

# Changes In The Law To Encourage Diversity In The Workplace

**Presented by:** Arlene O'Neill, Partner  
May 17, 2018



# Recent and Proposed Changes

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Ontario and Federal

- **Ontario - 2016:**
  - Bill 132 - Sexual Violence and Harassment Action Plan Act
  - Ontario Human Rights Code
- **Canada - 2018:**
  - Bill C-25 – Disclose Diversity amongst Directors and Senior Management of Public Companies
  - Employment Equity Act (Federal)
  - Bill C-65 – Anti-Harassment
- **TSX – Proposed:**
  - Board of Directors Diversity
- #Me too Movement – *In progress!*



## Bill 132- Sexual Violence and Harassment Action Plan Act

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Ontario, 2016

- Bill 132 in force in 2016 amended the Occupational Health and Safety Act and imposes positive duties on employers to foster harassment-free workplaces.
- Employers required to investigate complaints of workplace harassment, failing which the Ministry of Labour may order an external investigation at the cost of the employer.
- Employers are required to establish written workplace and harassment policies.

### **Ontario Human Rights Code**

- Avenue available for complaint.

# Bill C-25

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Awaiting Royal Assent as of April 19, 2018

- The amendments in Bill C-25 and draft regulations dealing with diversity would require publicly traded corporations to disclose information on the diversity amongst their directors and in senior management.
- The measures mirror those already required by all provincial and territorial regulators except in British Columbia and Prince Edward Island.

# Employment Equity Act

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Amended in the Miscellaneous Statute Law Amendment Act, 2017

- **Purpose of Act – Section 2**

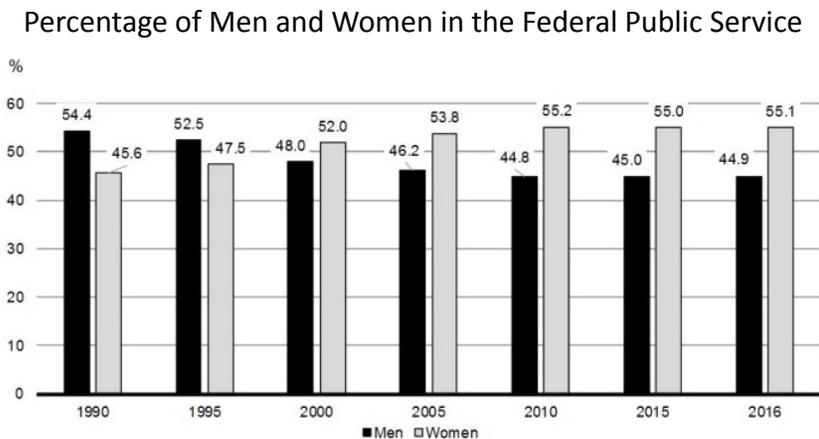
- The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for:

- reasons unrelated to ability and,
- to correct the conditions of disadvantage in employment experienced by:

women, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

# Bill C-65 - Anti-Harassment Rules

- In November 2017, the Government introduced Bill C-65 to create a single, integrated framework that will protect federally regulated employees from harassment and violence in the workplace.



## Bill C-65

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- Amends the Canada Labour Code (harassment and violence). The Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017.
- The major issues with the bill is it does not necessarily help those working in the private sector.

# Bill C-65

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Notable Amendments<sup>2</sup>

cont'd...

- **Prescribed Measures Against Violence and Harassment:**  
Although Ontario employers are already required to maintain workplace and harassment policies, federally regulated employers would now be required to take prescribed measures to prevent and protect against harassment and violence in the workplace, respond to occurrences of harassment and violence in the workplace and offer support to employees affected and violence in the workplace.

# Bill C-65

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Notable Amendments<sup>2</sup>

cont'd...

- **Repeal of Exemption:** The existing law allows federally regulated employers to request an exemption from establishing a workplace health and safety committee where the work is relatively free from risks to health and safety. This exemption would be repealed.

# Bill C-65

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Notable Amendments<sup>2</sup>

cont'd...

- **Protection of Privacy:** The privacy of complainants of workplace harassment or violence would be protected. Workplace committees, policy committees and health and safety representatives would not be permitted to participate in investigations into workplace harassment or violence, and would not be provided with any information that is likely to reveal the identity of a person involved in an investigation, unless an employee provides his/her consent.

