

# Cross Border Transactions – tips and traps

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- What is a “cross border transaction”?
- Any transaction where the laws of more than one jurisdiction are relevant
- Often people think in terms of different countries, but can be important even when different provinces are involved
- People are more mobile than in the past – not unusual to have clients with one or more children in a different jurisdiction or who have married a US citizen

# Issues within Canada

- Within Canada, “cross border” issues come up most often in estate planning
  - Vacation property in another province (Manitoba resident with cottage at Lake of the Woods)
  - Family with children who have moved to other provinces
  - Parents retire from farming and move to BC – a new will leaving the bulk of the land to their farming child may be subject to the BC’s ***Wills, Estates and Succession Act*** – BC courts historically more likely to vary wills they consider “unfair” than other jurisdictions – can also be an issue in Alberta, Nova Scotia and Newfoundland
  - should the parents have a separate will in the jurisdiction where their farm is located?

- Rights to property under family law varies between provinces
  - Rights of common-law partners
  - Rights to gifted and inherited property
- Farm families often don't have enough non-farm assets to treat non-farm children fairly – not uncommon to have clients want to leave a parcel of land to a non-farm child
- Farm families often concerned about land in the event of a divorce/relationship breakdown

# Is there a potential family law issue?

- Spouses have a right to division of family property in the event of a divorce
- Rights of Common-law partners in different provinces
  - Ontario, PEI, New Brunswick, Newfoundland, Nova Scotia do not provide common-law partners with rights to property (may have a claim for support or unjust enrichment)
  - Manitoba, Saskatchewan, British Columbia provide identical rights to spouses and common-law partners
  - Alberta provides spouses and “adult interdependent partners” (need not be a conjugal relationship) identical rights

# Does a common-law relationship exist?

- Manitoba: for property, relationship is registered or has existed for 3+ years, for support relationship is registered, has existed for 3+ years, or has existed for 1+ years and the parties have a child
- Alberta: 3+ years if the parties do not have a child together, or a relationship “of some permanence” if they do. Consult an Alberta lawyer if there is concern about a possible “adult interdependent partnership” of a non-conjugal nature
- Saskatchewan: 2+ years for property, for support 2+ years if no child or “of some permanence” with a child
- British Columbia: 2+ years for property, for support 2+ years if no child, appears to be no set limit if a child

# Treatment of gifts, inheritances, pre-acquired property

- Manitoba

- gifts and inheritances, and the increase or decrease in value of same, is not shareable (court might make an uneven distribution of shareable assets if the result is too lopsided) – we often have the initial subscription for common shares be by the parents who immediately gift to the child. This hasn't been tested in any cases to date but provides one more layer of protection
- Pre-acquired assets – only the value at the time of marriage/cohabitation is sheltered

- Saskatchewan

- Value of a pre-acquired asset (including gifts/inheritances) at time of marriage/commencement of cohabitation is sheltered
- Value of gift or inheritance at time of acquisition or marriage/commencement of relationship (whichever is **later**) is sheltered, increase afterwards is not (so a gift obtained during the marriage, the value at the time of the gift is sheltered, but a gift prior to marriage is treated the same as any pre-acquired asset and the value at the time of the marriage is sheltered)

- British Columbia

- Value of a pre-acquired asset, gift or inheritance as of the later of the date of acquisition or marriage/commencement of relationship is sheltered, increase in value is not

- Ontario

- Pre acquired assets (including gifts/inheritances) – value at the time of marriage is sheltered, increase or decrease is not
- Gifts or inheritances during the marriage – fully exempt
- Matrimonial home is subject to division even if pre-owned or gift/inheritance

- Alberta

- Value of gift or inheritance on the later of date of receipt or date of marriage/commencement of relationship is sheltered, increase or decrease is not

- PEI

- Pre acquired assets (including gifts/inheritances) value at time of marriage is sheltered, increase is not
  - Gift or inheritance during marriage – the lower of the value at the time of receipt or the value at the time of separation is sheltered

