FORWARD

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DECEMBER 2016

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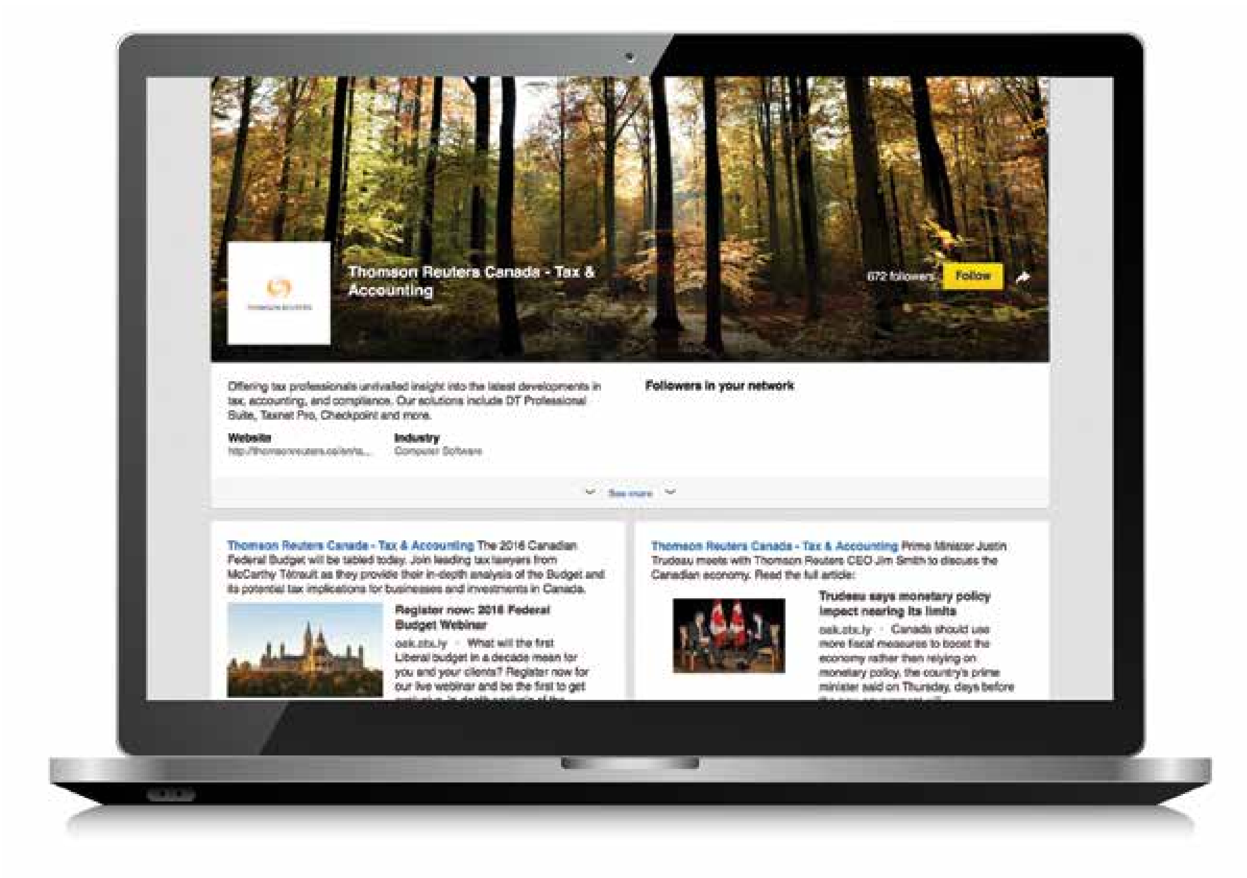

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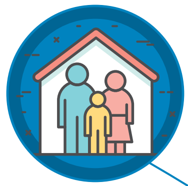

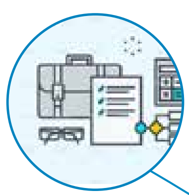

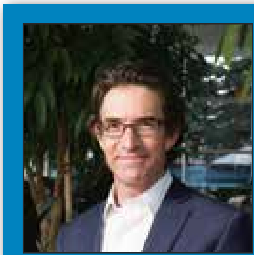

Director's Note

This issue of Forward starts on a sad note with David W. Chodikoff's touching tribute to Robert ("Bob") McMechan, who left us earlier this year. Bob was well known for his many accomplishments as a tax litigator, author and academic, and David's piece gives readers a better sense of the "non-tax" Bob: a man passionate about fitness, adventure and--above all--family. Many of us at Thomson Reuters Tax & Accounting Canada considered Bob a friend. We miss him and we thank David for writing this very thoughtful tribute.

In her piece, Rosanne T. Rocchi challenges our assumptions that trust interests acquired after the date of marriage are excluded from net family property calculations for the purposes of the (Ontario) ***Family Law Act*** ("FLA"). The issue is particularly acute in the circumstances of multiple trustees. Rosanne examines the definition of "property" in subsection 4(1) of the FLA and reviews court approaches to the issues in Canada and other commonwealth countries as grounding for her examination of the reasoning in ***Mudrona*** v. ***Mudrona*** and ***Tremblay*** v. ***Tremblay***, the latter currently under appeal.

Tina Tehranchian provides a summary of the personal and business tax measures of Budget 2016 and their impact on financial planning. Tina's article is a useful refresher, especially for those readers providing planning services to owner-managers and high net wealth individuals.

David W. Chodikoff, David Kerzner, and Max Reed alert readers of the increased vigilance of tax authorities and the complexities of cross-border tax planning, implementation and compliance. The authors rightly identify the risks to tax professionals and their clients when not fully informed of recent developments, and alive to the issues.

Tax Editors at Thomson Reuters Tax & Accounting provide a summary of the consultation draft of legislative proposals implementing measures of Budget 2016. These are intended to amend the Federal ***Income Tax Act*** by creating a new section – 233.8 – setting out the country-by-country reporting requirements in the BEPS Action Plan. The piece contains info-graphics displaying the BEPS timelines and summarizing the results of a Thomson Reuters survey of tax professionals that asked about their BEPS readiness.

Thank you for reading Forward magazine. As always, we welcome comments from readers.

Fred Glady, B.A., LL.B., LL.M.
Director, Market Segment Solutions
Thomson Reuters

ROBERT WILLIAM "BOB" MCMECHAN: "SAYING GOOD-BYE TO A STANDOUT COLLEAGUE"

David W. Chodikoff, Editor of Taxes & Wealth Management, Tax Partner, Miller Thomson LLP
Excerpt from Taxes & Wealth Management Newsletter, October 2016, Issue 9-3, pp. 1-2

Bob passed away on August 7, 2016. He was only 64 years old but, by any measure, Bob lived a full life.

I met Bob when he was still with the Department of Justice. That was many years ago. He was humble, funny, very hard working and bright. His accomplishments attest to these character traits. I attended Bob's funeral in Ottawa and was struck by the diversity of his interests. There were things that I only had some passing notion of. It was evidence of the depth and breadth of his impact on so many people. This was a large church and it was full of Bob's admirers, friends and family. He would have been embarrassed by the richness of his positive impact on the people around him.

Stepping aside for a moment to write about the "non-tax" Bob; did you know that Bob founded a running club in Ottawa called the Lickety Splits? Stories were shared about how Bob would encourage anyone to run with him, and weather — be it freezing cold, as it tends to be in Ottawa — be damned. Apparently, even all bundled up, Bob was ready for a good run and stayed positive throughout the efforts. Bob competed in many marathons and actually participated in an Ironman competition in B.C.

At the memorial, we heard about Bob's love of cycling from his neighbour and cycling pal. He was a regular and committed rider. From a brother-in-law, we heard about Bob's love of the outdoors, camping, travelling and experiencing the world.

He was a family man and had a close relationship with his children, grandchildren and extended family.

Turning back to the law, Bob was an exceptional tax litigation lawyer. Bob was a former General Counsel with Tax Law Services of the Department of Justice of Canada. He was also at one time a Senior Rulings Officer with Revenue Canada. Bob conducted the first major transfer pricing litigation in Canada (known as *Smith Kline*). In 2011, he was inducted as a Fellow of the Litigation Counsel of America (LCA) Trial Lawyer Honorary Society, and in the following year, he was named among In House Counsel Magazine's list of top Canadian lawyers. Bob was an author and scholar. He recently completed his doctorate of laws at Osgoode Hall and then published a superb book entitled, *Economic Substance and Tax Avoidance: An International Perspective* (Carswell).

One of Bob's last projects was looking after his partner, Allison. She was diagnosed with a giant brain aneurysm. Allison's diagnosis, medical odyssey and remarkable recovery were chronicled by Bob in a book that he wrote with Allison entitled *Allison's Brain*. It is truly an incredible story. The book won the 2015 National Indie Award for Excellence in the "Inspirational" category.

This last accomplishment is where this tribute ends because Bob was exactly that type of person: inspirational and a role model to us all. I miss him. And I know that many others will continue to do so, too.

David W. Chodikoff is an Editor of Taxes & Wealth Management. *David is also a Tax Partner specializing in Tax Litigation (Civil and Criminal) at Miller Thomson LLP. David can be reached at 416.595.8626 or dchodikoff@ millerthomson.com*

TRUST INTERESTS AND FAMILY LAW RIGHTS — WHAT ESTATE PLANNERS NEED TO KNOW AFTER *TREMBLAY* AND *MUDRONJA*

Rosanne T. Rocchi, Partner, Miller Thomson LLP
Excerpt from Taxes & Wealth Management Newsletter, October 2016, Issue 9-3, pp. 2-9

This article, written by Rosanne Rocchi of Miller Thomson LLP's Toronto Private Client Services Group, first appeared in the Miller Thomson LLP Wealth Matters publication in June 2016. The article was also included as part of the information and materials provided to delegates who attended the 2016 STEP Annual Conference in Toronto. The article provides a highly pertinent — and important — discussion of current family law issues relating to trust interests and common tax and estate planning strategies in Canada today.

INTRODUCTION

Since the enactment of the *Family Law Act* ("FLA"), courts have struggled with determining, firstly, if and when the interest of a spouse in a discretionary trust qualifies as "property" as defined in the FLA for purposes of equalization of net family property ("NFP") and secondly, how that property interest is valued.

