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FR DOLLARS AND SENSE

BREAKING NEWS! DRAFT REGULATIONS UNDER THE ESTATE ADMINISTRATION TAX ACT PUBLISHED

By Leonard Bosschart, LL.B.

On November 7, 2014, in the late afternoon, the Ministry of Finance (Ontario) quietly posted draft regulations under the *Estate Administration Tax Act* (Ontario) (the "Act") entitled "Information Required under Section 4.1 of the Act". The draft regulations are open for consultation and so are not yet in final form. Moreover the forms referred to in the draft regulations have not been released. These are, apparently, still being drafted by the Ministry. Section 4.1 of the Act makes it the duty of every estate representative who makes an application for an estate certificate to give to the Minister of Revenue such information about the deceased as may be prescribed by the Minister of Finance. The draft regulations published on November 7 set out the information that the estate representative will be required to provide the Minister of Revenue and the time frame for doing so. As the draft regulations are subject to comment and, hopefully, revision before they take effect, here are a couple of highlights:

- The regulations only apply to applications for an estate certificate filed from January 1, 2015 onward, they apparently will not apply to applications filed on or before December 31, 2014.
- The estate representative must file the information in the prescribed form with the Ministry of Revenue within 30 days of the date the estate certificate is issued by the court.

Once the regulations and the forms are published in final form, we'll provide you with more details, so stay tuned!

DIGITAL ASSETS

By Shaun M. Doody, J.D.

When "The Social Network" came out in 2010, it was reported that Facebook, with approximately five hundred million registered users worldwide, would be the third-largest country in the world if it were a physical nation. Fast-forward to 2014: Facebook has now grown larger than India, and is closing in on China for first place. Other social networks such as LinkedIn (with its 330+ million users) and Twitter (whose users collectively send 500 million tweets per day) are equally ubiquitous. Even outside of the social media realm, the internet has

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quickly become an integral part of peoples' daily lives; 77% of Canadians, for example, report using online banking at some point in the last year, with 55% using it as their primary method of banking. Perhaps even more surprisingly, this level of usage is relatively stable across age ranges. All this is to say that, in our hyper-connected world, people are developing an accumulation of online information that is becoming increasingly important to manage after death. While it might be obvious how knowing the deceased's online banking, investment, or email account information would be helpful to an estate executor, social media is an important area that is often overlooked.

It was reported in 2011, for example, that Facebook alone stores up to 800 pages of personal data per account; this information (which includes pictures, address information, credit card information, friend details, passwords, and phone numbers, much of which may have significant financial or personal value) is something that should at the very least be managed by executors to ensure that it does not fall into the wrong hands while no one is logging in regularly. This data can also provide a valuable source of information to answer questions the executors may have about the deceased or to provide a way to communicate with friends or family members. Executors may also want to change inappropriate status settings or cancel any automatic updates that may have been set up.

While some websites have developed policies allowing users to manage their accounts after death (Google, for example, introduced their "Inactive Account Manager" in April of 2013, allowing users to provide a contact for Google to notify after a certain period of inactivity), others have either no policy or one that users may not appreciate. (Yahoo, for example, states in their terms of service that "any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted".)

In order to allow for easier management of digital assets after death, it is extremely important that executors are armed with both information (login and password information for all important websites, including social media websites, should be kept in a secure location that an executor can access after death; perhaps unsurprisingly, various websites already exist that attempt to assist in this process) as well as the legal ability to manage the deceased's digital assets.

To accomplish this second goal we recommend including a clause in all wills specifically allowing an executor to manage all of the deceased's digital devices (computers, smartphones, tablets, etc.) and digital assets (emails, bank accounts, online photographs or video, etc.) after death. Such a clause can avoid disputes (such as where a beneficiary refuses to provide an executor with the deceased's laptop, claiming that it is a personal effect to which they are entitled) but can also emphasize the fact that the estate is the owner of potentially valuable online property such as website domain names or a Paypal account balance.

