



# PAC SEMINAR 2023

Tuesday, June 13, 2023



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PAR LA FCJ

**RICHTER**

# 2023 Federal Budget Update What You Need to Know

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JUNE 13, 2023

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# Alternative Minimum Tax (AMT)

# AMT regime - Overview

- Applicable to individuals and trusts
  - Not applicable on deemed dispositions on death
- To counter effect of certain preferential deductions
- Compare AMT tax to ordinary tax calculation
- If AMT exceeds ordinary tax calculation
  - Taxpayer pays excess
  - May recoup over following 7 years

# AMT – calculation of net adjusted taxable income

- Taxable income
- Add:
  - CCA and carrying charges on rental property
  - 30% of capital gains
  - 60% of 110(1)(d) stock option deduction
  - Losses and carrying charges from tax shelters
  - Loss carryover generated by CCA or carrying charges
- Less:
  - Dividend gross-up
  - \$40,000 basic deduction – has never been indexed

# Calculation of Minimum Amount

- Net adjusted taxable income X 15%
- Less allowable non-refundable tax credits (including donations) – certain credits denied
- = Minimum Amount

# Determination of AMT Liability

- Compare minimum amount to basic federal tax (BFT)
- BFT =

Tax liability at marginal rates

- 33% (highest – Federal)

Less:

- Non-refundable credits
- Less dividend credit

# Current AMT exposure

- Capital gains exemption claim
  - Capital gain not included vs 30% AMT inclusion
- Capital gains sheltered by rental losses
- Good income sheltered by rental losses or resource deductions

# New Measures

## Federal Budget March 28, 2023

- No detailed legislation provided
  - For taxation years that begin in 2024
- **Full inclusion of capital gains (non QSBC)**
  - 30% addback maintained on QSBC gains
  - 30% addback maintained on donation of public securities
- Full addback of stock option deduction
- ABIL deduction only at 50%
- Capital loss carryforwards only at 50% [loss carryback?]

# New Measures cont'd

## 50% limitation on certain expenses:

- **Interest and carrying charges;**
  - incurred to earn income from property
- **Non-capital loss carryovers;**
- Deduction for limited partnership losses of other years;
- Employment expenses;
  - other than those to earn commission income

## 50% limitation on other notable expenses:

- Childcare expenses;
  - Disability supports deduction
- Deductions for CPP, QPP, and PPIP contributions;
- Moving expenses;

# New Measures cont'd

## Other changes

- Disallowance of 50% of non-refundable tax credits
  - Which includes donations tax credit
- Increase of basic exemption from \$40,000 to \$173,000
  - With annual indexation
- Increase of AMT rate from 15% to 20.5%

# Impact – comparison of tax rates

- Capital Gains (non QSBC)
  - Highest marginal rate – 16.5%
  - Existing AMT rate – 12%
  - **New AMT rate – 20.5%**
- Dividends
  - **Highest marginal rate (eligible) – 24.8%**
  - **Highest marginal rate (non-eligible) – 27.6%**
  - Existing AMT rate – 15%
  - New AMT rate – 20.5%

# Review of impacts

- Different treatment of carryforwards
  - Emphasis on matching losses with income in same year
- Treatment of donations
  - Impact of donating against capital gains or dividends
- Leveraged investments
  - Lending to holding corporation

# Next steps

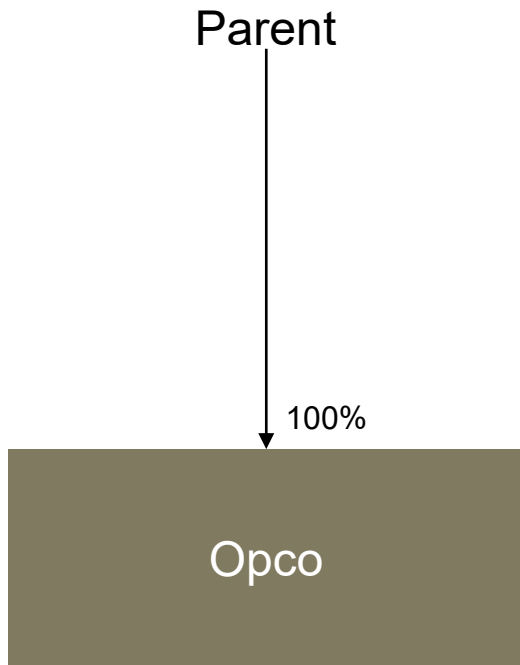
- Review existing structures
  - Trusts
  - Related party loans (spousal loans)
- Consider accelerating gains/donations
- Legislation
  - Consultation period?
  - Changes?
  - Québec?