Family law legislation varies from province to province, but it has been difficult to find any significant body of law in Canada addressing how to deal with interests in trusts. Other jurisdictions such as the U.K., Australia and New Zealand have extensive jurisprudence on the issue, as well as legislation that addresses the accountability of a spouse for a trust interest, both as a beneficiary and in terms of the bundle of rights that are reserved, whether as a Trustee, as a protector or as holder of a power to appoint.

Estate planners need to know when the rights reserved will result in the value of the trust property being included in a spouse's NFP under the FLA.

TRUST INTERESTS AS PROPERTY

In Ontario, the problem arises from the remedial nature of the legislation and the very broad definition of "property". Subsection 4(1) defines "property", in part, as follows:

> "property" means any interest, present or future, vested or contingent, in real or personal property and includes,
>
> (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
>
> (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property.

The first part of the definition includes the interest of a **beneficiary** under a Trust but paragraphs (a) and (b) relate not to the rights of a beneficiary, but rather to the bundle of rights by which a spouse has the power to control the disposition or consumption of the trust property, whether as a Trustee, protector or holder of a power to appoint.

Trust practitioners believe the definition is overly broad for several reasons.[1] There is no doubt that an individual who has a general power of appointment has a right that is tantamount to ownership of the property.[2] But paragraph 4(1)(a) extends to a power of appointment which a spouse has "alone or in conjunction with another person". The FLA does not provide any guidance as to the identity of the other person, but presumably the intention was that the other persons might be individuals whose compliance the spouse had either the ability or the expectation to compel.[3]

There do not appear to be any reported Canadian cases which have analyzed the identity of the co-trustees or whether or not they are truly independent, although *Tremblay*,[4] discussed *infra*, makes conclusions on the issue. U.K. courts have dealt with the issue of control of the trust property by examining the independence of the other trustees, the likelihood of the other trustees exercising independent authority and any correspondence between the parties such as letters of wishes and patterns of distributions of trust property.[5]

In a number of recent decisions of Commonwealth Supreme Courts and Courts of Appeal,[6] the approach taken by the court supports a "substance over form" approach to the problem of division of assets in the context of a divorce. The analysis of the court involves bringing "a judicious mixture of worldly realism and a respect for the legal affairs of Trusts, the legal duties of Trustees…".[7]

In *Charman v. Charman (No. 4)*,[8] the U.K. Court of Appeal considered whether assets held in an offshore trust over which the husband had *de facto* control even

1 It appears that, in matrimonial legislation, particularly where courts are given a discretion, there is a tendency to expand definitions of "property". The U.K. Supreme Court has recently warned against applying a different approach to the definition of "property" in the matrimonial litigation and in other areas of law. See *Prest v. Petrodel Resources Ltd.* [2013] 2 AC 415 (UK SC) at paras. 37 and 87.

2 *Francis v. Francis*, 1998 CarswellBC 685 (BC SC). See also in *Re Triffitt's Settlement*, Upjohn J. stated that: "Where there is a completely general power in its widest sense, that is tantamount to ownership".

3 Some guidance could have been provided, such as providing a rebuttable presumption of co-Trustees or co-owners of the power being other family members, a solicitor or an accountant.

4 *Tremblay v. Tremblay*, 2016 ONSC 588 (Ont SCJ).

5 See *Charman v. Charman* and *Kan Lai Kwan v. Poon Lok To Auto* at footnote 6.

6 *Charman v. Charman*, 2005 EWCA Civ. 1606, 2006 1 WLR 1053; *Charman v. Charman* (No. 4), 2007 EWCA Civ. 503, 2007 1 FLR 1246; *Whaley v. Whaley*, 2011 EWCA Civ. 617, 2012 1 FKR 735; *Kan Lai Kwan v. Poon Lok To Auto*, 2014 17 HKCFAR 414; and *Kennon v. Spry*, 2008 HCA 256, 2008 238 CLR 366.

7 *Charman v. Charman (No. 4)* at para. 57.

8 2007 EWCA Civ. 503, 2007 1 FLR 1246.

though there was a nominally independent Trustee, were "financial resources" of the husband. The court applied the test of "whether the Trustee would be likely to advance the capital immediately or in the future to the relevant spouse".[9]

Subsection 4(1)(b) is also directed to a power which the spouse does not possess alone. It is directed to a revocable Trust or to an act which commences with the disposition of property. It is not arguable that a power of revocation held alone should result in the inclusion of the value of the trust property in the NFP of the holder. In *Tasarruf Mevduati Sigorta Phonu v. Merryl Lynch Bank and Trust Co. (Cayman) Ltd.*,[10] the Privy Council concluded:

> The powers of revocation are such that in equity,...Mr. Demirel can be regarded as having rights tantamount to ownership....There is no invariable rule that a power is distinct from ownership.

However, subsection 4(1)(b) does not require that such a power be held alone. The particular mischief with paragraph (b) is that it is vague, and the word "consume" is not particularly instructive in assessing the use of trust property as the power to "dispose" of the trust property is clearly included in every trust indenture. Finally, because of the breadth of the definition, neither the legislation nor the jurisprudence appears to have taken into account the fact that if such powers are held in a fiduciary capacity, equitable principles would require that the Trustees, in exercising their discretion or such power, must act in a fiduciary fashion.

The result of such broad definitions is to permit inclusion in the NFP of one spouse of the value of a trust interest which is held for the benefit of persons other than the two spouses. Specifically, paragraph (b) is broad enough to include a power to resettle a Trust made in favour of, for example, the children of the marriage. In that instance, if such property is included in the NFP of one spouse, he or she would be required to make a payment to the other spouse even though neither is a beneficiary of the Trust.[11] Further, despite the fact that the FLA grants significant discretionary powers to the court, it does not grant to the court the power to vary Trusts to permit any one or more of the spouses to become a beneficiary of such a Trust.[12]

Tremblay v. Tremblay is the latest in a series of Ontario cases that have considered the inclusion of an interest in a trust property in NFP under the *Family Law Act* ("FLA").

Practitioners have found the ruling troubling and somewhat opaque. The decision is currently under appeal. It is important for estate planning practitioners to understand how trust assets are likely to be treated in matrimonial litigation when advising clients on the settlement of family trusts, including the type of powers to be reserved to an individual, the extent to which Trustee duties are limited and the identity of Co-Trustees. Frequently, clients will wish to retain as much control as is possible, restraining that wish only to avoid income tax rules that restrict benefits if an individual retains rights that would trigger one of the attribution rules. However, the rights retained in *Tremblay v. Tremblay* are not unusual and do not go so far as other more aggressive trust designs. Estate planners will need to examine more carefully the details that will be considered in a determination as to whether or not a specific bundle of rights will qualify as "property" within the meaning of subsection 4(1).

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9 *Charman v. Charman*, 2005 EWCA Civ. 1606, 2006 1 WLR 1053 at paras. 12 and 13.

10 2011 UKPC 17, [2012] 1 WLR 1721 at para. [59].

11 In *Kennon v. Spry*, 2008 HCA 256, 2008 CLF 366, the court did not accept the position that a husband who held a bare power of appointment among persons that did not include him, should be treated as having owned the property — citing Gibbs J. in *Ascot Investments Pty. Ltd. v. Harper*, (1981) 148 CLR 337 at 354 to 355, at page 46: "It would be unreasonable to impute to the Parliament an intention to give power to the Family Court to extinguish the rights and enlarge the obligations, of third parties, in the absence of clear and unambiguous words...except in the case of shams and companies that are mere puppets of the party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it."

12 Under the New Zealand legislation, the Property (Relationships) Act, 1976, the court has the authority to make a wide variety of orders including orders vesting property and an order varying the terms of any trusts. While the FLA grants to courts the right to vest property, it does not grant the authority under the FLA to vary any trusts.

Before reviewing *Tremblay v. Tremblay*, it is helpful to review an Ontario case decided some two years earlier.

MUDRONJA V. MUDRONJA[13]

This case was decided only two years earlier than *Tremblay* but was not cited in that case.

Eddy Mudronja ("Eddy") had an interest as a beneficiary in the Mudronja Family Trust (the "Trust"). The Trust was settled by Eddy's father. Eddy was the sole Trustee. The beneficiaries were Eddy's wife, Marijana, their issue and the Mareddy Corporation ("Mareddy"). This corporation was owned by Eddy as to 60% and by Marijana as to 40%. The Trust subscribed for non-voting common shares of Jitsu, an operating entity. The Trust also provided that Mr. Mudronja, as a protector, acting personally and not as a fiduciary, had the power to declare that any person or class of persons (including himself) should be included as a beneficiary. At the date of trial, no additional beneficiaries had been appointed.

Marijana submitted that the entire value of the Trust should be attributable to Eddy's NFP since he had the power to control the Trust.

Eddy argued that the trust property should be valued as if 35% were owned by the wife (25% plus 10% referable to her 40% share of Mareddy), 25% by Eddy Jr. (a son), 25% by Thomas (another son) and 15% by Eddy Sr. as he owned 60% of Mareddy.

This approach would be consistent with the approach taken in *Sagl v. Sagl*[14] and in *Kushnir v. Lowry*,[15] in which the interests of all beneficiaries of a discretionary Trust were valued at an amount equal to the value of the trust property divided by the number of discretionary beneficiaries. That approach, however, only deals with the interests of the beneficiaries in the Trust *qua* beneficiaries according to the first part of the definition of "property".

RIGHTS RESERVED

In addition to his interest as a beneficiary, Eddy also held a bundle of rights that would also have qualified as "property". In these circumstances, the court found that the value of the power of appointment was properly owned by Eddy, citing authority for the fact that a general power of appointment is tantamount to ownership:

> [91] This conclusion is supported by the following words of Donovan Waters in D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 97 stating that:
>
> > A general power enables the donee to appoint the property to anyone, including the donee, unless the donee is a fiduciary, and is therefore tantamount to ownership.

The court also noted that the power held by Eddy was held as a protector and was "not as a fiduciary":

> [92] In *Re MacIvor* , [1966] 1. O.R. 307-315 (H.C.) the Ontario High Court described the difference between a personal/ general power and a fiduciary power by invoking the case of *McCarter and Rusznyak v. M.N.R*, 22 D.L.R. (2d) 109, [1959] Ex. C.R. 316, [1959] C.T.C. 313. In *McCarter* the Court stated at para 8 and 9:
>
> > In determining whether or not a power is exercisable in a fiduciary capacity, I am of the opinion that, if the power is such that the holder can dispose of the property to himself, to be used as his own without any restriction as to the circumstances in which he may so exercise it, and without responsibility to any other person, the fiduciary feature contemplated by the

13 2014 ONSC 6217, 2014 CarswellOnt 15112 (Ont SCJ).