<sup>2</sup> <http://www.macleodlawfirm.ca/employers/2017/11/bill-c-65-federal-governments-crackdown-workplace-harassment-violence/>

# TSX Board of Directors Diversity

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2017 Diversity Disclosure Practices: As of July 31, 2017<sup>1</sup>

- The percentage of companies without any women on the board fell to 37% in 2017
- The average number of women directors per company is 1.13 (vs. 0.96 in 2016)
- 47% of S&P/TSX 60 companies have now adopted a target for the representation of women on the board (up from 39% in 2016)



# TSX Board of Directors Diversity

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2017 Diversity Disclosure Practices: As of July 31, 2017<sup>1</sup> cont'd...

- Women now hold 14.5% of all board seats among all companies disclosing the number of women directors on their boards and 26% of the board seats for S&P/TSX 60 companies
- 47% of companies disclosing indicate that they have a written board diversity policy
- At 15%, the average percentage of executive officers who are women was unchanged in 2017



# CSA Multilateral Staff Notice 58-308

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Compliance with NI 58-101 Disclosure of Corporate Governance Practices<sup>1</sup>

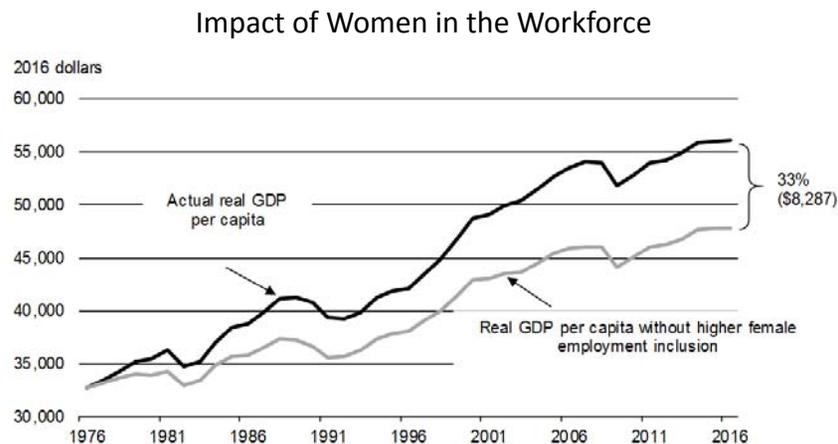
- National Instrument 58-101 Disclosure of Corporate Governance Practices (NI 58-101) requires non-venture issuers in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec, Saskatchewan and Yukon to disclose certain information regarding women on boards and in executive positions.

<sup>1</sup> [https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn\\_20160928\\_58-308\\_staff-review-women-on-boards.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20160928_58-308_staff-review-women-on-boards.pdf)

# 2018 Federal Budget

## Budget 2018

- Canada sets a new standard of gender budgeting as a core pillar of budget-making—legislating higher standards and making meaningful investments toward greater gender equality underpinned by clear objectives and strong evidence.



# “Me Too” Movement

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- Bill C-65 was one of the measures implemented by the Canadian Parliament in response to the #MeToo movement.<sup>3</sup>
- To analyze the case law, it does not seem enough time has elapsed to understand the full effect of the movement and its impact on the Canadian Common Law. Bill C-65 appears to be the only federal action in direct response to the movement.

<sup>3</sup> <http://www.cbc.ca/news/politics/billc65-stories-sexual-harassment-1.4515281>

# # Me too” Movement Status?

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***A WORK IN PROGRESS***



# Contact Us

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# Highlights of 2018 Federal and Province of Ontario Budgets

**Presented by:** Lorne Saltman  
May 17, 2018



# Topics to Discuss

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1. Introduction:
2. Personal Income Tax
3. Corporate Tax
4. HST
5. Marijuana Tax
6. Ontario Budget

# Individual Tax Rates

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- New annual reporting requirements for trusts after 2020
- No individual tax rate changes
- At-risk rules for tiered partnerships
  - For a limited partner that is itself a partnership, its share of losses from the bottom partnership that can be allocated to its own members will be restricted by that limited partner's at-risk amount in the bottom partnership