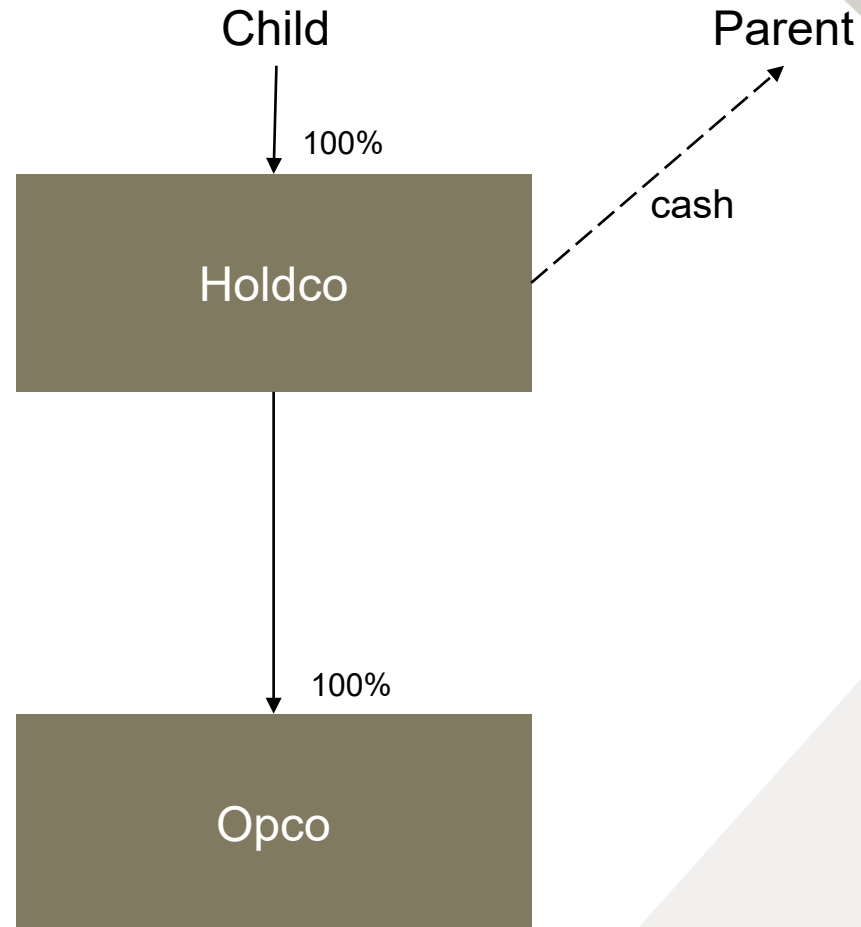
# Intergenerational Transfers

# Introduction – s. 84.1 ITA

## STEP 1



## STEP 2



# Bill C-208

- Intergenerational business transfers
  - Individual vendor transfers shares at FMV of Opco to Holdco
  - Shares of Opco qualify as QSBC
  - Holdco is controlled by the Child of the vendor
  - Holdco must keep the shares of Opco for at least 5 years
    - Except if death

**Result:** amount treated as capital gain, not deemed dividend

# Budget Proposals

Two possibilities:

1. Immediate Business Transfer (« IBT »)
2. Gradual Business Transfer (« GBT »)

Conditions applicable to both, IBT and GBT

At the time of the sale:

1. Parent is an individual (other than a trust)
2. Parent has legal and de facto control of Opco
3. Shares of Opco qualify as QSBC
4. Child controls Holdco

# Conditions applicable to both, IBT and GBT

After the sale:

5. Within 3 years from the sale, all voting and growth shares are held by Child of the following corporations:
  - Holdco
  - Opco
  - Opco subsidiaries
- Parent can hold non-voting p/s

# IBT

6. After the sale, legal and de facto control is held by Child of the following corporations:
  - Holdco
  - Opco
  - Opco subsidiaries
7. Within 3 years from the sale (or a reasonable longer period), management of all businesses of Opco and Opco subsidiaries is transferred to Child
  - Exception: Exit Event or Loss of Child

## 8. Within 3 years from the sale

- Child retains control of Holdco and Opco
- Continuation of carrying on the active businesses of Opco and Opco subsidiaries
- At least one Child continues being actively engaged in the business
  - Exception: Exit Event or Loss of Child

# IBT

- Congratulations! 84.1 does not apply, BUT
- Election is required
- All parties are jointly liable if conditions are not satisfied
- Normal reassessment period is extended by 3 years
- Application: transactions occurring on or after January 1, 2024

# GBT

In addition to conditions 1 – 5

After the sale

6. Legal control is held by Child (De facto can remain with Parent) of the following corporations:

- Holdco
- Opco
- Opco subsidiaries

7. Within 5 years from the sale (or a reasonable longer period), management of all businesses of Opco and Opco subsidiaries is transferred to Child

- Exception: Exit Event or Loss of Child

# GBT

8. Within 10 years from the sale, Parent's economic value (debt and equity) is reduced to  $\leq 30\%$  of the FMV of such interests at the initial sale time (ie « Final Transfer »)
- Holdco
  - Opco
  - Opco subsidiaries

## 9. After the sale and until the later of 5 years and the Final Transfer

- Child retains control of Holdco and Opco
- Continuation of carrying on the active businesses of Opco and Opco subsidiaries
- At least one Child continues being actively engaged in the business
  - Exception: Exit Event or Loss of Child

# GBT

- Congratulations! 84.1 does not apply, BUT
- Election is required
- All parties are jointly liable if conditions are not satisfied
- Normal reassessment period is extended by 10 years
- Application: transactions occurring on or after January 1, 2024

# RICHTER

MERCI | THANK YOU

# New Housing Measures

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PROHIBITION ON PURCHASE OF RESIDENTIAL PROPERTY BY NON-CANADIANS  
UNDERUSED HOUSING TAX (UHT)

PAC Seminar, June 13, 2023

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# Prohibition on Purchase of Residential Property by Non-Canadians: **Introduction**

- Came into force on January 1, 2023; will be repealed 2 years later

Subsection 4(1): [...] it is **prohibited** for a **non-Canadian** to **purchase, directly or indirectly**, any **residential property**.”