14 1997 CarswellOnt 2144, 31 RFL (4th) 405 (Ont Gen Div); additional reasons 1997 CarswellOnt 4984, 35 RFL (4th) 107 (Ont Gen Div).

15 2004 CarswellOnt 530 (Ont SCJ); affirmed 2004 CarswellOnt 3122 (Ont CA); affirmed 2005 CarswellOnt 2367 (Ont CA).

> exception is lacking, and I think this is so whether or not the power is incident to or derived from the holding of a position or office which under other circumstances would by itself imply a fiduciary relationship.

The rights reserved were similar to the extensive rights reserved by Mr. Clayton in the recent decision of *Clayton v. Clayton* of the Supreme Court of New Zealand.[16] In that case, Mr. Clayton was the Settlor, sole Trustee, discretionary beneficiary and had powers as a "Principal Family Member" and Trustee that were "both broad and free from the normal obligations imposed on fiduciaries in family trust deeds". The court concluded that that particular bundle of rights amounted to a power of appointment and allocated all the value of the trust property to Mr. Clayton.[17]

INTEREST OF A DISCRETIONARY BENEFICIARY

The court then addressed the issue of whether or not the interest of the object (i.e. a beneficiary) of a discretionary trust is "property" within the meaning of the FLA. It was noted that this had been considered by the Ontario Courts in *Sagl v. Sagl*[18] and in *Kushnir v. Lowry*[19] where the court accepted the position that the interest of each discretionary beneficiary be valued as if the trust assets were to be divided among the discretionary beneficiaries in equal shares. In a later case, *LeVan v. LeVan*,[20] a husband's interest in a discretionary trust was valued at 25% of the trust assets based on his mother's evidence regarding the parent's intentions in estate planning to treat their four children equally.

Had the court accepted this approach to valuation, 50% of the trust property would have been preserved for the Mudronja children and Marijana Mudronja would have been allocated a higher value for her interest in the trust property than the value attributed to Eddy.[21] However, the court did not follow that approach but rather considered a more reasonable and practical approach, taking into consideration Eddy's control of the Trust. The court held as follows:

> [99] The real question therefore is one of value. What is the value of the Respondent's [Marijana's] discretionary interest as an object in the Mudronja Family Trust, in circumstances where she has no status or right to enforce the allocation and distribution of any capital or interest from the assets of the trust? On V-day she had no right or power to either require or prevent the disposition, transfer or encumbrance of the entire trust value, nor does she currently have such a right or power.
>
> [100] In the circumstances of this case the entire discretionary, unfettered power in relation to the distribution and all dealings with the Trust's assets rest with the applicant. He is her adversary now and was also adverse in interest when the parties separated. I find therefore that the V-day value of the Respondent's interest in the Trust is nominal. To allocate otherwise would have the effect of artificially increasing her NFP, thereby unfairly and inequitably diluting her equalization entitlement arising from the applicant's significant business interests. A value of $1.00 is therefore attributed to the Respondent's interest in the Mudronja Family Trust for purposes of the equalization calculation.

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16 [2016] NZSC 29.

17 In the *Clayton v. Clayton* series of cases (and there were many) the New Zealand Courts examined in great detail the powers of the Trustee, the lower standard of care, the extensive indemnities and the exculpatory clauses which went beyond what would be expected where there is a core obligation of a Trustee.

18 (1997), 31 R.F.L. (4th) 405 (Ont Gen Div), Supp. Reasons (1997), 35 R.F.L. (4th) 107 (Ont Gen Div).

19 [2004] O.J. No. 375 (Ont. S.C.J.).

20 (2006), 82 O.R. (3d) 1, 32 RFL (6th) 291 (Ont. S.C.J.), affirmed (2008), 239 O.A.C. 1 (Ont CA).

21 Eddy's interest as a beneficiary in the Trust would have been derivatively through his ownership of Mareddy.

Such an approach echoes the trend in other common law jurisdictions to balance "worldly realism" with the terms of the Trust.[22]

The court summarized its approach as follows:

> [98] Based on the above-noted authorities, and the need to provide for a fair property settlement following marriage breakdown, I find an interest in a discretionary trust is an interest in property for purposes of equalization pursuant to the FLA… Having regard to the numerous and varied methods spouses choose to arrange their financial affairs during marriage, and the need to ensure an equitable result on marriage breakdown, a beneficial interest in a trust is not automatically excluded from a spouse's net family property merely because it is subject to discretion. The approach needs to be contextual, having regard to the particular circumstances of the parties, their financial situation and the terms of the trust in relation to the marital relationship on V-day.

The *Mudronja* decision properly separated the two interests in the Trust, being that of a beneficiary and that of a person entitled to control the Trust. In this instance, Eddy had retained extensive rights that amounted to control. If it were necessary to transfer part of the trust property to Marijana in order to satisfy his equalization payment, it would have been a simple matter to do so by allocating assets to Marijana as a beneficiary or by adding Eddy as a beneficiary, encroaching on capital for his benefit and transferring the property to him in satisfaction of his capital interest which could be used to pay the equalization payment to Marijana.

The *Mudronja* decision is more in keeping with the analysis followed in the U.K. and other Commonwealth jurisdictions.

TREMBLAY v. TREMBLAY[23]

Facts

Catherine and Jeffrey Tremblay met as teenagers in 1991. They married in 1996 and had two children. They separated in 2012. Both worked hard during their marriage, completed their education and eventually improved their qualifications. Jeff's father, Michael Tremblay, founded a group of companies in which Jeff was employed and served as a senior officer.

In 2009, Jeff's father implemented an estate freeze, the purpose of which was to allow growth of 50% of MH Tremblay Holdings Inc. ("MHTH") to accrue to the benefit of Jeff's family and 50% to Michael's family[24]. Two new holding companies and three new Trusts were created namely, MH Tremblay Family Trust No. 2,[25] the Jeffrey Tremblay Family Trust No. 1 ("Trust #1") and Jeffrey Tremblay Family Trust No. 2 ("Trust #2"). The common shares (growth shares) of MHTH were owned equally by the MH Tremblay Family Trust No. 2 and Trust #1. Despite the fact that various titles were given to Jeff, his father, Michael, retained sole voting control over the corporate entities.

In order to receive dividends from MHTH, another company was created, namely Nictor Holdings Inc. ("Nictor"). The dividend income from MHTH would flow through Trust #1 to Nictor, which was a beneficiary of Trust #1. Nictor received the funds tax-free as a related corporation. The only shareholder of Nictor was Trust #2. Jeff was the sole director of Nictor and had the sole power to declare dividends.

22 See the cases cited at footnote 6.

23 *Supra* at footnote 4.

24 This presumably included Jeff and his family as beneficiaries but this was not clear from the decision.

25 Suggesting there was already an MH Tremblay Family Trust No 1 in existence.

The beneficiaries of Trust #2 were Jeff, Catherine and their two children. The Trustees were Jeff and his two parents.

At the date of separation, approximately $905,000 was held in Nictor.

The issues in dispute related to, among other things, whether the value of shares in MHTH and Nictor should be included in the husband's NFP.

The Issues

Part of the difficulty with this case was the summary of the questions posed, which were in part as follows:

1. determination of the value of shares in MHTH and Nictor and whether that share value should be included in the Respondent's NFP;
2. a determination of whether the Respondent may exclude the value of the Nictor and MHTH from his NFP as having been received by him via gift.

Since Jeff did not own a direct interest in any of the corporate entities, the questions posed were not as precise as they ought to have been, as the issues related to Jeff's and Catherine's interests in Trust #2 which owned the shares of Nictor.

In determining whether or not the shares of MHTH would be included in Jeff's NFP, Phillips J. noted that if funds were held in MHTH, they were "entirely under the control of Michael Tremblay" and concluded that Jeff did not have a property interest in MHTH as defined by section 4 of the FLA.

We note, however, that 50% of the shares of MH Holdings Inc. were owned by Trust #1 and, presumably, there would have been some growth accruing to the common shareholders since the implementation of the estate freeze in 2009. This issue was not addressed at all. Again, it is unclear if the MH Tremblay Trust No. 2, which held the other 50% of the growth shares of MHTH, included Jeff and his family.

As for Nictor, Phillips J. stated that he accepted the evidence that "Nictor was intended to be a holding company for the Respondent to hold his 50% share of any profits that Michael Tremblay would actually disburse from MH Tremblay Holdings Inc." and noted that once funds are in Nictor, Jeff as director has "unfettered autonomous discretion with respect to the issuance of dividends".

He noted that if Jeff caused dividends to issue from Nictor, the only recipient would be Trust #2, under which Jeff was both a Trustee and a beneficiary. He then addressed the issue of whether Jeff's beneficial interest in Trust #2 constituted "property":

> [27] Traditional trust law principles are clear that a person who is the object of trustee discretion to pay out capital in his favour does not have an existing property interest. From a pure property law viewpoint, he has only what is termed an "expectancy". He has the right to be considered by the trustees as a recipient under the trust in accordance with its terms and for the trustees to consider this issue acting in good faith in accordance with their fiduciary duty. As such, he has rights which constitute equitable "choses in action".

Curiously, he did not cite any previous decisions which had already concluded that such an interest did.

He then posed the central question as follows:

> [31] In my view, the central question with respect to determining the **proprietary** character of the Respondent's discretionary

> interest in the Jeff Tremblay Family Trust No.2 **is his ability to control whether distributions of trust property are made to him for his benefit.** His having meaningful control in that regard would undermine the separation as between the entities.
>
> [32] Without trying to set out an exhaustive list, this may involve consideration of the degree to which he **as beneficiary** can directly or indirectly control the actions of the trustees, which may include consideration of such factors as:
>
> (i) any evidence with respect to the founding intent of the trust. Was the trust designed to effectively allow **control by the beneficiary**?;
>
> (ii) the composition of the trustees, including whether **the beneficiary** is a trustee;
>
> (iii) any requirement, including veto powers, that the beneficiary be part of any trustee decisions;
>
> (iv) any history of past trustee actions which demonstrate direct or indirect control by the beneficiary;
>
> (v) any powers of the beneficiary to remove trustees, or to appoint replacement or additional trustees;[26]
>
> (vi) the relationship of the beneficiary to the trustees. Are the trustees independent and at arm's length or are they instead family members or other persons who may not act independently?