# Corporate Tax Rates

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## Private Company Tax Planning

- The Federal Small Business Rate
  - Reduced from 10.5% to 10% for 2018 and to 9% for 2019
  - Given no change in the Ontario corporate tax rates, the combined small business rate for 2018 will be 13.5% and for 2019 it will be 12.5%
- Limiting Access to the Small Business Rate
  - Response to widespread criticism of proposed taxation of passive investment income
  - Significant reversal from previous proposals to impose heavy tax burdens on CCPC's with passive income

# Corporate Tax Rates ...cont'd

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## Private Company Tax Planning/ Passive Investment Income

- Propose to phase out the lower rate on a straight-line basis for associated CCPC's with between \$10 million and \$15 million of taxable capital employed in Canada
- If a CCPC and its associated corporations earn more than \$50,000 of passive investment income the amount of income eligible for the Small Business Rate would be gradually reduced
- The Small Business Deduction would be reduced by \$5.00 for every \$1.00 of investment income above the \$50,000 threshold
- As a result, the Business Limit would be reduced to zero at \$150,000 of investment income

# Corporate Tax Rates ...cont'd

Active business income qualifying for the small business rate under new business limit (\$)

Business Income	Investment Income				
	50,000.00	75,000.00	100,000.00	125,000.00	150,000.00
50,000.00	<b>NOT AFFECTED</b>				Nil
75,000.00					Nil
100,000.00					Nil
200,000.00					125,000.00
300,000.00		250,000.00	125,000.00	Nil	
400,000.00		375,000.00	250,000.00	125,000.00	Nil
500,000.00		375,000.00	250,000.00	125,000.00	Nil

# Corporate Tax Rates ...cont'd

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## Private Company Tax Planning/ Refundability of Tax on Investment Income

- Propose new refundable tax account: “eligible RDTOH” which tracks refundable taxes paid under Part IV on eligible portfolio dividends (i.e. from non-connected corporations), and Part IV tax payable because of dividends received from connected corporations that received a dividend refund on paying a dividend from its eligible RDTOH
- Any taxable dividend (whether eligible or non-eligible dividend) entitles the corporation to a refund from its eligible RDTOH account

# Corporate Tax Rates ...cont'd

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## Private Company Tax Planning/ Refundability of Tax on Investment Income

- Propose second new refundable tax account: “non-eligible RDTOH”, includes the current RDTOH account which tracks refundable taxes paid under Part I on investment income, as well as under Part IV on non-eligible portfolio dividends (i.e. dividends that are paid by non-connected corporations as non-eligible dividends)
- Refunds from this account will be obtained only on payment of non-eligible dividends
- An ordering rule provides that payment of a non-eligible dividend will generate a refund from its non-eligible RDTOH account before the corporation obtains a refund from its eligible RDTOH account