- Key concepts
  - > Non-Canadian
  - > Purchase (acquisition of a legal or equitable interest or a real right in residential property)
  - > Directly or indirectly
  - > Residential property

# Prohibition on Purchase of Residential Property by Non-Canadians: **Non-Canadians**

- Non-Canadian means:
  - > (a) an **individual** who is **not**
    - > a **Canadian citizen** or Canadian **permanent resident** (immigration laws); or
    - > registered as an **Indian** under the *Indian Act*
  - > (b) a corporation that is **not incorporated under laws of Canada** or a Canadian province
  - > (c) a corporation that is incorporated under laws of Canada or a Canadian province if:
    - > its shares are **not listed** on a designated stock exchange in Canada; **and**
    - > it is **controlled** by a person referred to in (a) or (b)
      - > **Control: 10%** votes or value, or control in fact
- Note: Non-corporate “entities” can also be non-Canadians; similar tests apply

# Prohibition on Purchase of Residential Property by Non-Canadians: **Residential Property**

- Any real property or immovable, other than a prescribed real property or immovable, that is **situated in Canada** and that is
  - > (a) a detached house or similar building, containing **not more than 3 dwelling units** [...]
  - > (b) a **part of a building** that is a semi-detached house, rowhouse unit, residential condominium unit or other similar premises **that is, or is intended to be, a separate parcel** or other division of real property or immovable **owned, or intended to be owned, apart from any other unit** in the building [...]; or
  - > (c) any prescribed real property or immovable
- **Exception:** Properties in certain non-urban areas are not residential properties for purposes of the prohibition (i.e., a property that is located in an area of Canada that is not within either a census agglomeration or a census metropolitan area)

# Prohibition on Purchase of Residential Property by Non-Canadians: **Exceptions**

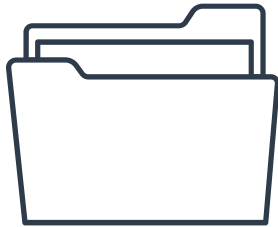
- Exceptions for **certain categories of persons**
  - > temporary residents (within the meaning of immigration laws), subject to conditions
  - > protected persons and refugees (within the meaning of immigration laws)
  - > non-Canadian individuals purchasing residential property with a Canadian spouse
  - > others (e.g., diplomats)
- Exceptions for certain types of “acquisitions”
  - > acquisition (by an individual) resulting from **death**, **divorce**, **separation**, or **gift**
  - > rental of a dwelling unit to a **tenant** for the purpose of occupation by the tenant
  - > transfer under the terms of a **trust** that was created prior to January 1, 2023
  - > transfer resulting from the exercise of a security interest by a **secured creditor**
  - > acquisition by a non-Canadian of residential property **for the purposes of development**

# Prohibition on Purchase of Residential Property by Non-Canadians: **Non-Compliance**

- **Statutory criminal offence** punishable on **summary conviction**; up to **\$10,000 fine**
  - > Every non-Canadian that contravenes the prohibition
  - > Every person or entity that counsels, induces, aids or abets (or attempts to)
    - > Knowing that the non-Canadian is prohibited from purchasing the residential property
- **Superior Court** may **order** the residential property **to be sold** (subject to conditions)
  - > Sale proceeds must be distributed in a specific order
  - > The non-Canadian may be repaid an amount not greater than the purchase price they paid
  - > Any excess is paid to the Receiver General for Canada

# Underused Housing Tax (UHT): **Introduction**

- **In force** for the **2022 calendar year** (January 1, 2022)
- 2 components



- > **Filing obligation** (UHT return): required to be filed for a calendar year by any person that is an owner – **other than an excluded owner** – of one or more residential properties on December 31 of the calendar year
  - > Key concepts: owner, excluded owner, residential property
  - > Filing obligation can apply to Canadian owners
  - > Deadline: **April 30** (subject to administrative relief for 2022)



- > **Liability for UHT**: payable by every person that is, on December 31 of a calendar year, an owner – **other than an excluded owner** – of a residential property (subject to exceptions)
  - > 1% of “taxable value”
  - > Greater of value on municipal roll and most recent sale price

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## Underused Housing Tax (UHT): **Owners and Excluded Owners**

- **Owner**: person **identified as an owner** under the **land registration system**
  - > or that could reasonably be considered to be an owner based on such a system
  - > includes a person that has continuous possession of the land under a **long-term lease**
    - > continuous possession of the land for 20+ years
    - > OR contains an option to purchase the land
- **Excluded owner** (non-exhaustive list):
  - > **Individual** who is a **Canadian citizen** or **permanent resident**
    - > Within the meaning of immigration laws, not tax residency
    - > Must be the “owner” in their **personal capacity** (and not as trustee or partner)
  - > Corporation incorporated in Canada (or a province) whose shares are listed on a designated stock exchange in Canada