Respectfully, these questions seem to confuse the bundle of rights held by Jeff as a Trustee in terms of his ability to control versus his rights as a beneficiary. Specifically, the consideration of "the degree to which he as beneficiary can…control the actions of the trustees" misstates both the facts and the principle of law.

The court noted that Trust #2 was intended to provide for Jeff's family and that Jeff had paid himself from the Trust for "family living expenses".

Power to Remove Trustees

The court noted that while decisions are to be made by majority, "the Respondent has the sole ability to appoint more Trustees" and he concluded that this represents an ability to control the Trust:

> [36] The Respondent and his two parents, Michael and Heather Tremblay, are the trustees. While decisions in the discharge of the trustees' fiduciary obligations to the beneficiaries are made by majority rule, the Respondent has the sole ability to appoint more trustees. I find that his ability to name additional trustees is, in a practical sense, an ability to control the trust, at least insofar as an ability to cause the trust funds to come into his hands should he deem that to be in his and the other beneficiaries' best interests. While I acknowledge that each added trustee would have a personal fiduciary obligation, in my view, practically speaking, the Respondent's ability to select additional trustees' amounts to an ability to ensure his wishes about the best interests of his family will ultimately carry the day. It is, after all, the *Jeff Tremblay* Family Trust. The overwhelming evidence is that the larger Tremblay family is close and has a history of cooperatively

26 The power to remove Trustees appears to have been considered exceptionally relevant to control. See *infra*.

> sharing their considerable wealth. Even if that close relationship were ever to break down the Respondent has the ability to appoint additional trustees with the result that he could prevail over any dissent.
>
> [38] The degree of control that the Respondent has over the Jeff Tremblay Family Trust No. 2 elevates his expectancy into something more like a certainty. I find that degree of control to amount to the Respondent having a present property interest in the property held in Jeff Tremblay Family Trust No.2. As such, the holdings of the Jeff Tremblay Family Trust No.2 are to be considered property in the context of section 4 of the *Family Law Act*.

Since a majority of the Trustees could make a decision contrary to the wishes of Jeff, the court seems to have concluded that if the Trustees had done so, Jeff could have exercised his power to appoint additional and more compliant Trustees. Regrettably though, he concludes that this power as Trustee changed the character of his discretionary trust interest *qua* beneficiary from an "expectancy" to a "certainty".

Generally, with Canadian trusts, it is not usual to have the same extensive type of control that was seen in the Mudronja Family Trust as it would run afoul of subsection 75(2) of the *Income Tax Act*. However, it is not unusual for an individual to have the power to replace Trustees, even though the reservation of such a right is not recommended. Nevertheless, the trend in family law decisions appears to be that a power to change or add Trustees is often one of the factors considered by the courts in determining whether a person has *de facto* control of the trust such that when combined with the position of such a person as a beneficiary, the interest of that individual is tantamount to the ability to consume the whole of the trust property.

In *Kan Lai Kwan v. Poon Lok To Auto* the court reversed the decision of the lower courts to attribute only two-thirds of the Trust to the "matrimonial pot" on the basis that it would be improper for the Trustees to not reserve one-third of the Trust for the child of the marriage. The court held that the terms of the Trust and the letter of wishes indicated that the husband held a dominant position in relation to the administration of the Trust and, in making himself protector of the Trust, he had reserved important powers, including the power to remove the Trustee which was intended to have only a passive role as a shareholder.

Exclusion as a Gift

The second issue addressed was whether or not Jeff could exclude the value of Nictor as held by Trust #2 as having been received by him by way of gift received after the date of marriage, pursuant to subsection 4(2) of the FLA.

Again, the posing of the question in such a fashion confuses the matter since Jeff did not receive any shares of Nictor by way of gift. Rather, he received an interest in Trust #2 by way of gift.

The court adopted the position taken by the Court of Appeal with respect to the law of gift in *McNamee v. McNamee*[27] which also involved an estate freeze. It was concluded that Michael intended that Jeff receive the benefit of Trust #2 as a gift.[28] Phillips J. concluded that Jeff acquired his interest in Trust #2 when it was settled and that there was no evidence suggesting that he paid any consideration to be included in the class of beneficiaries. Therefore, his beneficial interest in Trust #2 came to him by way of gift.

---

27 2011 ONCA 533 (Ont CA).

28 At para. 48.

Inclusion of Trust Interest in Wife's NFP

The court then addressed the issue of Catherine's interest in Trust #2 and concluded that she was "as much of an equitable owner" of Trust #2 as was Jeff.

Without addressing whether or not the discretionary interest was to be treated as an equal property interest *per* the *Sagl* decision, there is no further discussion of the beneficial interests in the Trust #2 or the valuation of the beneficial interests. This might have been on the basis that each was entitled to an equal interest in Trust #2 which cancelled one another in terms of value. However this approach is in contradiction to *Mudronja* which considered that it would be unlikely that the spouse be the object of any beneficial entitlement, particularly where the Trustees were the estranged spouse and his parents.[29]

Exclusion of Trust Interest "Owned"

Phillips J. then addressed the issue of whether or not Jeff "owned" the property in question on the valuation date (the date of separation) and concluded that "although this interest amounts to property as contemplated by section 4(1) of the FLA, that finding does not equate to a finding of ownership. The proposition that ownership leads to a property interest does not necessarily work in reverse". He then concludes as follows:

> [55] I conclude that the Respondent has not discharged his onus under section 4(3) of the *Family Law Act* to exclude his interest in the Jeff Tremblay Family Trust No.2 as property owned by him on valuation date acquired by gift.

Subsection 4(3) of the FLA states that the onus of proving a deduction under the definition of NFP or an exclusion under subsection 4(2) is on the person claiming it. "Excluded property" is defined in subsection 4(2) and includes "property, other than a matrimonial home that was acquired by gift or inheritance from a third person after the date of the marriage". Having concluded that the property in question was the interest in Trust #2 and that the trust interest had been received by way of gift, it made no sense to conclude that the onus had not been discharged.

The distinction between owning property and not owning property is ephemeral and there is no guidance given as to why the existence of a property interest does not amount to ownership of a property interest. There was some prior discussion regarding ownership of trust property being split between a Trustee and a beneficiary with a beneficiary having "what could be called equitable ownership". However, the reasoning is unclear and estate planners who are relying on the fact that a trust interest acquired after the date of marriage would be excluded from NFP will need to consider very carefully the significance of this case and the meaning of the finding that although the trust "interest" was property, it was not "owned".

Presumably on the appeal, the *Mudronja* case will be drawn to the attention of the Court of Appeal and some clarification will be made of the distinction between the existence of a property right and its ownership.

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29 *Mudronja v. Mudronja*, 2014 ONSC 6217, 2014 CarswellOnt 15112 (Ont SCJ).

IMPACT OF BUDGET 2016 ON YOUR FINANCIAL PLANNING

Tina Tehranchian, MA, CFP, CLU, CHFC

Excerpt from ***Taxes & Wealth Management Newsletter, May 2016, Issue 9-2, pp. 20-22***

Finance Minister Bill Morneau presented the first federal budget of Prime Minister Justin Trudeau's Liberal government on March 22, 2016.

Budget 2016 included a big emphasis on infrastructure spending, eliminated certain tax credits and advantages, and tried to eliminate tax structures that abused the system. Other significant changes introduced in this budget included the introduction of a new method of depreciation of eligible capital property and reduction of the eligibility age for Old Age Security and Guaranteed Income Supplement from 67 to 65.

According to the new budget, a deficit of $5.4 billion is expected for Canada in 2015-2016, which will grow to $29.4 billion in 2016-2017 and will gradually decrease after that with no indication of when Canada will have a balanced budget again.

A detailed explanation of the significant tax measures proposed in Budget 2016 that would have an impact on your personal financial planning follows.

PERSONAL TAX MEASURES

New Canada Child Benefit

In an effort to provide more benefits to lower-and-middle income families, Budget 2016 proposed to replace the current Canada Child Tax Benefit (CCTB) and the Universal Child Care Benefit (UCCB) with a new Canada Child Benefit (CCB).

The Canada Child Benefit provides greater benefits for families at lower income levels and is tax-free. It will start on July 1, 2016 and will provide a non-taxable maximum benefit of $6,400 per child under the age of six and $5,400 per child for children who are age six through 17. If a child is eligible for the disability tax credit, the CCB maximum is increased by an additional $2,730. The CCB maximum benefit levels will be reduced based on family income and the number of children in the family.

According to the government the new Canada Child Benefit will help nine out of 10 families save an estimated $2,300 a year. It would therefore be prudent for families with children who are 17 and under to funnel their tax savings into a Registered Education Savings Plan (RESP) to save for their children's higher education and take advantage of the 20% Canada Education Savings Grant (CESG) that the government will pay on up to $2500 of annual savings in an RESP.

Elimination of Family Tax Cut

The Conservative government of Stephen Harper had enacted the family tax cut that allowed income splitting between spouses. This would allow a higher-income spouse with at least one child under 18 to notionally transfer up to $50,000 of taxable income to his/her spouse or common-law partner, in order to reduce the couple's total income tax liability by up to $2,000.

Budget 2016 proposed to eliminate the family tax cut effective for 2016 and future taxation years.

Elimination of Education and Textbook Tax Credits

According to Budget 2016, starting in 2017, the education and textbook tax credits will be eliminated. However, any unused education and textbook tax credits carried forward from years before 2017 will remain available to be claimed in 2017 and subsequent years.

Elimination of Children's Fitness and Arts Tax Credits

Budget 2016 proposed to phase out the Children's Fitness and Arts Tax Credits by reducing the maximum eligible amount for 2016 (to $500 for Children's Fitness Tax Credit and $250 for Children's Art Tax Credit) and to eliminate both tax credits for 2017 and subsequent taxation years.

Taxation of Fund Switches in Corporate Class Mutual Funds

Currently, switching funds in a mutual fund corporation (commonly referred to as Corporate Class Mutual Funds) will not trigger any taxes and the *Income Tax Act* does not deem the exchanges to be dispositions for income tax purposes.

Budget 2016 surprised the investment community by proposing to amend the *Income Tax Act* so that starting September 2016 an exchange between different classes of funds in mutual fund corporations will be deemed to be a disposition at fair market value.

If the shares that are exchanged only differ in respect of management fees or expenses borne by the investor, and otherwise drive their value from the same fund or portfolio within the mutual fund corporation, then the proposed changes will not apply.