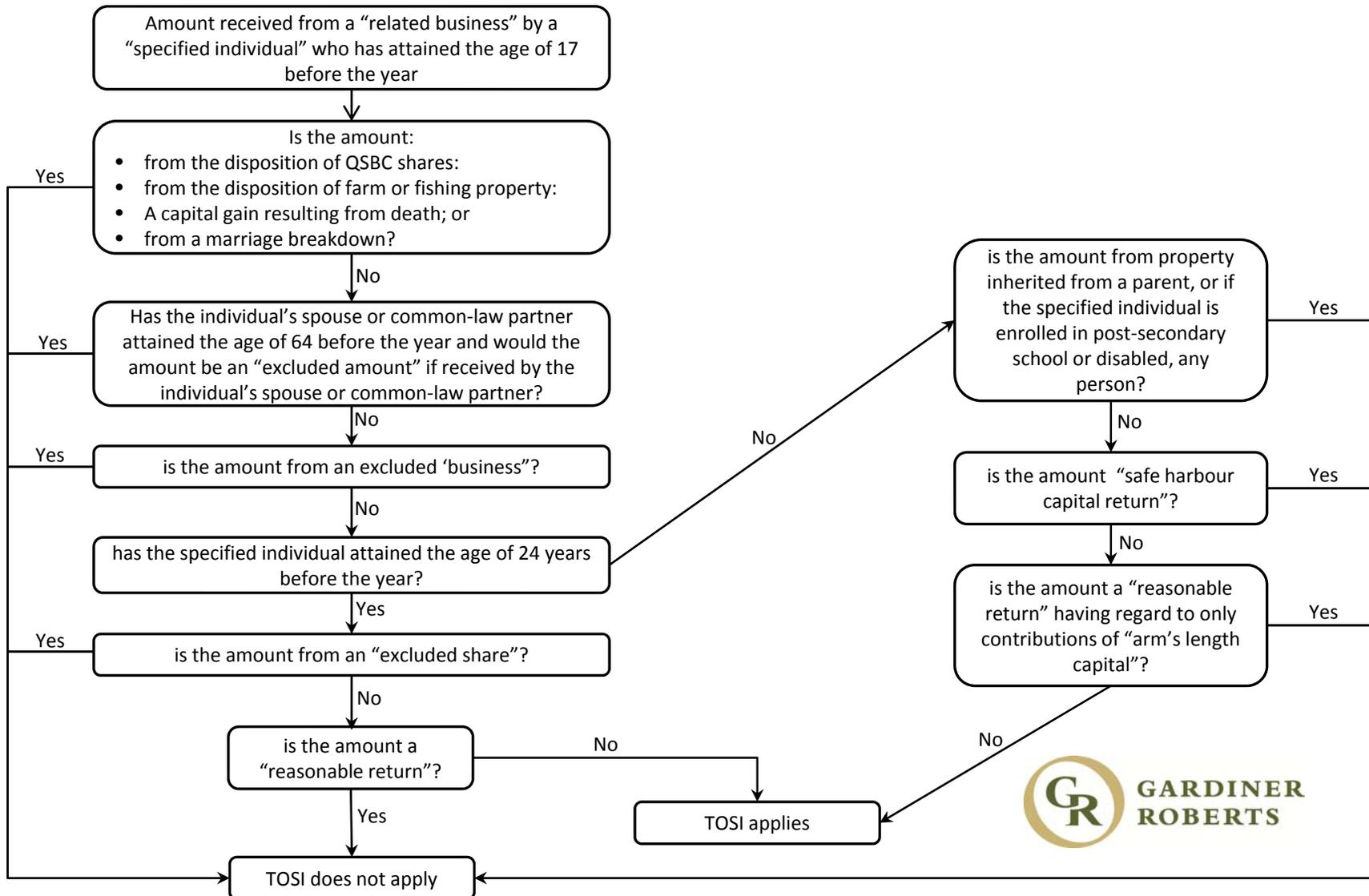
# Corporate Tax Rates ...cont'd

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## Private Company Tax Planning/Income Sprinkling

- Plan to proceed with revised proposals dated December 13, 2017, effective January 1, 2018 to impose tax on split income (“TOSI Rules”) at top rates
- Parliamentary Budget Officer, Jean-Denis Frechette, estimates that these tax changes will result in a windfall for government revenues: \$356 million for 2018-2019, versus Finance’s estimate of \$190 million, and \$429 million by 2022-2023 versus \$220 million per Finance
- Presumption is that TOSI Rules apply to an individual who earns income from a private business that is a dividend, interest, partnership or trust allocation or capital gain, unless an exception applies

# Private Company Tax Planning/Income Sprinkling...cont'd



## Private Company Tax Planning/Income Sprinkling...cont'd

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- “Excluded Amount” includes income and gains from inherited property provided the individual has not then attained 24 years of age; income derived by an individual who has then attained 17 years of age if from an “unrelated business”; for individual between 17 and 24 there is a “safe harbour” return based on a prescribed rate of return on an arm’s length property investment by the individual; for individual who then has attained 24, income or gains from an “excluded share” which is a share of a corporation carrying on a non-service business and in which the individual holds at least 10% of the shares, or attains a reasonable return on capital invested
- “Excluded Business” means a business in which the individual is actively engaged on a regular, continuous and substantial basis