## Underused Housing Tax (UHT): **Residential Property**

- Property (other than prescribed property) that is situated in Canada and that is
  - > (a) a detached house or similar building, containing **not more than 3 dwelling units** [...]
  - > (b) a **part of a building** that is a semi-detached house, rowhouse unit, residential condominium unit or other similar premises **that is, or is intended to be, a separate parcel** or other division of real or immovable property **owned, or intended to be owned, apart from any other unit** in the building [...]; or
  - > (c) a prescribed property
- Note: Unlike for purposes of the “prohibition”, properties in non-urban areas are residential properties for purposes of the UHT.

# Underused Housing Tax (UHT): **Exemptions (non-exhaustive)**

- Exemptions in relation to ownership
  - > Specified Canadian **corporation**, specified Canadian **trust**, specified Canadian **partnership**
  - > **New owners** (person became the owner during the calendar year)
  - > Exceptions where **owner dies** and for **personal representatives** of a deceased individual
- Exemptions in relation to the use of the residential property
  - > **Primary place of residence** (not the same concept as “principal residence”)
  - > **Qualifying occupancy** (180+ days of “qualifying occupancy periods”)
- Exemptions in relation to the residential property
  - > Residential properties in “**prescribed areas**” (requires **use** by the owner 28+ days)
  - > Not suitable for year-round use
  - > Seasonally inaccessible because public access not maintained
  - > Uninhabitable (disaster, hazardous condition, renovations)

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# INTEREST RATE INCREASES AND THE EFFECT ON CHARITABLE PLANNING

Presented by: Linda Argalgi, CPA,  
Philanthropic Advisor



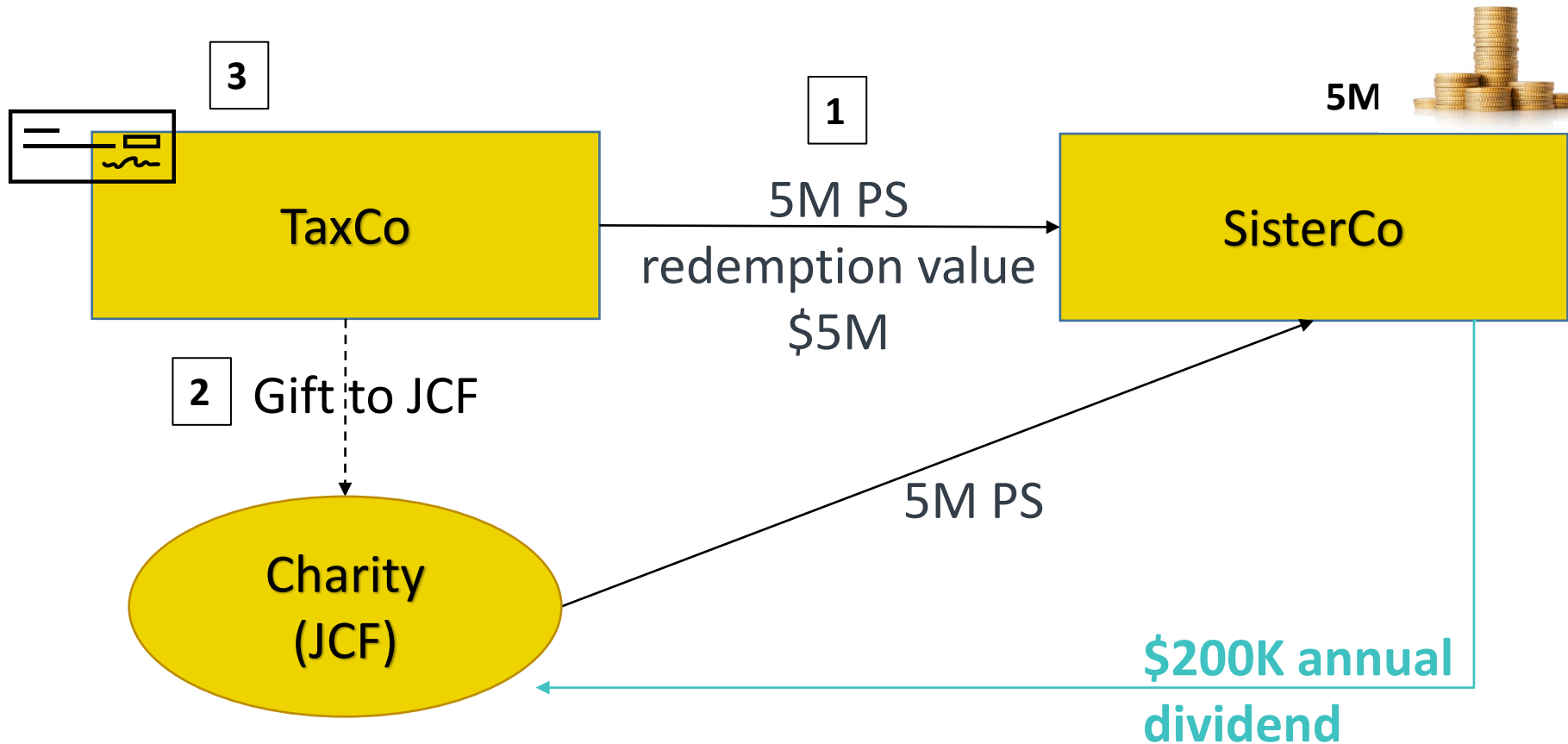
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# AGENDA