Taxation of Linked Notes

An equity linked note is a debt instrument whose return is determined by the performance of a single equity security or stock, a basket of stocks, or an equity index.

It has been a common practice for investors in linked notes to sell the notes prior to maturity. By doing so they were able to convert the tax treatment of the return from interest income to capital gains. Based on Budget 2016, for linked notes offered after September 2016, the return on a linked note will be treated as interest income whether it is earned at maturity or through a sale on a secondary market before maturity.

Return of the Labour-Sponsored Venture Capital Corporations (LSVCC) Tax Credit

The federal Labour-Sponsored Venture Capital Corporations (LSVCC) tax credit was introduced in the 1980s when access to venture capital for small and medium-sized businesses was limited. However, the economic environment and the structure of the venture capital market have changed significantly since that time.

While the federal tax credit for federally registered LSVCCs will remain at five percent for the 2016 taxation year and will be eliminated for the 2017 and subsequent tax years, Budget 2016 proposed to restore this tax credit to 15 per cent for share purchases of provincially registered LSVCCs for 2016 and subsequent taxation years.

Ontario Electricity Support Program

The Ontario Electricity Support Program (OESP) will provide assistance to low-income households in Ontario for the cost of electricity effective January 1, 2016. The OESP, which is based on household income and the number of people living in the household, will provide a non-taxable monthly credit on a tax payer's electricity bill.

Mineral Exploration Tax Credit for Flow-Through Shares Investors

According to Budget 2016, the eligibility for the mineral exploration tax credit will be extended for one year, to flow-through share agreements entered into, on or before March 31, 2017.

This tax credit provides investors in mining flow-through shares with a credit equal to 15 per cent of specified mineral exploration expenses incurred in Canada.

Retirement Income Improvements

Budget 2016 included a number of welcome improvements to retirement income provisions for Canadians including the following:

1. Guaranteed Income Supplement (GIS) for low-income single seniors will be increased.
2. The Canada Pension Plan (CPP) will be enhanced and the government's goal is to make a collective decision in this regard with the provinces and territories before the end of 2016.
3. Old Age Security benefit will start at 65 years old instead of at 67.
4. Benefits will be increased for senior couples who live apart for health or other reasons in recognition of the fact that they face higher expenses.

Increase in Canada Student Grant

Budget 2016 proposed to increase Canada Student Grant amounts by 50 per cent, from $2,000 to $3,000 a year for low-income families; from $800 to $1,200 per year for middle-income families; and from $1,200 to $1,800 for part-time students.

Setback for Charitable Donations

While the measure announced in Budget 2015 that provided an exemption from capital gains for certain dispositions of private corporation shares or real estate where the cash proceeds from the disposition are donated to a registered charity within 30 days drew cheers from the charitable sector, Budget 2016 announced the government's intention not to proceed with this measure.

Therefore, if you had done any estate planning based on this tax measure, you would need to revise your planning based on the new changes proposed in Budget 2016.

Increase in Top Tax Rate on Personal Service Business Income

As a result of the new top marginal personal income tax rate being increased to 33% effective January 1, 2016, a federal tax rate increase from 28% to 33% on personal service business income earned by a corporation is proposed to be introduced to the *Income Tax Act.* Therefore, the combined corporate income tax rate in Ontario will increase to 44.5% on personal service business income.

BUSINESS TAX MEASURES

Small Business Tax Rate

Based on previous budgets the federal small business tax rate applicable on the first $500,000 of business income earned by a Canadian-controlled private corporation (CCPC) had been legislated to reduce to 9%. However, despite an election promise to reduce the small business tax rate over the next three years, Budget 2016 not only did not include any reductions to the small business tax rate but instead proposed to cancel these previously legislated reductions and to keep the small business tax rate at 10.5 per cent after 2016.

Multiplication of Small Business Deduction

For years, skilled and experienced accountants had helped their small business owner clients multiply their $500,000 small business deduction through creative and complicated tax planning. Budget 2016 put an end to this type of planning and proposed to prevent business owners from multiplying access to the $500,000 small business deduction through the use of complex partnerships and corporate structures effective March 22, 2016.

Life Insurance Policies

Going forward, the government is planning to close loopholes that allow private corporations to use a life insurance policy to distribute amounts tax-free that would otherwise be taxable.

Transfer of an interest in a life insurance policy to a corporation will be affected by this change in rules. Budget 2016 proposed to amend the *Income Tax Act* to ensure that when a disposition of an interest in a life insurance policy happens, the amounts are not received tax-free by a policyholder. While in the past proceeds of disposition of the policy were equal to the policy's cash surrender value, after March 22, 2016 the fair market value of any consideration received in exchange for an interest in a life insurance policy will be included in the policyholder's proceeds of disposition.

Back-to-Back Shareholder Loan Rules

Budget 2016 proposed that in situations where the interposition of a third party between the corporation and the shareholder prevents the shareholder loan rules to be applied, new legislation will make it possible to look through the third party and have the shareholder loan rules apply so that if a debt owing to a shareholder from a corporation is outstanding for more than a year, either the loan or a prescribed rate imputed interest benefit is included in the shareholder's income.

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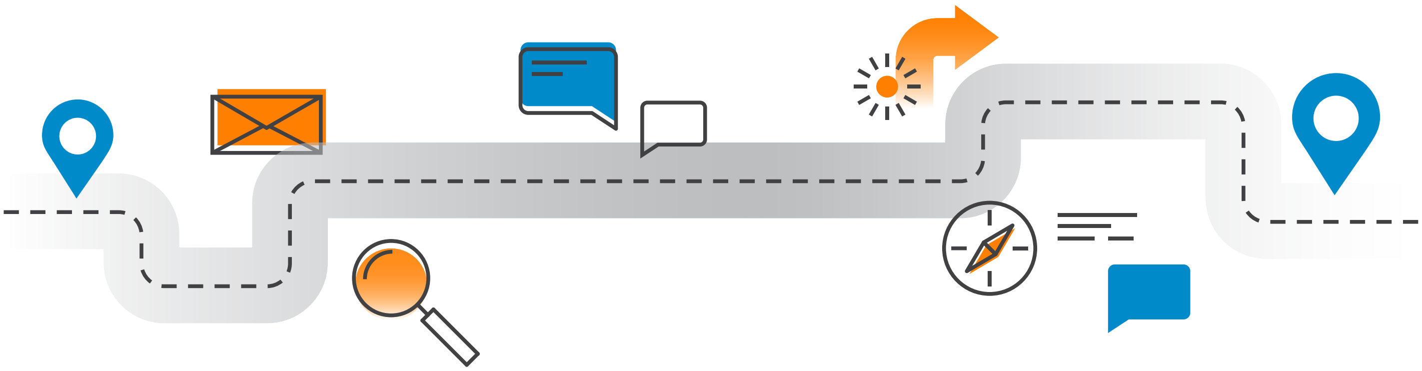
CANADA RELEASES CONSULTATION ON COUNTRY-BY-COUNTRY PROPOSALS

Thomson Reuters Tax & Accounting



On July 29, 2016, the Canadian Department of Finance released for consultation draft legislative proposals that would implement certain measures from the 2016 Budget.

One of the proposed measures would amend the *Income Tax Act* (the "Act") by creating a new section 233.8, setting out the reporting requirements for the country-by-country (CbC) report as discussed in the BEPS Action 13 recommendations. The new section would apply to reporting fiscal years of MNE groups that begin on or after January 1, 2016. The amendments define specific terms, as well as determine the filing obligations for the report.

Section 233.8 defines a multinational enterprise (MNE) group as two or more business entities that include the following:

- Are required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the business entities were traded on a public securities exchange.
- One of the business entities is resident in a particular jurisdiction and (i) another business entity resides in a different jurisdiction, or (ii) is subject to tax in a different jurisdiction with respect to a business carried on by it through a permanent establishment.
- Have a total consolidated group revenue of at least €750 million during the fiscal year immediately preceding the particular fiscal year.

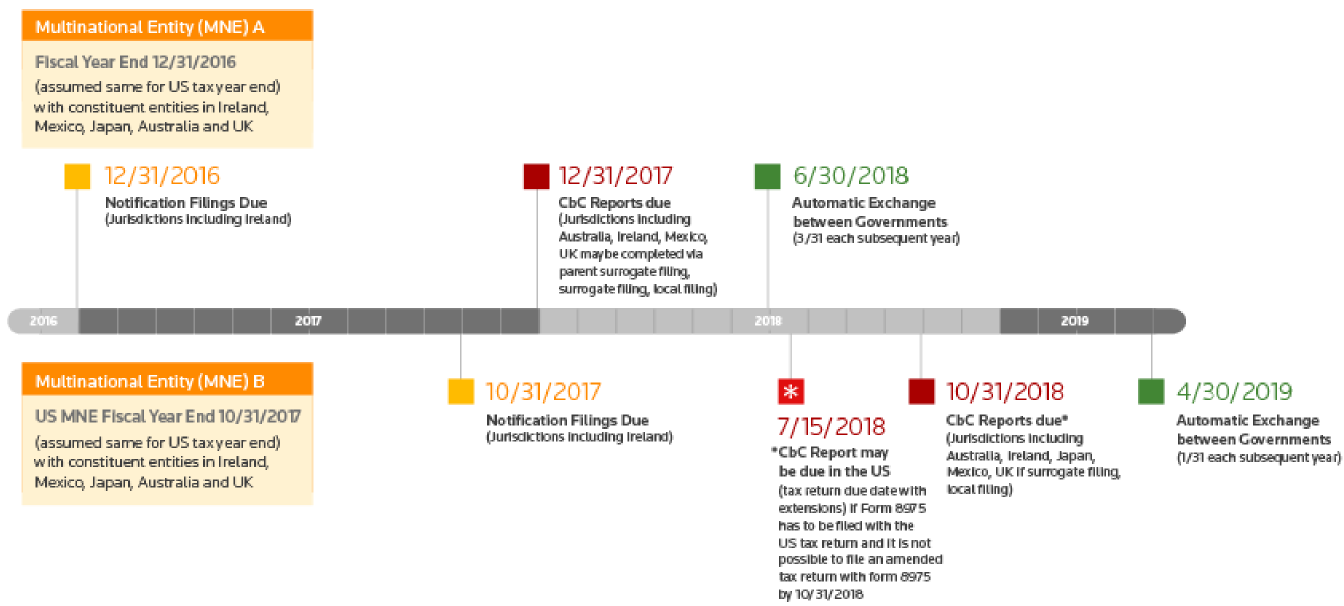
A CbC report shall be filed for the reporting fiscal year of an MNE group on or before the specified date by (a) the ultimate parent entity of the MNE group, if it is resident in Canada in the reporting fiscal year; or (b) a constituent entity of the MNE group (not the ultimate parent entity) if the following conditions are satisfied:

- The constituent entity is resident in Canada in the reporting fiscal year.
- One of the following conditions applies:
  - The ultimate parent entity of the MNE group is not obligated to file a CbC report in its jurisdiction of residence.
  - The jurisdiction of residence of the ultimate parent entity of the MNE group does not have a qualifying competent authority agreement in effect to which Canada is a party on or before the time specified for filing the report.
  - There has been a systemic failure of the jurisdiction of residence of the ultimate parent entity and the constituent entity has been notified.