# International Tax Measures

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- Proposal to deem the activities of a foreign affiliate to be a separate business resulting in Foreign Accrual Property Income, where the income from such activities accrues to the benefit of a specific taxpayer under a tracking arrangement, whether the foreign entity employs more than five employees or provides that each taxpayer can make use of a separate cell of such entity
- Sharing Information
  - Amend CBCA to disclose beneficial ownership and eliminate bearer shares
  - Tax information will now be open to be shared with Canadian police officers, and foreign countries that are mutual assistance partners, investigating serious crimes, such as terrorism, organized crime, money laundering



# HST

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- Propose new rule for general partners of an investment limited partnership, so that management and administrative services performed by a GP will be considered a taxable supply to the limited partnership, based on the FMV of such services
- An investment limited partnership means an LP, the primary purpose of which is to invest funds in property consisting primarily of financial instruments
  - e.g. a fund promoted to invest in securities or interests in other LPs
  - excludes an LP that primarily invests in real property

# Marijuana Tax

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- Propose new federal excise duty under the Excise Act, 2001 to be imposed on federally-licensed producers at the higher of (a) a flat rate applied to a quantity of cannabis contained in the final product, and (b) a percentage of the dutiable amount of the product sold by the producer
- Generally, the dutiable amount is the quantity of cannabis contained in the final producer's selling price that does not include cannabis duties
- All cannabis products will have to have an excise stamp before they can be removed from the premises of a cannabis licensee and enter the market for a retail sale
- Also, cannabis products that might otherwise be exempt from HST as being agricultural or basic groceries will become subject to HST
- Revenue sharing: 25/75, federal/provincial



# Ontario Budget

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- For individuals, the budget proposes to eliminate the surtax on personal income tax, resulting in some restructuring of tax rates but no change at the top rate: still 53.53%
- For corporations, Ontario will generally parallel the Federal changes:
  - Small business rate going down from 4.5% to 3.5%, resulting in combined rate of 13.5% in 2018 and 12.5% in 2019
  - Adopt the phase out of the small business deduction
  - Adopt income sprinkling rules – TOSI
  - Agree on cannabis taxation and revenue sharing
- Ontario is linking its cap-and-trade carbon market to that of Québec and California



**Questions?**



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# Federal Budget 2018

## Reporting Requirements for Trusts

**Presented by:** Pamela Liang  
May 17, 2018



# Overview

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- Federal budget released in February 27, 2018
- New reporting requirements apply to:
  - Express trusts resident in Canada
  - Non-resident trusts that file T3 returns

## Why is CRA doing this?

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- “Some taxpayers have used trusts in complex arrangements to prevent the appropriate authorities from acquiring this required information.”
  - Budget 2018 Tax Measures
- “This change is being made to improve the collection of beneficial ownership information with respect to trusts and to help the CRA assess the tax liability for trusts and its beneficiaries.”
  - CRA website

## Reporting Requirements – Current

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- Generally no need to file annual income tax (T3) return if trust does not earn income or make distributions in a year
- T3 return is filed if trust has tax payable or it distributes all or part of its income or capital to its beneficiaries
- Copy of will or trust deed must be included when trust is filing T3 return for the first time

# Reporting Requirements - New

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- Effective for the 2021 taxation year
- In addition to filing annual T3 return, must also disclose:
  - Identity of all trustees, beneficiaries and settlors
  - Identity of each person who has the ability (through the trust terms or a related agreement) to exert control or override trustee decisions over the appointment of income and/or capital of the trust amongst beneficiaries
    - Such as a “protector” of the trust

## Reporting Requirements – New (cont'd)

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- Trust must file a new schedule with its T3 return to report the additional information
  - Schedule form not yet released

# Trusts excluded from new requirements

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- Mutual fund trusts, segregated funds and master trusts;
- Trusts governed by registered plans (RRSPs, RRIFs, TFSAs, etc.);
- Lawyers' general trust accounts;
- Graduated rate estates;
- Qualified disability trusts;
- Trusts that qualify as non-profit organizations or registered charities;
- Trusts that have been in existence for less than 3 months; and
- Trusts that hold less than \$50,000 in assets throughout the taxation year;

# Penalties

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- \$25 for each day after filing deadline
  - Minimum penalty of \$100
  - Maximum penalty of \$2,500
- Gross negligence penalties for failure to file T3
  - Up to 5% of the maximum FMV of property held by the trust during the relevant year with a minimum penalty of \$2,500
- Existing late filing penalties