- Private company preferred share gift plans
- Charitable remainder trusts
- Life insurance gift plans

# PRIVATE COMPANY PREFERRED SHARE GIFT PLANS



# PRIVATE COMPANY PREFERRED SHARE GIFT PLANS

## ALTERNATIVE MINIMUM TAX CONSIDERATIONS

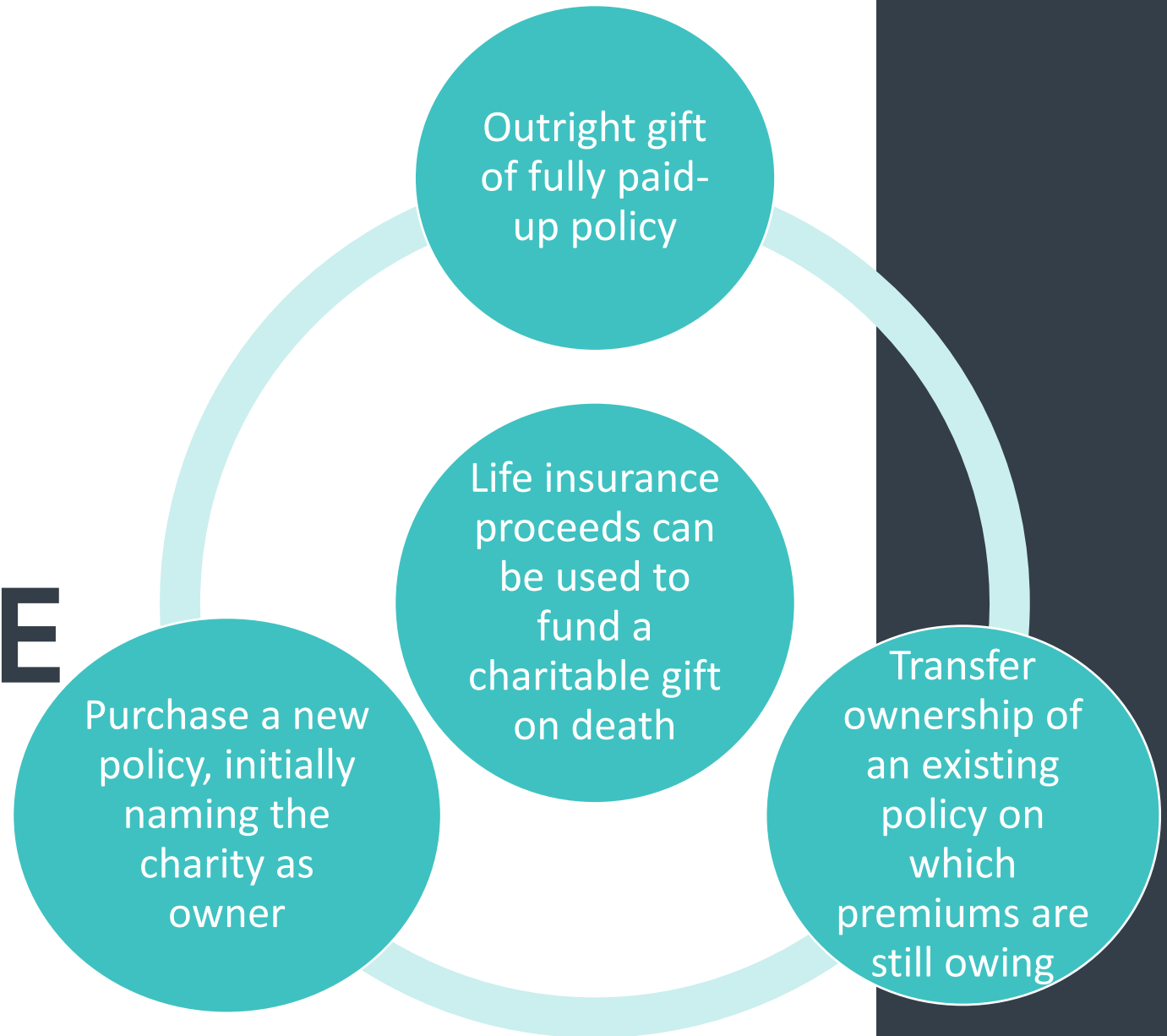
- Mrs. A (age 85) gifts \$1M of preferred shares of Holdco to charity
- Shares are redeemed after gift
- Other income - \$200,000
- Tax results
  - TCG = \$500,000
  - Donation receipt = \$1M
  - Eliminate PS from final tax return