- New Brunswick
  - Gift or inheritance and income therefrom is not usually shareable but may be subject to division if it would be inequitable to do otherwise
- Nova Scotia
  - Gifts and inheritances generally non-shareable but there may be an uneven distribution of shareable assets if there has been significant appreciation
- Newfoundland
  - Gifts and inheritances, and the increase in value thereof, are exempt

# Transactions involving a non-resident of Canada

- Common situations where it matters if a party is resident in Canada
  - Spousal roll (s73(1)) requires both parties to be resident in Canada
  - Inter-vivos roll of farmland or shares to a child (s73(3) and (4)) requires the recipient to be a resident of Canada
  - Post mortem roll (s70(9) etc.) requires the recipient to be resident in Canada
  - A transfer from an estate to a non-resident beneficiary does not roll under s107(2) – s107(5) provides that it is a distribution at fair market value
  - Only residents of Canada can claim the capital gains exemption (s110.6(2))
  - Non-residents do not receive capital dividends tax free – 25% withholding tax and likely taxable in their home jurisdiction
  - Only Canadian residents can receive eligible dividends, but GRIP is not wasted if eligible dividend is declared on a class of shares that has non-resident shareholders (see CRA opinion 2008-0284951C6)
  - Not all countries treat estate freezes as tax neutral
  - Other jurisdiction might treat transactions differently – tax treaty credits usually only apply if the jurisdictions agree on what kind of tax is involved (must be the exact same kind of tax – capital gains tax on death in Canada is NOT equivalent to estate tax in Germany, for example)

- Farm families often have the vast majority of their wealth tied up in farm land / corporations
- May struggle to treat children fairly without giving non-farming children some land or shares, or may have sentimental attachment to the idea of ensuring all children receive at least a little land
- Can create issues when a child is not resident in Canada

- Example: Mrs. A has 8 quarter sections of land. Her daughter B farms with her husband, her son C is a teacher in the city (in Canada), and her daughter D is a computer programmer working in a different country. Mrs. A wants to leave 6 quarters to B, and a quarter to each of C and D.
  - The parcel left to D will be subject to a deemed disposition at fair market value on her death as the s70(9) rollover will not apply
  - If the estate takes a long time to be administered, the increase in value between Mrs. A's death and the transfer out of the estate could generate capital gain to the estate on which tax must be paid because the s107(2) rollover is not allowed
  - If D rents the land to B and her husband, will be withholding tax on the rent (may create a tax credit on taxes in her home jurisdiction depending on the tax treaty) and if she sells, will not be able to claim capital gains exemption even if it would otherwise qualify
  - If at all possible, better to leave cash to D.
  - Might be able to leave a parcel to B on condition that she make a payment to D, but may be issues with gift tax in D's jurisdiction – consult with tax advisor in D's jurisdiction before trying anything complex

# Sale or rental of land owned by non-resident

- If a non-resident owns land, the purchaser or renter subject to different rules than if the land was owned by a resident
- Sale of land is taxable in Canada even if the owner not otherwise subject to Canadian tax
- Purchaser has to withhold 25% (50% for depreciable property such as farm buildings) of the purchase price and remit to CRA – vendor files a tax return and gets a refund to the extent that the 25% exceeds the amount actually taxable
- Can apply in advance for a clearance certificate and only remit the tax actually payable, but usually there is not enough time so not practical
- If the purchaser does NOT withhold and remit, CRA can go after the purchaser (who is easier for them to collect from than a non-resident vendor)

- Sale of Land by non-resident happening more frequently
- Western provinces have restrictions on ownership by non-citizens / permanent residents (in MB up to 40 acres, in AB up to 20, in Sask up to 10 for a corp or based on tax assessed value for individual)
- Largely passed during a period when price of farmland was depressed and non-residents (many from Europe) were investing in Canadian farmland
- These laws largely grandfathered existing holders, but don't necessarily permit their heirs to inherit
- Can apply to board for an exemption frequently not granted
- "Grandfathered" owners now elderly, may need to divest before they die to avoid double tax (estate tax etc. in home jurisdiction and capital gains tax in Canada) or heirs may not be granted an exemption and have to dispose of land after death of original owner

