms may be required. Failure to ensure proper steps are taken under s. 116 could result in personal liability to the estate trustees for any unpaid tax;

- Interest in a Canadian or Ontario corporation - problematic issues may arise where a foreign beneficiary holds an interest in a Canadian or Ontario private corporation, in particular under the beneficiary's domestic tax laws. For example, a U.S. resident may be exposed to double taxation on earnings of the corporation due to a mismatch of foreign tax credits and be subject to certain filing requirements. Also, if the corporation is a Canadian controlled private corporation it may lose its status if it becomes controlled by foreign-resident shareholders.

Ontario Estate With Foreign Situs Assets

Forced Heirship

Most civil law jurisdictions have some form of “forced heirship” rules. These are sometimes referred to as “mandatory family protection” rules in those jurisdictions, indicating the difference in mindset between civil and common law jurisdictions regarding testamentary freedom and inheritance issues.

Each civil law jurisdiction has its own rules regarding what portion of an estate is subject to forced heirship and who is entitled among family members and in what proportions, as well as in some cases "clawback" rules which take into account gifts made during the deceased's lifetime.

Muslim countries which follow Sharia have similar legal rules, usually applicable to assets located in the jurisdiction, and which may exclude non-Muslims living there as well as assets located abroad.

If the deceased is a "national" (i.e. a citizen) of, or has a relevant affiliation with, a jurisdiction with forced heirship rules, or owns assets in the foreign jurisdiction, and has beneficiaries in Ontario and/or in the foreign jurisdiction, his or her estate may be subject to these forced heirship rules. In one Ontario case, *Granot v. Hersen*, the Court held that the forced heirship rules under Swiss law applied to an estate asset in Switzerland, in that case a condominium, as under Ontario rules, the law of where real property is located should govern its succession.

Foreign Family Law Regimes

Foreign family law in another country can affect who is entitled to an estate on death. A key issue is what law governs the property rights of the deceased person and his or her spouse in determining who is entitled to property on death and the validity and effect of the deceased's will.

This issue will be particularly important where the last common habitual residence of the spouses was not in Ontario. Section 15 of the *Family Law Act* (Ontario) provides the law of the couple's last common habitual residence applies in determining matrimonial property rights, with a tie-breaker rule if they had no such common residence.

If the applicable matrimonial regime is a form of "community of property" (that is, the spouses' property acquired during the marriage is considered jointly owned with certain exceptions), this may limit what a spouse may dispose of in his or her will.

Other Foreign Laws Regarding Succession to Assets on Death

Foreign registered accounts and pensions will likely be governed by the law of the jurisdiction where the asset is located, including with regard to the determination of who is the beneficiary of the account and whether the deceased's will governs who is entitled. In many civil law jurisdictions, beneficiaries inherit assets directly from a deceased and are responsible for the deceased's debts and liabilities. These rules can affect the administration of assets and payment of debts in other jurisdictions.

Foreign Tax Considerations

Tax filing requirements in multiple jurisdictions need to be completed with appropriate professional advice. Knowledgeable professional advice is a necessity in multijurisdictional estate administration – many tax advisors will not be familiar with international and multijurisdictional tax issues or bi-lateral tax treaties. Canada only has two tax treaties which deals with taxation on death: with the U.S. and France.

Where there is no tax treaty between Canada and the jurisdiction in which assets are located, double taxation can arise, creating further challenges.

Consideration also needs to be given to privacy and confidentiality issues in making tax filings. This is particularly important as more jurisdictions enact beneficiary and other disclosure rules.

Ontario estate trustees should not make the mistake of thinking that there will be no tax consequences if foreign reporting is not done. "How will the tax authorities in the other jurisdiction ever find out?" is a common question. The current global agenda for governments includes aggressive measures to ensure greater transparency and information exchange in order to stop leakage of tax revenues due to non-reporting across borders. Further, failure to accurately report taxable income or gains or file required tax returns can result in personal liability for an estate trustee, including substantial penalties, particularly if deliberate tax evasion is involved.

Responsibility for Foreign Tax Liabilities and Filings

What right does a taxing authority have to enforce tax liabilities in a foreign jurisdiction against the estate trustee of the estate in the foreign jurisdiction? A general rule of private international law is that the courts of one country will not enforce, directly or indirectly, claims made for taxes of a foreign government.

However, protocols and conventions entered into between jurisdictions may modify this general rule, many of which are now in place between Canada and other jurisdictions, and which continue to be entered into each year. Many countries have determined that it is in their best interests to provide information and allow enforcement of foreign income tax obligations in their jurisdiction in order to obtain reciprocal benefits from other jurisdictions.