A CbC report that is required to be filed by a constituent entity shall be filed on or before the later of (a) if notification of systemic failure has been received by the constituent entity, 30 days after receipt of the notification; and (b) 12 months after the last day of the reporting fiscal year.

BEPS Timeline – Dates You Need to Know

COUNTRY-BY-COUNTRY (CbC) REPORTING TIMELINE



EXAMPLE 1: CbC REPORTING APPLICABLE STARTING FROM 2016 FISCAL YEAR

- **12/31/2016**: U.S. MNE Fiscal Year End (assumed same for U.S. tax year end) with constituent entities in Ireland, Mexico, Japan, Australia and UK
- **12/31/2016**: Notification Filings (Jurisdictions including Ireland)
- **12/31/2017**: CbC Reports (Jurisdictions including Australia, Ireland, Mexico, UK may be completed via parent surrogate filing, surrogate filing, local filing)
- **06/30/2018**: Automatic Exchange Between Governments (March 31st each subsequent year)

EXAMPLE 2: CbC REPORTING APPLICABLE STARTING FROM 2017 FISCAL YEAR

- **10/31/2017**: U.S. MNE Fiscal Year End (assumed same for U.S. tax year end) with constituent entities in Ireland, Mexico, Japan, Australia and UK
- **10/31/2017**: Notification Filings (Jurisdictions including Ireland)
- **10/31/2018***: CbC Reports (Jurisdictions including Australia, Ireland, Japan, Mexico, UK, U.S. may be completed via ultimate parent filing, surrogate filing, local filing)
- **04/30/2019**: Automatic Exchange Between Governments (January 31st each subsequent year)

**CbC Report may be due in the U.S. by 7/15/2018 (tax return due date with extensions) if Form 8975 has to be filed with the U.S. tax return and it is not possible to file an amended tax return with Form 8975 by 10/31/2018.*

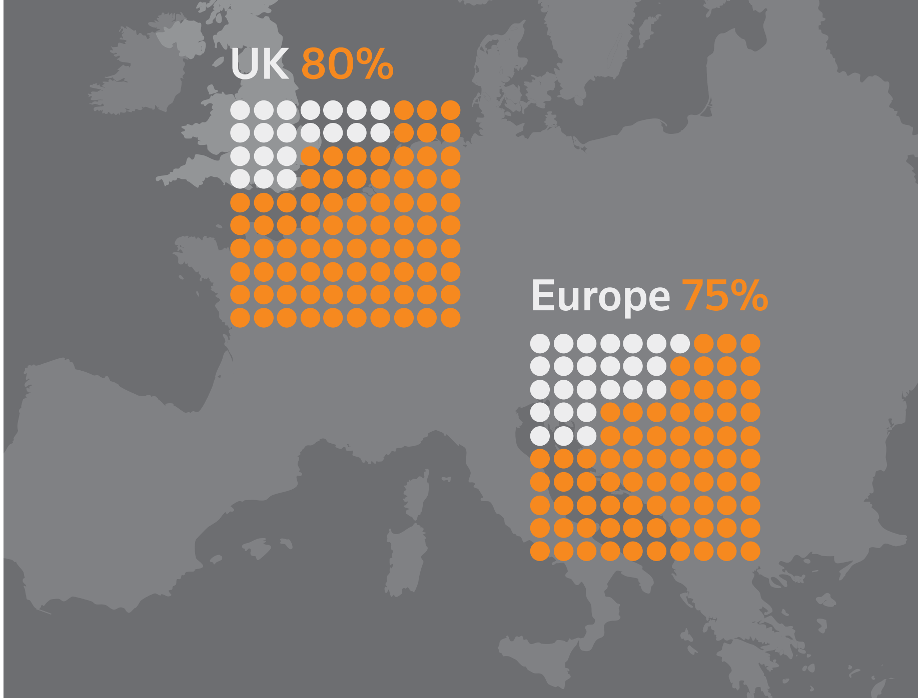
BEPS: YEAR ONE

EUROPE, UK LEADING THE CHARGE

Among all countries, the percentage of respondents who report proactively taking steps in responding to BEPS has increased by 12 percentage points year-over-year (54% to 66%). Three-quarters (75%) of European and 80% of UK respondents report proactively taking steps, higher than the aggregate results (66%).

What has best described your approach in responding to BEPS?

Proactively taking steps based on the BEPS recommendations



Aggregate Values

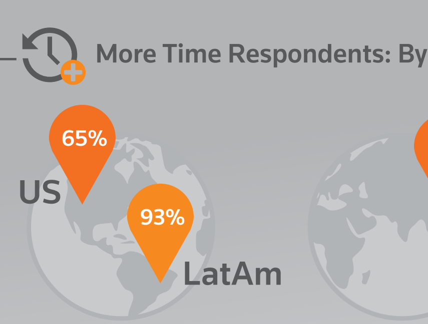
Proactively taking steps based on the BEPS recommendations	65.9%
Waiting for countries to implement	21.6%
Waiting for peers to make a move	6.7%
Waiting for all action points in the project to be finalized before you act	2.9%
Not doing anything at all	2.9%

MIND THE GAP

How are tax departments taking these s
for additional budget? Across the regior
professionals has been spending more t
Headcount is next, followed by advance
tax rulings in any country.

What changes has the BEPS action
(Respondents were able to make multipl

More Time Respondents: By



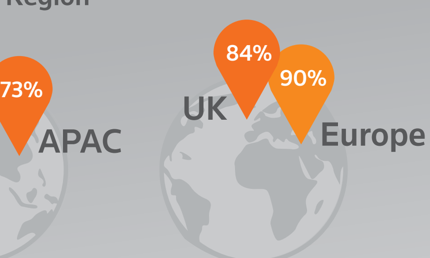
Which BEPS action item
most concern amongst
Report, available on our

In association with International Tax Review, Thomson Reuters conducted a survey of tax professionals from multinational enterprises (MNEs) around the world regarding their preparation for the OECD's Base Erosion and Profit Shifting (BEPS) Action Plan and the impact it has had on their companies, one year in. Here are some of the results.

steps when they have no commitment
ns, the overwhelming change for tax
time on BEPS-related compliance.
pricing agreements (APA) or other

plan meant to your department?
e selections)

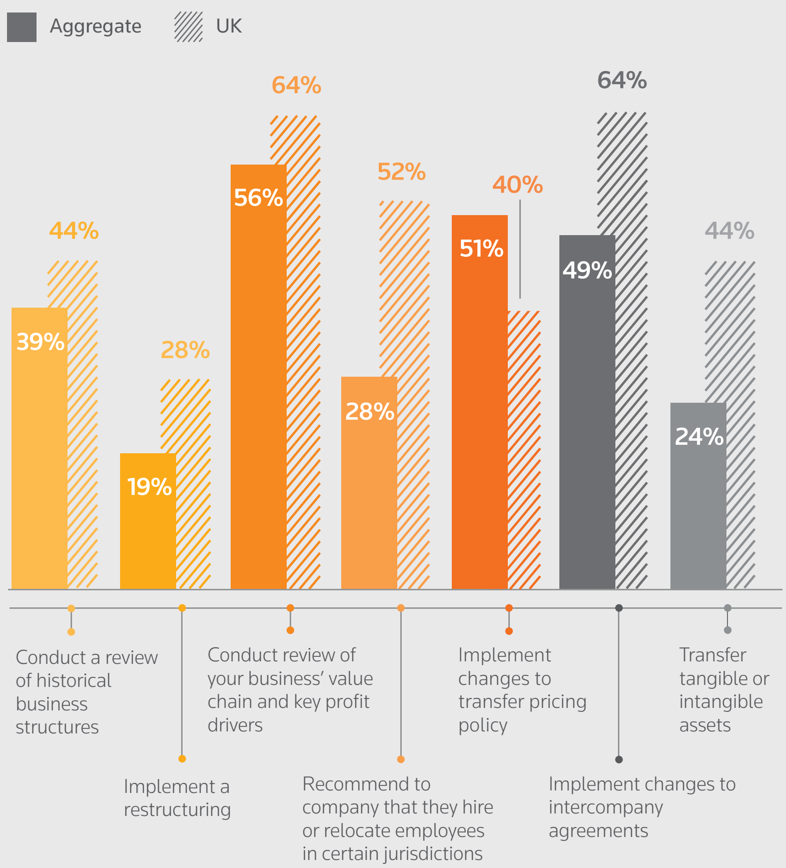
Region



DUE DILIGENCE FIRST, THEN CHANGE

When asked what business operational changes have been or will be made after BEPS implementation, reviewing value chain drivers and key profit drivers led responses across Europe, the UK and the US. It's also notable that the UK tracked higher than the aggregate implementation of business operational changes in six out of seven categories.

What changes, promoted by BEPS implementation, have been made, or will be made, to your business operations?
(Respondents were able to make multiple selections)



n has driven the most business change amongst the respondents? What jurisdictions are causing the the MNEs we polled? What solutions are companies favouring? Find out more in our BEPS Readiness r website: **tax.tr.com/BEPS**

STRATEGIES, SOLUTIONS, AND INSIGHTS TO TODAY'S DIFFICULT CROSS-BORDER TAX PROBLEMS

David W. Chodikoff, LL.B., David Kerzner, LL.M., Ph.D., and Max Reed, B.C.L./LL.B.

*This excerpt of a white paper by industry experts for Thomson Reuters Tax & Accounting Canada analyzes the implications of an increasingly litigious climate upon taxation professionals and their clients. To access the entire article online, visit **www.gettaxnetpro.com/cross-border-tax-problems**.*

The International Consortium of Investigative Journalists (ICIJ) leak this year yielded evidence that, in the past three years alone, offshore trusts, corporations, and individuals with unreported accounts are estimated to hold in excess of $21 trillion.