- Kau v The Queen 2018 TCC 156
  - Vendor's address for service was in the US
  - Purchaser was aware that the transfer documents were being signed in the US
  - Vendor's declaration as to residency was not sworn but HST affidavit was
  - Court ruled that s116(5)(a) of the ITA "calls for and deserves more than a brief, baldly stated affidavit or solemn declaration when there are factual red-flags potentially suggestive of non-residency"
  - Purchaser was forced to pay 25% of the purchase price to CRA despite having paid the Vendor the full purchase price

- Court suggested follow-up questions such as requesting a permanent address rather than just address for service, requesting a copy of the vendor's driver's license
- Vendor may not be cooperative with further inquiries – remitting to CRA means their receipt of 25% of the purchase price will be significantly delayed – may be an issue clearing mortgages etc.
- The 25% may not be the vendor's entire tax liability – we had one case where a vendor who bought land in the 1980's, remitted the 25% and was expecting a refund (cost base etc.) but AMT was so much there was none

- Rental income paid to a non-resident usually subject to a 25% withholding tax (s212(1)(d)) – may be adjusted by a tax treaty
- 3792391 Canada Inc. v the King 2023 TCC 37
  - Involved a residential tenancy – the numbered company paid rent to the landlord and the tenant (shareholder of the company) debited his shareholder's loan account
  - Landlord was found to be non-resident – tenant didn't specifically know and made no particular effort to find out, did not remit 25%
  - Court found that there was no requirement that the tenant have knowledge
  - Court found that there was a due diligence defence available for the penalties but not for the requirement to remit, and in this case the defendant had not established that it had done due diligence

- Decision was controversial
  - CRA expressed that they don't intend to go after renters but in context the statement appears to have been talking about residential renters
  - Discussion from the Department of Finance regarding amending the legislation for residential leases by individuals, but no bill currently before Parliament
  - Many farmers would be renting through their corporation and not a residential tenant, so relieving legislation along the lines discussed may not help

# Issues Specific to the US

- The US taxation system is based on citizenship, not just residence
- Client (or family members) may be subject to US taxes even if born in Canada or moved to Canada as a child
- Income earned by a non-resident citizen outside the US is exempt up to the foreign earned income exclusion (\$130,000 in 2025, indexed to inflation), but still a filing requirement
- Unlike Canada, US has Gift Tax, Estate Tax and Generation Skipping Tax – share an exemption (\$13,990,000 in 2025, was set to sunset but “Big Beautiful Bill” made it permanent, increased it to \$15 million and indexed it to inflation)
- With the scale of modern farms, \$15 million is not as much as it sounds

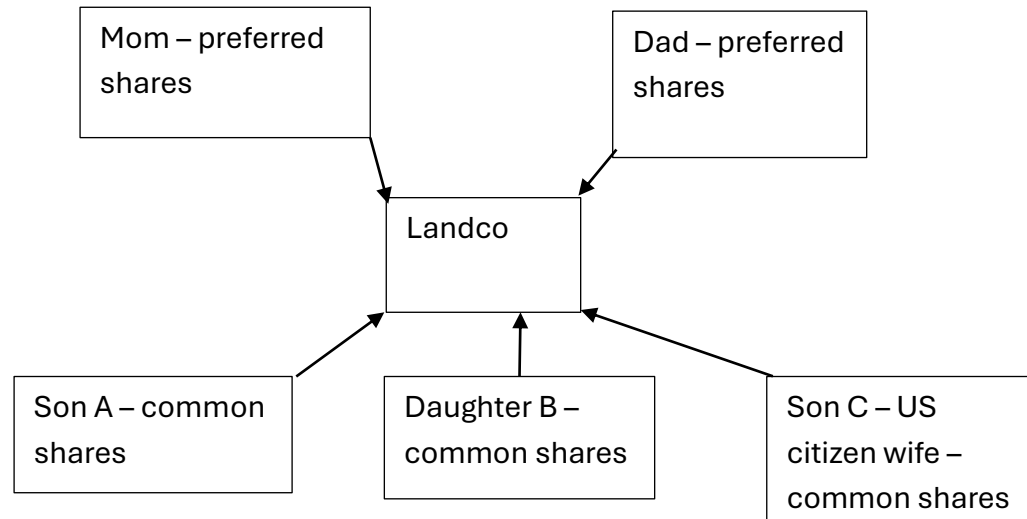
- Usually tax treaty credits only apply if it is the same kind of tax – Canada and the US have an agreement that the Gift/Estate/Generation Skipping Tax and Canada's capital gains tax on deemed dispositions will be treated the same (most countries do not do this)
- The exemption for Estate, Gift and Generation Skipping tax has to be prorated based on what percentage of assets are in Canada vs the US
- Cross border assets (Canadians with a winter home in Arizona, or Americans with a cottage at Lake of the Woods etc.) need to watch this
- US issues can come up after a structure is put in place – a beneficiary of a discretionary family trust marries a US citizen – their children are US citizens and likely also beneficiaries