Multiple Wills and Income Tax and Debt Payment Obligations

An Ontario estate trustee will need to consider which estate trustee under which will is liable to pay tax liabilities on death and to file tax returns in each jurisdiction. It may be necessary to apportion primary and secondary liability among the estate trustees of multiple wills. The language used in each will must be carefully reviewed and legal advice obtained if necessary. The interpretation of the will and express provisions relating to payment of debts and tax will be important if there is a dispute. As an example, in *Barna Estate*, the deceased left a British Columbia will and a French will. The court considered whether the estate trustee of the B.C. will should pay French taxes on property passing under the French will, and concluded the estate trustee should not, based on its interpretation of the B.C. will which it held showed the deceased only intended Canadian taxes to be paid.

Great care will need to be taken if one estate is insolvent or lacks sufficient assets to discharge tax and other liabilities in the jurisdiction to which they are subject.

Foreign Probate or Other Legal Requirements

Many civil law jurisdictions, including most European, American and Latin countries do not have a probate requirement. This differs from common law jurisdictions, including most Commonwealth jurisdictions and U.S. states where probate is generally a standard requirement.

African and Asian countries (except those which are Muslim) vary between civil law and common law depending on their history and development. Muslim countries generally follow Sharia, which has its own requirements, processes and rules. Sharia has more similarities with the civil law than the common law, and incorporates a type of forced heirship.

Local rules can create complications for an Ontario estate trustee, who may not be able to obtain authority to act in the foreign jurisdiction due to probate restrictions which, for example, may require only a resident can take out probate, or in civil law jurisdictions, rules which provide for the local authority to deal directly with beneficiaries. There may be a requirement to file a bond for a non-resident estate trustee, which may create problems if the estate trustee does not qualify for a bond in that jurisdiction (for example, they do not own any assets there). The foreign probate process may be time-consuming and will require the assistance of local counsel as well. The legal processes in many foreign jurisdictions do not move at speed, which can cause frustration for an Ontario estate trustee and the beneficiaries.

If the estate trustee does not qualify under the rules to apply for probate, or cannot obtain a bond, he or she or the beneficiaries may need to appoint a resident to act in the jurisdiction in question and administer the foreign assets, adding to the expense and length of the estate administration. Also, local rules may provide rights in respect of assets located in that jurisdiction to a spouse or dependent of the estate which differ from Ontario law, complicating the estate administration regarding the foreign located property.

FOREIGN ESTATE WITH AN ONTARIO OR CANADIAN CONNECTION

Foreign Estate with an Ontario Resident Beneficiary

Usually, the presence of an Ontario-resident beneficiary does not create significant complications for a foreign estate, since capital distributions payable to Canadian residents generally do not result in the foreign estate incurring any additional income tax obligations. As well, Canada treats a distribution of capital as a gift, which is not taxable in Canada in the hands of the beneficiary who receives the gift.

Distributions from certain foreign entities such as trusts or corporations are beyond the scope of this Advisory and can be treated differently.

Foreign Estate of a Deceased Canadian Citizen

An estate trustee dealing with the estate of a foreign resident or citizen who was also a Canadian citizen would encounter no additional complications due to the deceased's Canadian citizenship, other than it possibly being necessary to inform various federal Canadian and Ontario government authorities, such as Service Canada, Service Ontario, and the Canada Revenue Agency, of the individual's death.

Canada does not tax based on citizenship or levy an estate tax on its citizens' estates. Instead, Canada taxes based on actual or deemed tax residence in Canada or on certain income which is earned in Canada, as well as capital gains tax on certain property located in Canada (referred to as "Taxable Canadian Property", discussed above) when assets are disposed of or deemed to be disposed of (including on death, subject to exemptions and credits, etc.).

The estate trustee of the estate of a non-resident Canadian citizen is typically not required to file Canadian income tax returns unless the deceased owned Taxable Canadian Property at death or earned income in Canada in the year of death.

Non-resident Estate Trustee

If a non-resident person owned assets in Ontario at death, complications can arise both in Ontario and in the foreign jurisdiction, particularly for a non-resident estate trustee or for certain types of assets, including in respect of the probate process and applicable tax rules.

Obtaining Authority to Act in Ontario

At common law, a foreign estate trustee such as an executor or administrator has no authority over the assets of the deceased in Ontario by virtue of a foreign court appointment or the authority given to them under the law of another jurisdiction. This means that they must, in most cases, obtain a probate grant in Ontario to confirm their authority. While there have been certain amendments made to legislation on this principle, they usually allow, but do not require, recognition of a foreign grant. It is therefore the asset holder's choice, such as a bank or financial institution, to decide if it will accept a foreign grant as proof of authority in such cases or require a local grant.

If a foreign deceased person owned real property in Ontario, even if there is an exemption to the requirement for an Ontario probate grant in order to deal with the real estate, best practice is for the foreign estate trustee to obtain an Ontario probate grant to confirm their authority to avoid any possible claim that they acted without due authority.

The requirement for an Ontario grant where a non-resident estate trustee is involved is waived by financial institutions less often than for a resident estate trustee. Financial institutions are more risk adverse when it comes to a foreign estate trustee who may not be subject to the jurisdiction of an Ontario court including if there should be fraud or mistake. There may be less of a business case to be made for allowing exceptions or waivers. Regardless, in most situations involving a non-resident estate trustee and an estate with Ontario financial assets, an Ontario grant will be required.