We have seen an unprecedented rise in the United States' use of criminal prosecution to obtain taxpayer information in the form of John Doe summonses and non-prosecution agreements. And we've seen major scandals involving some of the largest banks in the world, such as PNC, Paribas in France, Commerce Bank in Germany, many of the well-known Swiss banks, and, more recently, HSBC.

Where there is bank secrecy, there is often a convergence of evil: international tax evasion, global financial crime, and international terrorism.

Where there is bank secrecy, there is often a convergence of evil: international tax evasion, global financial crime, and international terrorism. As Professor Arthur Cockfield observes in his study of the 2013 "big data" leak by the ICIJ, offshore service providers such as trust and finance companies take advantage of tax haven secrecy to help individuals engage in global financial crime.

Commenting on the guilty plea of *BNP Paribas* in 2014, U.S. District Attorney Cyrus R. Vance, Jr. recognized that such shared values in the international community as human rights, peaceful coexistence, and a world free of terror are dependent on the enforcement of our laws and, in particular, on a banking system that is not permitted to be a conduit for criminal activity.

The string of global banking scandals from 2008 to 2015 and from UBS to HSBC connotes a code of conduct observed by the leadership of global banks that runs counter to such values, and is neither moral nor right.

The 2016 announcement by the ICIJ of the Panama Papers, an additional leak of more than 11.5 million financial and legal records revealing more than 214,000 offshore entities, have ushered in a greater sense of urgency in Canada, and around the world to create new pathways and strategies across the global financial industry to recognize and prevent the dangers associated with tax evasion.

FATCA and the new IRS offshore disclosure programs now have approximately 8 million U.S. citizens living outside the United States in their sights.

As part of the veritable tsunami of new laws on global exchange of information, the United States has implemented an unprecedented information exchange program known as the *Foreign Account Tax Compliance Act* (*FATCA*) in over 80 nations, including Canada and the United Kingdom. *FATCA* is designed to force foreign financial institutions to give up the names of U.S. account holders or face substantial penalties. *FATCA* and the new IRS offshore disclosure programs now have approximately 8 million U.S. citizens living outside the United States in their sights.

The extraterritorial enforcement by the United States of its tax and reporting laws, combined with the new Common Reporting Standard to take effect in Canada in 2018, pose inescapable challenges for estate planning and private wealth advisers globally. With the current global emphasis on offshore tax evasion, it is imperative that tax professionals are equipped with the best possible awareness of issues and hidden land mines within the fields of cross-border investments and mobility between the United States and Canada.

Never before have tax professionals and their clients had more to lose by suboptimal planning, implementation, and compliance.

Continue reading at
www.gettaxnetpro.com/cross-border-tax-problems

About the Authors

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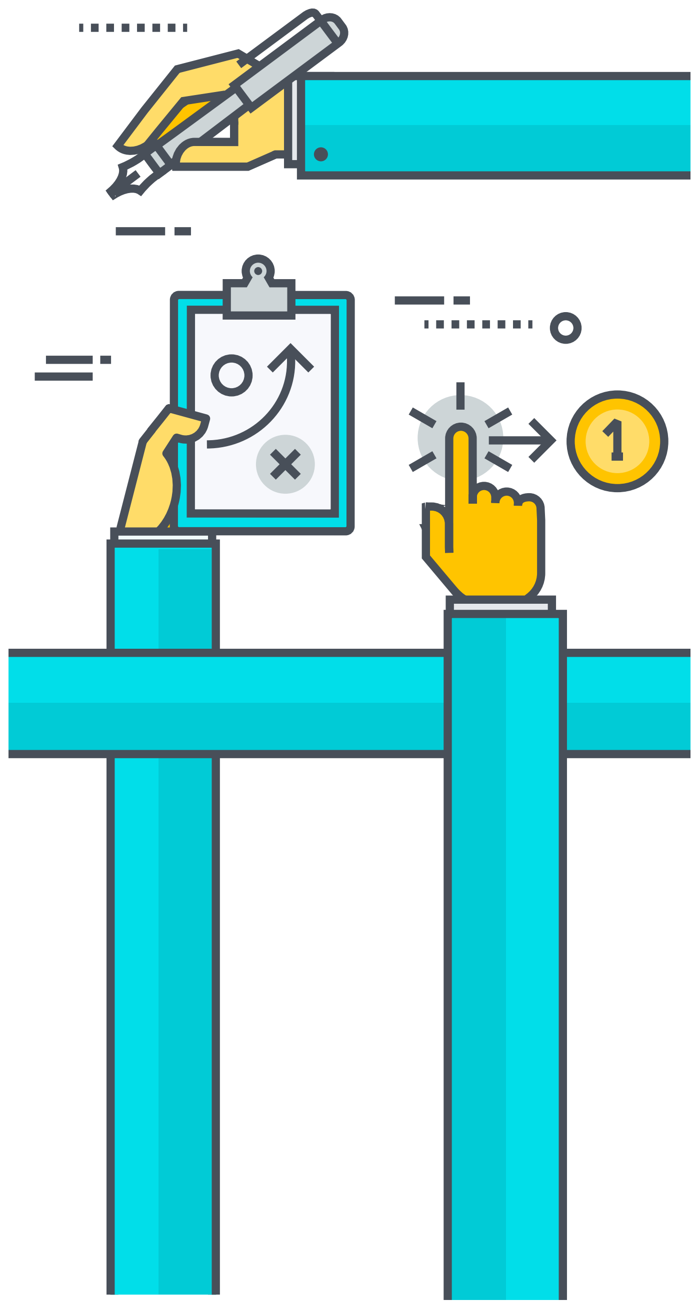
David is the National Leader of Miller Thomson's Tax Litigation Group, representing individuals and corporations in civil and criminal disputes with revenue authorities on a provincial, national and global basis. He is a prolific writer and editor of authoritative domestic and international works in the areas of tax law and tax litigation, with tax publications including *Transfer Pricing and Tax Avoidance*, *Tax Litigation*, and *Advocacy and Taxation*. David holds an AV Preeminent® Rating in Martindale-Hubbell and the International Tax Review has consistently ranked him one of the leading tax controversy advisors in the world since 2013.

David Kerzner, LL.M., Ph.D.

David is admitted to the bar in New York and Ontario and has been creating cross-border tax and legal solutions for businesses and individuals for more than 24 years. David manages the U.S. tax and legal affairs of private individual and business clients in Toronto. His books on international tax law are published by pre-eminent Canadian and global publishers including Thomson Reuters, Irwin Law, Palgrave Macmillan, and Springer. His co-authored published works include: *The Tax Advisor's Guide to the Canada-U.S. Tax Treaty; The Manager's Guide to International Tax*; *International Tax Evasion in the Global Information Age;* and *Practical Insights: Canada's Tax Information Exchange Agreements* (forthcoming in 2016 on Taxnet Pro™).

Max Reed, B.C.L./ LL.B.

Max is a cross-border tax lawyer with a focus on U.S. taxation for Canadians. He is the co-author (with Dick Pound of Stikeman Elliot) of *A Tax Guide for American Citizens in Canada*, and several technical publications, including a recent article on the U.S. tax classification of Canadian mutual fund trusts. Prior to his current role with SKL Tax, Max worked at White & Case LLP, an international law firm in New York City where he provided U.S. tax advice to individuals, corporations, and foreign states.

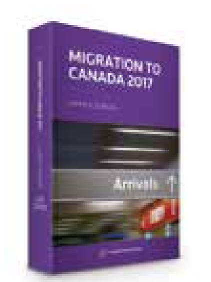


WHAT'S TRENDING?

- CRA Income Tax Folios S3-F10-C1, S5-F4-C1 and S3-F10-C2 and Chapter History S3-F10-C1 released Friday September 2, 2016.
  - Folio de l'impôt sur le revenu S3-F10-C2 – Placements interdits – REER, FERR et CÉLI (ARC)
  - Income Tax Folio S3-F10-C2 – Prohibited Investments – RRSPs, RRIFs and TFSAs (CRA)
  - Folio de l'impôt sur le revenu S5-F4-C1, Monnaie de déclaration (ARC)
  - Income Tax Folio S5-F4-C1 – Income Tax Reporting Currency (CRA)
  - Historique du chapitre S3-F10-C1 – Placements admissibles – REER, REEE, FERR, REEI et CÉLI (ARC)
  - Chapter History S3-F10-C1 – Qualified Investments – RRSPs, RESPs, RRIFs, RDSPs and TFSAs (CRA)
  - Folio de l'impôt sur le revenu S3-F10-C1 – Placements admissibles – REER, REEE, FERR, REEI et CÉLI (ARC)
  - Income Tax Folio S3-F10-C1 – Qualified Investments – RRSPs, RESPs, RRIFs, RDSPs and TFSAs (CRA)
- A new Canada-Israel Tax Convention, replacing the 1975 treaty between the countries, was signed on Sept. 21, 2016 and released on Sept. 23, 2016
- On September 16, 2016, the Department of Finance Canada released draft proposals that are technical amendments to the *Income Tax Act* to improve the efficiency of existing income tax rules on bond premiums, foreign spin-offs and shareholder benefits, Scientific Research and Experimental Development (SR&ED), upstream loans, partnership stop-loss rules, eligible pension income, trust attribution, exception – hybrid entities, Foreign Affiliates, and much more
- Federal Bill C-2, implementing the middle-class income tax cut, received First Senate Reading on Sept. 27, 2016

WHAT'S NEW FROM THOMSON REUTERS TAX AND ACCOUNTING CANADA

September



Migration to Canada 2017

Garry Duncan, FCPA, FCA, CFP

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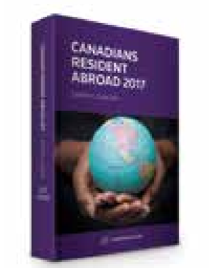
Citizens of many nations are on the move for employment, retirement or to join their families in various countries around the world. Canada is one such destination. Now there is a single resource covering the basic requirements to come to Canada, the tax consequences of coming to Canada, taxation on a resident and the essential matters to consider before and after you settle in Canada.