- Common estate planning tools in the US do not work well in Canada and vice versa
  - Estate freezes are not tax neutral in the US – if there is a US citizen shareholder (current or post freeze) discuss with a US advisor how to achieve the same goal in another way
  - Capital dividends paid to a Canadian resident US citizen are not exempt from US dividend tax – bear this in mind for shareholders agreements using insurance to fund a “roll and redeem” strategy
  - Transfers to trusts often used in US estate planning but often not tax deferred In Canada

# Passive Foreign Investment Companies

- A corporation with one or more US shareholders not located in the US that earns 75% of its gross income from passive sources or 50% of its assets generate passive income
- A former farm corporation that rents out its land or a Landco which rents its land to the same shareholder's Opco may qualify – consult a US tax advisor
- If a US shareholder, may be subject to extensive filing requirements and the US may impute dividend income even if the shareholder does not receive any

# Sample situation



- Mom and Dad were farmers. Through a series of transactions they transferred land into a new corporation, Landco
- Mom and Dad have significant value in pref shares
- Children each have 1/3 of common shares
- Intent was to redeem Mom and Dad's shares while they were alive, leave equally down to the 3 kids who could redeem or pay dividends as desired
- Doing a shareholders agreement for Landco, son C wanted to leave shares to his spouse rather than down to children because his children were very young
- It came out that the spouse (and therefore the children) were US citizens

- Not currently a problem, but foreseeable issues:
  - Landco is almost certainly a Passive Foreign Investment Company from US perspective – if Son C dies before parents, spouse may be deemed to receive dividends (and taxed on them) even if she doesn't receive any money
  - If Landco sells any of its land, capital gain will generate CDA – US citizen spouse and children of Son C cannot receive capital dividend tax free (will have to pay US tax on capital dividend) and CDA will be partially wasted

- Exchanged Son C's common shares for another class of Common share – allows dividend sprinkling
- Adjusted shareholders agreement
  - If Son C dies while either of parents alive, a portion of the company's income is to be used to pay dividends on the common shares held by C's family
  - If CDA generated, capital dividend can be paid to Son A and Daughter B and not on shares of Son C if held by US citizen (some discussion of paying higher dividends on Son C's shares to compensate)
- Not necessarily the bargain another group of parties would have come to, but because the issue was raised before it was actually impacting anyone it was easier to come to an agreement everyone could live with

- It is always easier to deal with a problem if you know about it before the situation has arisen
- When doing an estate plan, ask more questions
  - Where are children? Are there any known plans to move?
  - Are any of them US citizens or married to US citizens?
  - Do clients have any out of jurisdiction assets (house in Arizona, condo in Mexico, inherited vineyard in Germany)
  - Do the clients have any intention of retiring out of jurisdiction?
  - Think a couple of steps ahead – there may currently be no problem but a couple of deaths into the future and you may have one
- Update when you see your clients in future – we've had clients where one of their children moved to Denmark or married a US citizen – had to re-examine the existing estate plan to ensure no problems

- It's impossible to be an expert on everything
  - Involve advisers in the other jurisdiction if relevant, preferably early in the process
  - US/Canada CPAs can be a great help
- Be aware of who the other side of a transaction is – if there are signs a vendor may be non-resident, you need to follow up