# CHARITABLE REMAINDER TRUSTS

- Donation receipt now, access to future investment income earned from the assets
- Works well for people who are older and:
  - Don't have children to leave assets to in their will
  - Would otherwise leave most of their estate to charity
  - Don't expect large taxable income at death
- Donation receipt calculation based on interest rates

# GIFTS OF LIFE INSURANCE



# GIFTS OF LIFE INSURANCE

- Traditional method:
  - An individual takes out a \$100,000 insurance policy and names the JCF as owner and beneficiary
  - Annual premiums (10? 20? years) paid by individual by way of donation
- New method:
  - Canada Life *My Par Gift* – single premium – easy!
  - Combine with mining flow through or donation of marketable securities to pay the single premium

# THANK YOU!

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# New Disclosure Rules – A Brave New World

JCF PAC SEMINAR

David Wilson

June 13, 2023

OSLER

## Agenda

### Quebec Enterprise Registry

- Brief refresher on “ultimate beneficiary” reporting and transparency rules
- Currently in force since: **March 31, 2023**

### Trust Reporting

- Brief refresher on expanded trust reporting
- Coming into force: **taxation years ending after December 30, 2023** (i.e. applies to **2023 calendar year-ends with reporting due March 30, 2024**)

### Mandatory Disclosure Rules

- Update on Quebec disclosure rules and comments from Revenu Québec
- Overview of expanded federal disclosure rules

## Quebec Enterprise Registry – “Ultimate Beneficiary” Disclosure in the REQ

- Disclosure requirement currently in force (since March 31, 2023) – to be filed with annual updating declaration
- Trusts operating commercial enterprises are subject to the rules
- As of March 31, 2024, REQ will be “searchable” using name of individual
- Requires identification of “ultimate beneficiaries”
  - Natural person holding, directly or indirectly, 25% of votes or value
  - Direct or indirect influence that, if exercised, would result in control in fact
  - Includes trustees and general partners
- Limited exemptions for Crown corporations, non-profits, reporting issuers, FIs/trust companies – **unlikely that private companies will be exempt**
- Information required in respect of UBs:
  - Publicly available: Name / Professional address / Date of becoming or ceasing to be UB / Type of control
  - Not publicly available: DOB / Residential address (assuming professional address provided)
- Penalties for non-compliance up to \$25,000 (doubled for subsequent offence) and cancellation of Quebec registration

## Quebec Enterprise Registry – Practice Points

- Appropriate messaging to clients to obtain information on “ultimate beneficiaries” is critical – advisors need to clearly outline what information clients are required to provide to ensure REQ records are compliant
- Consider impact of disclosure (and ease of access of information) on potential audits
- Consider whether positions taken (for example, on fair market value, *de facto* control) for purposes of UB disclosure is consistent with positions taken for tax purposes – corporate/paralegal advisors may need to liaise with tax advisors

## Trust Reporting

- Originally proposed in 2018 federal budget; however, coming into force deferred multiple times
  - Received Royal Assent in December 2022
  - Applies to taxation years ending after December 30, 2023 (i.e. applies to taxation years ended December 31, 2023 – reporting deadline is March 30, 2024)
  - Applies to “express trusts” (generally, trust created by deed by settlor’s intent) and non-resident trusts required to file T3
- 
1. Exemption from T3 filing requirement for inactive trusts with no tax payable no longer applies. “Bare trusts” also required to file T3.
  2. Disclosure of name, address, DOB, jurisdiction of residence and taxpayer identification number (TIN) for:
    - (a) settlor, (b) trustees, (c) beneficiaries, and (d) any person with ability to exert influence over decisions on appointment of trust income or capital
      - Definition of settlor includes any person who has loaned (except where interest is reasonable) or transferred (except at FMV) property to the trust.

## Trust Reporting

- Exemptions from new information filing requirements for certain trusts, including:
  - Trust was in existence for <3 months at the end of the year
  - Trust holds assets with a FMV that does not exceed \$50,000 throughout the year if the only assets throughout the year are:
    - Cash, debt, shares or debt listed on a designated stock exchange, shares of a mutual fund corporation, units of a mutual fund trust, interests in a related segregated fund
  - Trust is a graduated rate estate or qualified disability trust
  - Trust is a registered charity
  - RRSPs, RESPs, RRIFs, TFSAs, etc.
  - Lawyers' general trust accounts
  - Mutual fund trusts, segregated funds and master trusts

## Trust Reporting – Practice Points

- Trustees will need to identify all beneficiaries, settlors (broad definition) and collect required information
  - May be complicated if many classes of beneficiaries
  - Collection of information may make individuals aware of trust
  - Consider situations where class of beneficiaries is defined generically
    - Corporations controlled by listed beneficiaries – consider requiring additional “designation” to formalize status as beneficiary
- For new trusts, consider reporting requirements in drafting trust deed and defining beneficiaries – need to strike balance between flexibility (i.e. not needing to continually amend deed) and over-inclusion