Canadians Resident Abroad 2017

Garry Duncan, FCPA, FCA, CFP

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Practitioner's Goods and Services Tax Annotated with Harmonized Sales Tax 2016, 33rd Edition – Supplement

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Keep up to date with the latest changes to the GST/HST legislation, regulations and selected remission orders. This supplement includes all recent legislation since the publication of the 33rd edition. More than just legislative updates, this comprehensive supplement also includes up-to-date amendments and David Sherman's expert insight and detailed annotations.

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November

Tax Planning for You and Your Family 2017

KPMG LLP, Paul B. Hickey, CPA, CA (Toronto), Peter J. Bangs, CPA, CA (Ottawa), and Carol Bethune, MA (Toronto)

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In Canada, taxes are one of the biggest obstacles to the creation and preservation of independent wealth. Whether you're a student, a married or single parent, an executive or the owner-manager of your own business, this book offers practical, easy-to-understand strategies that can help you keep more of your hard-earned dollars and boost your family's net worth.

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Practitioner's Ontario Taxes Annotated 2016, Fall Edition

Giselle Feldman, M.B.A., M.Tax.

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Practitioner's Goods and Services Tax Annotated with Harmonized Sales Tax 2016, 34th Edition

David M. Sherman, B.A., LL.B., LL.M.

Softcover | 978-0-7798-7231-2 | $148

ProView | A23667-34ON | $148

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The primary information related to GST is all contained in this one handy, softcover volume – the complete, authoritatively updated texts of the GST, HST and non-GST portions of the *Excise Tax Act* and Regulations, augmented by draft legislation, GST-related Remission Orders and Technical Notes – all cross-referenced with detailed annotations to related provisions, definitions, case annotations summarizing each case's relevance, memoranda, technical information bulletins, policy papers, forms, history and much more. The book also features a Topical Index, newly updated, comprising more than 13,000 separate line entries with extensive references to all legislation, regulations and Canada Revenue Agency publications.

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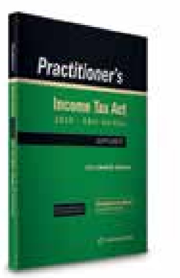
December



Practitioner's Income Tax Act 2016, 50th Edition – Supplement

David M. Sherman, B.A., LL.B., LL.M.

Softcover | 978-0-7798-7227-5 | $39

ProView | A23549-50S1 | $39

Print + ProView | L7798-7223BS | $43

The Practitioner's Income Tax Act 2016, 50th Edition Supplement allows you to be up to date with the latest changes to the *Income Tax Act*. This supplement includes all recent legislation since the publication of the 50th edition. More than just legislative updates, this comprehensive supplement also includes up-to-date amendments and David Sherman's expert insight and detailed annotations.

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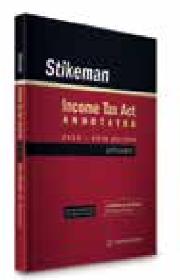

Stikeman Income Tax Act, 60th Edition – Supplement

Richard W. Pound, O.C., O.Q., Q.C., FCPA, FCA

Softcover | 978-0-7798-7228-2 | $39

ProView | A23563-60S1 | $39

Print + ProView | L7798-7224BS | $43

This *Stikeman Income Tax Act, 60th Edition Supplement* includes all recent legislation since the publication of the 60th edition. More than just legislative updates, this comprehensive supplement also includes up-to-date amendments and Richard Pound's expert insight and detailed annotations.

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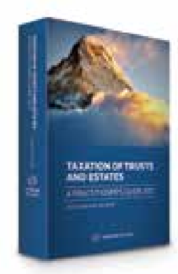


Taxation of Trusts and Estates: A Practitioner's Guide 2017

Grace Chow, CPA, CA, FCCA, FTIHK, TEP, Ian Pryor, LL.B., B.Comm., B.A., TEP

Softcover | 978-0-7798-7233-6 | $106

Taxation of Trusts and Estates: A Practitioner's Guide 2017 is an essential handbook and research source for lawyers, accountants, trust administrators, and trust officers. Professionally compiled by an experienced multi-disciplinary team, this publication provides comprehensive in-depth commentary on trust and estate-planning concepts, and a discussion of the use of various types of trusts.

Preparing the T3 Trust Income Tax and Information Returns and Schedules with accuracy and certainty is no small task. To help you accomplish this quickly and correctly, this comprehensive guide offers clear, practical solutions and commentary for each step of the Return.

December

Insight into Canadian Income Tax 2016-2017 Edition

Editor: Joanne E. Magee, M.B.A., LL.M,. FCPA, FCA, CFP

Softcover | 978-0-7798-7636-5 | $162

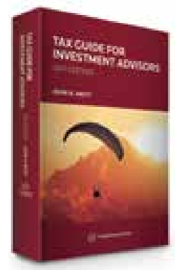
Insight into Canadian Income Tax is a comprehensive, straightforward introduction to the Canadian income tax regime. The book discusses all the basic concepts in personal and corporate taxation, and serves as a useful reference work for tax and accounting professionals in both private and public companies.

Insight into Canadian Income Tax Problems and Solutions Manual 2016-2017 Edition

Editor: Joanne E. Magee, M.B.A., LL.M, FCPA, FCA, CFP

Softcover | 978-0-7798-7637-2 | $32

The Problems and Solutions manual includes fully revised and updated practice situations in conjunction with *Insight into Canadian Income Tax 2016-2017 Edition*. This manual will help students test their knowledge and comprehension of the material.

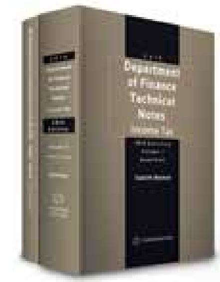


Tax Guide for Investment Advisors 2017

John R. Mott, CPA, CA, CFP, TEP, CPA (Illinois)

Softcover | 978-0-7798-7232-9 | $65

Tax Guide for Investment Advisors, 2017 Edition is an indispensable resource on relevant tax information, written especially for Canadian investment advisors. The text is clear and comprehensive, supplemented by numerous examples and illustrations, and provides in-depth coverage of the tax topics that are critical to advising clients effectively.



2016 Department of Finance Technical Notes: Income Tax, 28th Edition

David M. Sherman, B.A., LL.B., LL.M.

Softcover | 978-0-7798-7214-5 | $281

Get finance's explanation of the purpose and application of each section of the *Income Tax Act* and an explanation of each amendment organized by section of the Act – in the words of those who drafted the amendments.

This work consolidates and organizes the following 12 sources of information going back to 1946: Technical Notes/ Explanatory Notes, Notices of Ways and Means Motions, Budget Supplementary Information, Budget Speeches, June 1987 Tax Reform White Paper, December 1987 Tax Reform Supplementary Information, Press Releases, De Boo Budget Date Comments, June 1971 Tax Reform Summary, House of Commons Finance Committee Reports, Regulatory Impact Analysis Statements, and Department of Finance comfort letters.

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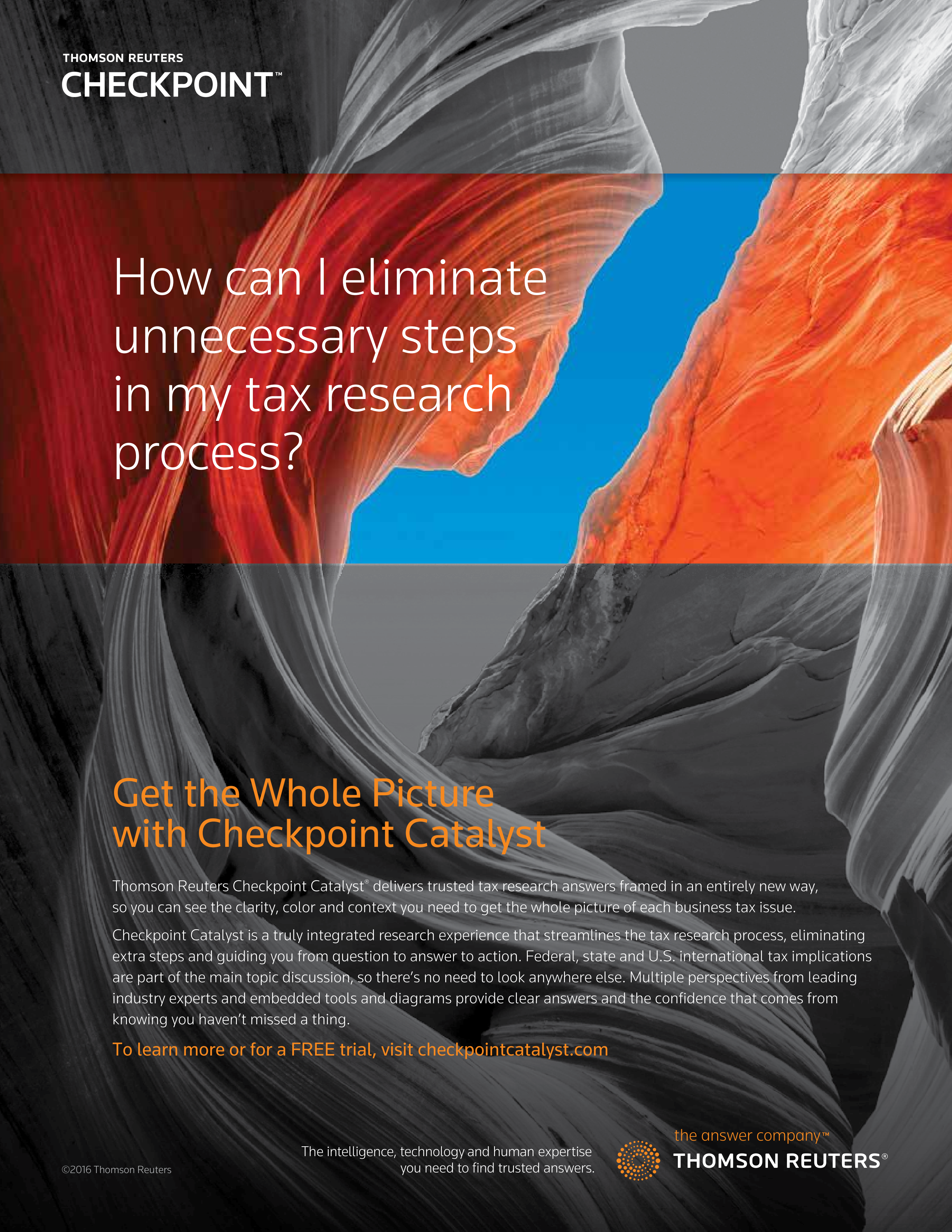
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