**Questions?**



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# Planning for Trusts Faced With The 21-Year Deemed Disposition Rule

**Presented by:** William S. Bernstein, LL.M. (Taxation), TEP  
May 17, 2018



# Overview of Issues Reviewed

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- 21-Year Deemed Disposition Rule
- Typical Use of Trust
- Allowing Deemed Disposition
- Rollout to Canadian Resident Beneficiaries
- Limitations on Rollout Approach
  - Non-Resident Beneficiary
  - 75(2) Problem
- Vested Indefeasibly Approach

# Overview of Issues Reviewed

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- Pros and Cons Between Vested Approach and Rollout Approach
- Non-Tax Considerations
- Key Takeaway Points

# The 21-Year Deemed Disposition Rule

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- The 21-year deemed disposition rule (“**DDR**”) is one of the significant limitations that applies to the use of trusts
- The DDR is provided for in subsections 104(4), 104(5) (depreciable property) and 104(5.2) (resource property) of the Income Tax Act (“**ITA**”)
- Most trusts are deemed to dispose of their assets at fair market value on each 21<sup>st</sup> anniversary of the trust for proceeds equal to fair market value

# The 21-Year Deemed Disposition Rule

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- 21 years can pass more quickly than you can expect
- Assuming fair market value exceeds tax cost, this results in a capital gain and income tax
- Often large income tax exposure with no liquidity to pay
- The purpose of DDR is to avoid being able to have unlimited deferral of capital gains tax

# The 21-Year Deemed Disposition Rule

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- Limited exceptions to DDR include qualifying spouse and common-law partner trusts, alter ego trust, joint spouse trusts, all interests vested indefeasibly (discussed below), eligible capital property and inventory that is not land
- Because of limited time, presentation will address a few selected issues

## Typical Use of Trust

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- Many different possible uses for a trust in tax and estate planning (beyond scope of presentation)
- Common use is for trust to own shares in a private corporation
- Trust often introduced in the context of an estate freeze in situation where common shares owned by a parent are exchanged for frozen value shares with new growth shares issued to trust so increase in value of corporation accrues to trust (with various family members as beneficiaries) to limit capital gains tax of parent

## Typical Use of Trust

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- Recent tax changes reduce some tax advantages for use of a trust, such as income splitting but still useful reasons for a trust
- Many advantages to have growth shares owned by a trust rather than children directly, including more flexibility, more control for parent, creditor protection, etc.
- Trustees have ability to decide later how growth shares allocated among family members
- Parent can be among the discretionary beneficiaries for commercial protection, if needed (subject to careful set-up to avoid subsection 75(2), as per below)

# Allowing Deemed Disposition

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- Non-tax reasons for assets to remain in Trust vs transfer to beneficiaries
- Assets without significant unrealized gains
- Liquid assets to sell to pay tax
- Reduce value of shares by pay dividends from CDA and RDTOH
- Retain some assets and roll out other assets
- Trust can elect 159(6.1) to pay tax in 10 annual instalments subject to interest and provide security

## Rollout to Canadian Resident Beneficiaries

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- Most common approach to dealing with DDR is to distribute assets from the trust to Canadian resident beneficiaries on a tax-deferred basis, pursuant to subsection 107(2) of the ITA in satisfaction of capital interest (the “**Rollout Approach**”)
- Various planning required in connection with use of Rollout Approach
- Non-tax commercial consideration to place restrictions on family members receiving shares from the trust (dealt with below)

# Rollout to Canadian Resident Beneficiaries

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## Reorganization Prior to Rollout

- Often desirable to reorganize shares prior to rollout
- May be desirable for parent to retain voting control
- May be desirable for parent to subscribe for class of shares with discretionary dividend rights if not a beneficiary.
- May be desirable to freeze existing growth shares so parent can gift new growth shares to married children for Family Law Act protection

# Rollout to Canadian Resident Beneficiaries

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## Reorganization Prior to Rollout