Choice of Original Grant Jurisdiction

Where a deceased's assets are located in multiple jurisdictions, there may be a choice available to the estate trustee regarding in which jurisdiction the original grant of probate should be obtained. Considerations in making this decision include:

- In which jurisdictions it is necessary to obtain probate because a financial institution or other third party requires it;

- Requirements in each jurisdiction regarding an original versus secondary grant of probate, including necessity to produce the original will and whether an original grant in one jurisdiction will make another jurisdiction's requirements impossible or more difficult;
- Probate fees payable in each jurisdiction and the difference between fees payable on an original grant or a secondary grant – e.g. an original Ontario court grant will require payment of Ontario Estate Administration Tax of approximately 1.5% on a deceased's worldwide assets, other than those not passing through the estate or foreign real property, with no deduction for debts other than a debt registered on real estate in Ontario;
- Costs, including legal fees, to obtain probate in each jurisdiction;
- Bonding requirements, availability and costs to obtain a bond in each jurisdiction;
- Qualifications for appointments in each jurisdiction, including whether the applicant estate trustee must be resident in that jurisdiction;
- Court oversight of estate administration in each jurisdiction or lack thereof – e.g. the Ontario court does not oversee the estate administration except in limited circumstances where an interested party comes to court with a request, but elsewhere (including many U.S. states) courts have extensive oversight powers and requirements to file a multitude of documents and accounting records in order for an estate trustee to be discharged during or at the end of the estate administration;
- Protection afforded to an estate trustee or the estate by obtaining a court grant and whether such protection is desirable in a jurisdiction, even if it is otherwise not necessary to obtain a grant in such jurisdiction.

Ontario Court Grant for a Non-Resident Estate Trustee

Whether the non-resident estate trustee resides in a Commonwealth jurisdiction or not and whether the deceased had a will or not will dictate which type of court grant will be necessary in Ontario and whether the estate trustee will be entitled to apply for a court grant at all.

A non-resident estate trustee of an estate where the deceased died without a will in a non-Commonwealth jurisdiction may not be entitled to apply at all. A non-resident estate trustee of an estate without a will who has not received a foreign court grant is ineligible in Ontario at first instance due to the court rules, although an Ontario court may allow this in certain circumstances.

Regardless of whether the deceased died with or without a will, an estate trustee who lives in a non-Commonwealth jurisdiction may be required to post a bond. The requirement for a bond can be dispensed with by the Ontario court in some circumstances, and the court may also reduce the amount of a bond. Where a bond is required, a non-resident estate trustee may find it difficult to obtain one given that they are unlikely to have assets in Ontario which can be used as collateral for the bond.

Canadian Income Tax Issues

For non-residents, as noted above, Canada levies income tax on income arising in Canada (subject to certain exceptions) and capital gains tax on Taxable Canadian Property (discussed above) when Taxable Canadian Property is actually sold or deemed to be sold or otherwise disposed of, subject to certain exceptions. When a person dies, they are deemed to have disposed of their property for Canadian income tax purposes.

Their estate trustee will be responsible for filing a terminal tax return for the income tax year up to the deceased's date of death, as well as possibly additional tax returns if the estate has income or capital gains after the deceased's date of death. Penalties and interest on unpaid tax may also be payable if timely tax filings and payments are not completed.

Other Issues

Aside from the practical difficulties of geography, where an estate trustee resides outside of Canada and assets are located in Canada, given the increase in financial institution compliance designed to prevent income tax evasion and money laundering, it is becoming increasingly difficult for a non-resident estate trustee to open an estate bank account or liquidate or provide investment instructions for financial assets in Canada. Canadian financial institutions have implemented extensive and often onerous procedures and requirements which can be burdensome to meet, and which increase the time and costs of the estate administration. These requirements are applied even where an Ontario probate certificate has been obtained.

CONCLUSION

As the global population becomes more mobile, Canadians are acquiring assets in other countries and relocating in greater numbers, while people from other jurisdictions are relocating to Canada, acquiring assets in Canada and leaving behind beneficiaries in other countries. Estate administration becomes more complicated because the person's cross-border connections subject them to multiple legal and tax regimes which must be considered, understood and dealt with – not an easy task! The more complex a person's assets and affiliations in multiple jurisdictions, the more complex their estate is as well.

This Advisory is designed to explain some of the more common issues which can arise when there are multijurisdictional assets, estate trustees or beneficiaries or where the deceased was subject to tax rules in Canada and one or more other jurisdictions due to residence, nationality, domicile or other affiliation. Expert legal and tax advice will be necessary to successfully navigate these complex matters.

The comments offered in this Client Advisory are meant to be general in nature, are limited to Ontario law and are not intended to provide legal advice on any individual situation. Before taking any action involving your individual situation, you should seek legal advice to ensure it is appropriate to your personal circumstances.