The management of our digital assets after death is an area that we often overlook. Given the growing importance of these assets, however, it is increasingly something that we overlook at our peril.

DESIGNATING THE PRINCIPAL RESIDENCE

By Ian V. MacInnis, LL.B.

The principal residence exemption is undoubtedly one of the most substantial and frequently-used tax "breaks" under the *Income Tax Act* (Canada) (the "Act"). It may come as a surprise to know that, technically, in order for an individual to claim the principal residence exemption, the taxpayer must file a prescribed form to designate the property as a principal residence[1]. Regulation 2301 to the Act specifies that Form T2091 must be filed with the taxpayer's income tax return for the year in which the property is disposed of or the year in which the taxpayer grants an option to acquire the property, whichever comes first. If Form T2091 is not filed on a timely basis, the principal residence exemption is not available on a strict reading of the Act.

As an administrative policy, the Canada Revenue Agency (the "CRA") does not require the form to be filed unless: (i) the principal residence exemption does not completely eliminate the capital gain or (ii) the 1994 election to use the $100,000 capital gains exemption was filed for the property[2]. In addition, the instructions on Form T2091 state that the form is to be attached to the tax return "only if a capital gain has to be reported" (i.e. where the principal residence exemption does not completely eliminate the capital gain on the sale of the property).

It is important to note that this administrative concession is not binding on the CRA. Indeed, the CRA could reverse its position after the time for filing the form has expired[3]. In at least three (3) cases[4], the Minister of National Revenue raised the argument that the principal residence exemption was not available because timely elections were not filed. It has been held by the Courts[5] that the failure to file the required form was fatal to the taxpayer. This should serve as a warning to all taxpayers who rely on administrative concessions of the CRA[6]. The CRA would have the authority under subsection 220(2.1) of the Act to waive the requirement to file Form T2091. Indeed, it could be argued that paragraph 2.15 of Income Tax Folio S1-F3-C2 constitutes such a waiver, but it would be prudent to file Form T2091 to remove any doubt. This would be particularly important in those situations where there is some sensitivity or doubt whether the principal residence exemption is available in whole or in part to the taxpayer.

For example, the principal residence exemption is available with respect to the housing unit and the surrounding land up to one-half hectare. Property in excess of one-half hectare, however, will only qualify for the principal residence exemption if the taxpayer can establish that such excess land was necessary to the use and enjoyment of the housing unit as a residence.

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1. This follows from paragraph (c) of the definition of "principal residence" in section 54 of the Act. In the case of a disposition by a personal trust, the prescribed form is Form T1079.
2. See Income Tax Folio S1-F3-C2, paragraph 2.15.
3. There does not appear to be a basis for a taxpayer to late-file the form since the "principal residence" designation in section 54 of the Act and Regulation 2301 are not listed in Regulation 600.
4. See *Smellie Estate v. M.N.R.*, 77 DTC 308 (T.R.B.); *Saccomanno v. M.N.R.*, 86 DTC 1699 (T.C.C.); and *Rhéaume v. The Queen*, 2004 DTC 2228 (T.C.C.).
5. See *Smellie Estate* and *Rhéaume, supra*, and *Eliyin v. The Queen*, 2014 DTC 1132 (T.C.C.).
6. It should be noted that in *Eliyin*, supra, there is no indication in the decision whether the Minister of National Revenue denied the principal residence exemption by reason of the taxpayer's failure to file the prescribed form. However, the decision of the Tax Court makes it clear that the taxpayer's principal residence exemption claim was denied on several grounds, including the failure of the taxpayer to designate the property as his principal residence in his tax return.

7. The case law indicates that excess lands can satisfy the "necessity" test and qualify for the principal residence exemption where there is a legal minimum lot size or unavoidable severance restriction. See *Cassidy v. The Queen*, 2011 DTC 5160 (F.C.A.). See also Income Tax Folio S1-F3-C2, paragraphs 2.33 – 2.35.

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