- Alternate for new growth shares owned by new Trust so 21 years to allocate
- Concern with frozen shares to children re retraction right (may split into voting shares and non-voting common shares if not do freeze)
- Interpose holdco (with voting shares owned by parent and equity shares owned by children) to own retractable frozen shares
- Can't rollout to another trust - 104(5.8)



# Rollout to Canadian Resident Beneficiaries

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## Reorganization Prior to Rollout

- Technical Interpretation indicates CRA will apply GAAR if roll to a corporation wholly-owned by another trust (high risk)
- Tailor details to the situation
- In some circumstances, Rollout Approach not available

# Limitations on Rollout Approach

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## Non-Resident Beneficiary

- Rollout not available to non-resident beneficiary per subsection 107(5) and trust deemed to dispose at fair market value pursuant to subsection 107(2.1)
- This will trigger capital gains tax to trust
- Rollout involves disposition by Beneficiary of Capital Interest in Trust
- For non-resident beneficiary may trigger section 116 compliance if at any time during past five years more than 50% of the value of the trust is attributable to Canadian real estate (usually tax-free but compliance burden)



# Limitations on Rollout Approach

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## Non-Resident Beneficiary

- Alternative for non-resident beneficiary is to use Rollout Approach to a Canadian resident corporation owned by the non-resident individual
- Recent Technical Interpretation says CRA may apply GAAR
- Issue of whether trust deed allows for such a transfer (care required in drafting)
- If corporation isn't a beneficiary, complications for individual beneficiary to transfer capital interest to a corporation
- US beneficiary may prefer to use ULC

# Limitations on Rollout Approach

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## 75(2) Problem

- Key exception to Rollout Approach is if subsection 75(2) of the ITA applied to the trust at any time (cannot cure)
- Negative impact of 75(2) is more often loss of rollout rather than attribution
- During lifetime of settlor or other transferor, Rollout Approach available only to settlor or settlor's spouse

# Limitations on Rollout Approach

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## 75(2) Problem

- If transferred to other beneficiaries subsection 107(4.1) prevents a rollout under section 107(2), with trust deemed to dispose of assets at fair market value triggering capital gains tax per subsection 107(2.1)
- 75(2) problem and loss of Rollout Approach ends upon death of settlor/transferor so the problem may be eliminated
- Loss of Rollout Approach even if transferred property does not generate income (e.g. settlement of trust with a coin)

# Limitations on Rollout Approach

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## When Does 75(2) Apply

- Some uncertainty as to proper interpretation and application of 75(2)
- Many Technical Interpretations from CRA over the years with changes to position
- Number of Tax Court cases, some of which disagreed with CRA's position
- To avoid 75(2), great care must be taken at time of settlement in preparing trust deed and also subsequent transfers to the trust
- Dangerous trap if trust deed not prepared by tax specialist



# Limitations on Rollout Approach

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## Choice of Settlor and Trustees

- Problem if settlor is a beneficiary, even if only remote possibility
- Be careful with contingent/default beneficiaries
- Problem if settlor has certain powers as trustee or otherwise
- Problem if settlor is sole trustee (even if settlor is not a beneficiary)

# Limitations on Rollout Approach

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## Choice of Settlor and Trustees

- If settlor is one of two trustees (but not a beneficiary) 75(2) wording could apply since settlor has a veto, but CRA has provided some comfort in Technical Interpretations, subject to certain qualifications
- Safest if settlor is not a trustee or a beneficiary
- Inconvenient if settlor is a trustee with minimum of 3 trustees

# Limitations on Rollout Approach

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## Other Transfers

- 75(2) not limited to transfer of property to trust by settlor, but can apply to any transfer of property to the trust
- Possible trap if parent has paid expenses of the trust (can be viewed by CRA as a transfer of property from parent to trust)
- Any expenses paid by parent should be documented as a loan
- Despite prior positions of CRA, Courts have held that bona fide loan to a trust is not considered a transfer of property and does not cause 75(2) to apply



## Vested Indefeasibly Approach

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- If Rollout Approach is not available, alternative approach is to rely on paragraph (g) of the definition of “trust” in subsection 108(1) of the ITA, such that if all interests in the trust have vested indefeasibly, the trust is not considered a trust for purposes of the DDR (the “**Vested Approach**”)

# Vested Indefeasibly Approach

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## How to Cause Vested Indefeasibly