## Mandatory Disclosure Rules – Update on Quebec

- **“Specified transaction”** disclosure regime
- Taxpayers must disclose transactions or series of transactions if “form and substance” are significantly similar, but not necessarily identical to, a specified transaction
- Advisor who markets or promotes a specified transaction must disclose to Revenu Québec where during implementation with different taxpayers, it has not required any significant change to its form and substance
- Promoters of specified transactions also must disclose
- Penalties:
  - Taxpayer: (A) \$10,000 plus \$1,000 per day, up to maximum of \$100,000, *plus* (B) 50% of the tax benefit [note that disclosure can avoid ineligibility for public contracts in case of eventual GAAR]
  - Advisor: (A) \$10,000 plus \$1,000 per day, up to maximum of \$100,000, *plus* (B) 100% of fees

## Mandatory Disclosure Rules – Update on Quebec

- Currently, the list of specified transactions includes the following transactions:
  - **Transaction 1 – Payment to a non-treaty country;**
  - **Transaction 2 – Avoidance of deemed disposal of trust property;**
  - **Transaction 3 – Multiplying the capital gains deduction;**
    - Targets two types of planning:
      - A person (usually a business principal) uses accommodator parties to multiply the deduction (including through a trust) and ultimately all or a part of the proceeds are returned to that person; and
      - Introduction of spouse as shareholder with manipulation of attribution rules.
    - Revenu Québec has provided some administrative guidance regarding certain complexities (e.g. joint bank accounts, funds held in trust for children, proceeds used by principal to purchase “family” home, etc.)
  - **Transaction 4 – Tax attribute trading.**
    - Targets use of tax attributes of one taxpayer by another taxpayer (other than affiliated taxpayers), and use of tax attributes after third-party capitalization of a corporation or trust (includes *Birchcliff* and *Dean’s Knight* type transactions)

## Mandatory Disclosure Rules – Update on Quebec

- Focus on **Transaction 3 – Multiplying the capital gains deduction**
- Some guidance and several comments made by Revenu Québec regarding proceeds of sale on which capital gains deduction was claimed in various scenarios:

Example	Specified Transaction? (Generally)
Proceeds held in bank accounts for minor children, registered in name of parent “in trust”	No
Proceeds distributed to principal’s spouse (through trust) and then held in joint bank account	Not necessarily; however if principal uses funds for own benefit, yes
Proceeds distributed to principal’s spouse (through trust) and then used to (A) purchase family residence, or (B) pay for travel costs	(A) Purchase of residence itself, no. However, a bequest of residence to principal, possibly. (B) Travel costs allocable to principal may require disclosure
Proceeds distributed to child are used to subscribe for shares of parent’s holding company	Possibly. Need to trace source of funds. Lapse of time between events not relevant.
Proceeds allocated to child through trust, distribution is made in the form of demand note. Child does not demand repayment.	Yes. [However see next slide]

## Mandatory Disclosure Rules – Update on Quebec

- Focus on **Transaction 3 – Multiplying the capital gains deduction**
- Note that existence of a specified transaction only triggers *disclosure* – it is not in itself a charging provision, and it does not necessarily mean that capital gains deduction will be denied (to deny the deduction, a separate legal basis is required)
- Revenu Québec has noted that existence of a specified transaction (and requirement to disclose) does not necessarily mean there is an offensive result
- Proceeds distributed up to the amount of the non-taxable portion of the capital gain generally covered by “excluded transaction” carve-out
- Revenu Quebec updated their guidance on June 5, 2023 to provide the following new “excluded transaction” which applies to allocations made after June 5, 2023:

*The allocation by a trust to a beneficiary of a taxable capital gain that is payable by a note if:*

- *the note is repaid before the expiry of the 60-day deadline for disclosing a specified transaction that applies to the individual; and*
- *it has been established that the repayment was not made as part of a series of transactions and repayments.*

## Mandatory Disclosure Rules – New Federal Regime

### **“Reportable” transactions**

- Significant expansion to scope of existing regime
- Only one “hallmark” required for disclosure to apply
- Coming into force only upon Royal Assent

### **“Notifiable” transactions**

- New regime based on “designated transactions” (similar to Quebec “prescribed transactions”)
- Coming into force only upon Royal Assent

### **Reportable uncertain tax treatments**

- Requires reporting of uncertain tax treatments
- Applies to corporations with at least \$50 million in assets and audited financial statements prepared in accordance with IFRS or country-specific GAAP
- Applies to transactions after 2022; penalties only upon Royal Assent

## Mandatory Disclosure Rules – Reportable Transactions

- Two conditions to be a “reportable transaction”:

### Condition 1)

- “Avoidance transaction”: one of main purposes was tax benefit
  - *Previously*: same definition of avoidance transaction as GAAR (primary purpose)

### Condition 2)

- Any 1 of 3 generic hallmarks (*previously*: 2 of 3):
  1. Promoter/tax advisor gets contingent fees based on tax benefits obtained or number of taxpayers who participate
  2. Promoter/tax advisor obtains “confidential protection”
  3. Taxpayer/certain other persons obtain “contractual protection” in respect of the transaction, including certain forms of insurance against a failure to achieve the intended tax benefit
    - Definition of contractual protection amended

## Mandatory Disclosure Rules – Reportable Transactions

- Carved out from **contractual protection**: insurance or protection that is integral to an agreement between AL persons for the sale or transfer of all or part of a business and the insurance or protection is intended to ensure that the purchase price takes into account liabilities of the business immediately prior to the sale or transfer and is obtained primarily for purposes other than to achieve any tax benefit from the transaction or series.
  - Meant to apply to standard indemnities and RWI policies in the ordinary course M&A context which safeguard purchasers from pre-closing liabilities such as taxes.
  - Allays the prior concern that most ordinary course M&A transactions with standard indemnities and RWI would all become reportable.
  - However, carved out from this carveout are insurance or protections acquired to cover identified tax risks, such as tax liability insurance in relation to avoidance transactions.