- Some uncertainty as not defined in ITA
- Limited guidance from CRA as question of law
- Archived IT-449R – unassailable right to ownership of a particular property
- Interests of beneficiary must be totally fixed without any type of condition
- Beneficiary is entitled to interest in trust even if beneficiary does not survive to the date of distribution

# Vested Indefeasibly Approach

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## How to Cause Vested Indefeasibly

- If beneficiary with vested interest does not survive to date of distribution, then the vested interest passes as per the beneficiary's will
- Upon death of beneficiary, there would be deemed disposition of vested interest pursuant to subsection 70(5) of ITA for proceeds equal to fair market value triggering capital gain

# Vested Indefeasibly Approach

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## Deed of Trust

- Issue of whether Deed of Trust itself allows for causing vesting indefeasibly
- Not necessary that interests are vested from the outset so long as trustees have power to vest before 21<sup>st</sup> anniversary
- Issue of whether trust deed has power to amend to deal with causing vesting indefeasibly

# Vested Indefeasibly Approach

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## Court Variation

- If trust deed does not allow for vesting indefeasibly, it may be necessary to apply to Court for variation of the trust
- Messy and lengthy procedure involving Office of the Children's Lawyer if there are any minor beneficiaries or unborn beneficiaries, even if only contingent or discretionary beneficiaries
- Likely necessary to set aside some assets for minor beneficiaries and unborn children

# Pros and Cons Between Vested Approach and Rollout Approach

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- If Rollout Approach is available it is most commonly used and likely subject to less scrutiny by CRA (subject to possible 75(2) problem)
- Advantage of Vested Approach that no red-flag on trust's tax return as nothing to report versus Rollout Approach requires reporting disposition of assets to beneficiaries

# Pros and Cons Between Vested Approach and Rollout Approach

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- Possible advantage of Vested Approach allows shares to continue to be owned by the Trust so need not deal with children directly owning shares (subject to rule in *Saunders v. Vautier*)
- Rollout Approach has advantage to obtain restrictions in advance from beneficiaries, such as shareholders' agreement, but with Vested Approach, it is risky to have beneficiaries agree to restrictions in advance, as such restrictions could jeopardize vesting

## Non-Tax Considerations

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- While avoiding capital gains tax from DDR is a priority, there are also non-tax considerations
- Want beneficiaries to agree to restrictions as to how to deal with shares or vested interest
- Under Rollout Approach, prudent to have beneficiaries sign shareholders' agreement in advance
- Restrictions for encumbering and transferring shares both while alive and upon death

## Non-Tax Considerations

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- Parent typically wants shares to be transferred to lineal descendants (rather than spouse of child)
- Parent wants to retain complete control of corporation during lifetime
- Variety of issues can be dealt with in Shareholders' Agreement depending on the situation
- Under Vested Approach, risk to causing vesting indefeasibly if restrictions agreed to in advance
- Need lead time to get shareholders' agreement signed in advance

## Non-Tax Considerations

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- Issues of possible independent legal advice for children
- Disadvantages of Vested Approach that beneficiaries may refuse to agree to restrictions after the vesting
- Under Vested Approach, want beneficiaries to agree not to force wind-up of trust under *Saunders v. Vautier*

## Family Law Act Considerations

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- Consider steps to protect shares or vested interests from spousal claim
- Prior to rollout, consider freeze of growth shares with gift of new growth shares from parent to married child
- Best protection may be in limited purpose marriage contract
- Depending on circumstances, interest in trust and assets distributed from trust may qualify for exclusion from net family property based on gift during marriage if married at time trust settled

## Key Takeaway Points

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- Often large income tax exposure with no liquidity to pay
- Care needed at time of set-up of trust to avoid subsection 75(2)
- Care needed in connection with all subsequent transfers of property to trust (including payment of expenses) to avoid 75(2)
- Care required in drafting trust deed for various issues, including allowing rollout to corporation for non-resident beneficiary, allowing for vested indefeasibly

## Key Takeaway Points

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- Significant lead time required prior to 21<sup>st</sup> anniversary for proper planning and implementation with shareholders' agreement and possible marriage contract
- Best approach must be tailored to the situation

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