## Mandatory Disclosure Rules – Reportable Transactions

### Contingent fee hallmark:

- Carved out fees (even if contingent) for preparing SRED claims.
- *EN*: clarified that contingent fee hallmark is present when an advisor or promoter is entitled to certain types of fees relating to the quantum or achievement of tax benefits from, or the number of participants/recipients of advice about, an avoidance transaction or series. Such fees do not include:
  - *For advisors*: value billing and tax litigation contingent fees
  - *For financial institutions*: standard fees for establishment and maintenance of financial accounts or instruments, discounts offered connected to the number of accounts maintained for a particular client, and normal per-transaction charge for each security trade in the context of year-end tax-loss selling program operated by the financial institution

## Mandatory Disclosure Rules – Reportable Transactions

- Joint and several liability for penalties (present in the August draft) was removed, but the penalties and other consequences for failure to report increased significantly.
- Penalties increased:
  - For taxpayers, they can be up to: the greater of \$100,000 and 25% of the tax benefit sought.
  - For advisers or promoters, they are the total of the fees charged, plus \$10,000, plus an additional amount of up to \$100,000.
  - Unlike in the August draft, liability for advisor or promotor (and their NAL persons) is no longer capped at the fee they are entitled to in respect of the reportable transaction.
- In addition to direct financial penalties, all three MDR regimes extend the reassessment period for any transaction, including an uncertain tax treatment, until three or four years (depending on the type of taxpayer) after all applicable reporting requirements have been complied with.

## Mandatory Disclosure - Notifiable Transactions

- Bill C-47 introduces a requirement to file a prescribed information return for “notifiable transactions”, which are designated by the Minister of National Revenue, with the concurrence of the Minister of Finance.
- Notifiable transactions include transactions that the CRA has found to be abusive and those identified as transactions of interest.
- Taxpayers, advisers and promoters will be required to report a transaction or series of transactions that is the same as, or substantially similar to, a “designated” transaction or series of transactions.
  - Substantially similar means they are expected to obtain the same or similar types of tax consequences (as defined in s 245(1)) and are either factually similar or based on the same or similar tax strategy.
  - The legislation specifies that this is to be interpreted broadly in favour of disclosure.
- Definition of “advisor” in the notifiable transactions regime is generally the same as for the reportable transactions regime. However, there is a deeming rule which provides that the filing of an information return by an employer in respect of a transaction would also cover off the obligations of its employees.

## Notifiable Transactions – sample transactions

Backgrounder released by Finance in February 2022 sets out six sample “designated” transactions (or series of transactions):

- manipulating Canadian-controlled private corporation status to avoid anti-deferral rules that apply to investment income
- creating loss straddle transactions using a partnership
- avoiding the 21-year deemed disposition of trust property
- manipulating bankruptcy status to reduce a forgiven amount relating to a commercial obligation
- relying on purpose tests in an anti-avoidance rule relating to tax attribute trading restrictions in order to avoid a deemed acquisition of control
- using back-to-back arrangements to circumvent the thin capitalization and non-resident withholding tax rules

## Mandatory Disclosure Rules – Practice Points and Considerations for Advisors

### What triggers advisor's obligation to disclose?

- Reportable transactions:
  - Entitled to a fee in respect of transaction that is
    - (i) contingent fee hallmark;
    - (ii) in respect of contractual protection described in definition of reportable transaction.
- Notifiable transactions:
  - Every advisor “in respect of the notifiable transaction”
  - One employer/partnership only needs to file one information return, instead of every involved individual potentially having to file one - *No equivalent provision in reportable transaction rules*

## Mandatory Disclosure Rules – Practice Points and Considerations for Advisors

- Definition of “advisor” is broad and includes person providing “any assistance or advice with respect to creating, developing, planning, organizing or implementing the transaction”.
- “Contractual protection” carve-out still needs careful attention, particularly in cases of insurance.
- Consider when (and to what extent) fees are received “in respect of” contractual protection.
- In the context of planning and transactional matters, firms should be aware of (A) internally, what different departments are working on (i.e. corporate department vs. tax department), and (B) externally, what other advisors are working on.
- Parties and advisors to transactions need to be aware of respective intention to disclose (or not disclose). Consider contractual language to ensure parties notify of intention to disclose (now commonplace in transaction agreements).
- Consider privilege.
- Consider terms of engagement with clients (are MDR in scope or out of scope?).

# THANK YOU!

COMMENTS & QUESTIONS?



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